COMMENT

RECALIBRATING SECTION 220

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The importance of Delaware’s Section 220 in shareholder derivative litigation has dramatically increased over the past few decades, and for good reason: Section 220 can help sort out meritorious derivative claims from frivolous ones, thus generating successful claims that serve corporate governance objectives by holding managers accountable. But perverse incentives—deriving both from the preclusion issues of multijurisdictional shareholder litigation and from the incentive to draw out Section 220 litigation with overly aggressive defensive and offensive tactics—threaten the utility of Section 220. Without recalibration of these incentives, concerns that Section 220 has created surrogate proceedings where Delaware intended summary proceedings are only exacerbated. Accordingly, I propose that Delaware consider two legislative changes to recalibrate Section 220. First, because plaintiffs engaged in multijurisdictional litigation are incentivized by the threat of preclusion to forego prefiling investigations, I propose a limited fee-shifting provision in Section 220 that would more narrowly target the causes of frivolous litigation without overly deterring litigation. Second, to reduce the intensity and misuse that increasingly characterizes Section 220 proceedings, Section 220 should be streamlined by providing presumptive access to formal board-level materials to plaintiffs that state a proper purpose. Ultimately, the proposals put forth in this Comment provide tailored solutions to the incentive problems facing Section 220, seeking to mitigate the burden on litigants and the courts while maintaining its critical role in shareholder litigation.

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INTRODUCTION

In a recent speech, Chancellor Kathaleen McCormick of the Delaware Court of Chancery raised her concern that shareholder demands for corporate books and records under Delaware’s Section 220 have been “‘larding up’ the court’s docket with ‘glorified discovery disputes.’”¹ Chancellor McCormick’s observation is consistent with significant growth in the use of Section 220—from 2004 to 2018, there was a thirteen-fold increase compared to previous decades.

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in the number of books and records requests filed in the Delaware Court of Chancery. While the use of Section 220 has generated some notable benefits for the effectiveness and efficiency of shareholder derivative litigation, its use is also subject to perverse incentives deriving from the use of prefiling investigations in multijurisdictional litigation and aggressive offensive and defensive tactics that increase the intensity and potential misuse of litigation.

Delaware General Corporation Law's Section 220 allows plaintiffs to seek the books and records of corporate defendants, thereby empowering shareholders with information in the exercise of their primary rights to vote, sell, or sue. The use of Section 220 has grown as a result of doctrinal developments that have raised pleading requirements to demand more information from plaintiffs, as well as a broad interpretation of the statute. Significantly, the growth of Section 220 has also come at the insistence of the Delaware courts. Plaintiffs' access to corporate information with the aid of Section 220 has proven to be critical in sorting out meritorious claims from frivolous ones. But perverse incentives threaten the utility of the doctrine.

While the evidence suggests that Section 220 is a desirable tool to encourage meritorious derivative claims that will hold managers accountable, the incentives at play are misbalanced. The looming threat of preclusion in shareholder litigation proceeding in multiple jurisdictions creates perverse incentives. Some plaintiffs may forego careful investigation in favor of rushing to the courthouse, thereby predictably resulting in a dismissal at the demand futility stage and precluding more careful plaintiffs who sought books and records from bringing a claim on the same underlying facts in Delaware. But even if the case remains in Delaware and does not face the

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3 DEL. CODE ANN. tit. 8, § 220 (2022); see also George S. Geis, Information Litigation in Corporate Law, 71 ALA. L. REV. 407, 449 (2019) [hereinafter Geis, Information Litigation in Corporate Law] (arguing that shareholders in Delaware possess a right of information access in addition to their fundamental rights to vote, sell and sue).

4 See infra notes 42–65 and accompanying text.

5 See infra subsection I.B.2.

6 See, e.g., Cal. State Teachers’ Ret. Sys. v. Alvarez, 179 A.3d 824, 839 (Del. 2018) (“[T]his Court has repeatedly admonished plaintiffs to use the ‘tools at hand’ and to request company books and records under Section 220 to attempt to substantiate their allegations before filing derivative complaints.”).


8 See Cox, Martin & Thomas, supra note 2, at 2127 (“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 . . . .”).

9 See infra subsection II.A.2.
threat of preclusion from parallel proceedings in other jurisdictions, perverse incentives still remain. Plaintiffs and defendants can both misuse Section 220 and transform what was once intended to be summary proceedings into surrogate litigation on the underlying merits. Defendants can employ overly aggressive tactics to thwart plaintiffs’ access to corporate records, and plaintiffs can push the boundaries of the scope of documents they are entitled to, seeking a sort of prefiling discovery that unfairly burdens defendants and the courts. Recalibration is needed to ensure that Section 220 remains a useful tool for screening shareholder litigation without becoming overly burdensome on the courts and on litigants. Recent scholarship has explored the increasing role that information rights play in shareholder litigation. This Comment highlights the perverse incentives that follow from the expanding use of inspection rights in multijurisdictional litigation and the increasing intensity and potential misuse of Section 220 litigation generally. Ultimately, this Comment offers two legislative solutions to work towards recalibrating Section 220.

First, because plaintiffs engaged in multijurisdictional litigation are incentivized to file quickly and forego prefiling investigations due to the threat of preclusion, a limited fee-shifting provision in Section 220 enacted by legislative amendment would more narrowly target the causes of frivolous litigation without overly deterring all litigation. While some have suggested that Delaware should rely on private ordering to address the preclusion problem, private ordering is ultimately unlikely to solve the issue because plaintiffs may still initiate inspections. Moreover, private ordering would not provide the standardized and efficient solution that Section 220 requires. Second, with respect to the increasing intensity and misuse of Section 220, Delaware courts should streamline Section 220 proceedings to mitigate their increasingly surrogate nature. Specifically, Delaware courts should provide streamlined access to formal board-level materials to plaintiffs that state a proper purpose to ultimately reduce the burden of Section 220 litigation on litigants and the courts.

This Comment proceeds as follows. Part I considers the role of information rights in shareholder derivative litigation and explores why Section 220 has become a mainstay in derivative litigation over the past decade, concluding with research detailing the screening benefits of Section

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11 See infra Section II.B.

12 See generally Geis, Information Litigation in Corporate Law, supra note 3 (examining the appropriate scope and limitations of providing corporate information); Roy Shapira, Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight, 42 CARDOZO L. REV. 1949 (2021) [hereinafter Shapira, Corporate Law, Retooled] (exploring the broadened role of information rights in shareholder litigation).
After reviewing its desirable features, Part II examines the incentive problems plaguing Section 220. Part II first discusses the ways in which multijurisdictional shareholder derivative litigation creates a preclusion problem that encourages the quick filing of scantly researched complaints. It goes on to explain how perverse incentive problems remain, even when a case remains only in Delaware, due to both plaintiffs’ and defendants’ tendency to employ overly aggressive offensive and defense tactics, resulting in the increasing intensity and misuse of Section 220 litigation.

In Part III, after explaining why private ordering solutions are insufficient, this Comment advocates for two legislative proposals to address these perverse incentive problems. First, to address the preclusion problem, this Comment proposes an amendment to Section 220 allowing for a court to implement limited fee-shifting for parties that bring a claim but unreasonably fail to incorporate information from a prefiling investigation. Next, to address the perverse incentives presented by the increasing intensity and misuse of Section 220, this Comment proposes simplifying the scope of inquiry by providing presumptive access to formal board-level materials to plaintiffs that state a proper purpose. Together, these proposals can mitigate the burden of Section 220 litigation on litigants and the courts, while still maintaining its critical—yet discrete—role in shareholder litigation.

I. THE INCREASINGLY PROMINENT ROLE OF SECTION 220 IN SHAREHOLDER DERIVATIVE LITIGATION

Section 220 plays an important role for shareholders by providing information to support the exercise of their three primary rights to vote, sell, or sue. In derivative litigation, information rights are particularly important to overcome the gatekeeping mechanisms—the demand requirement and special litigation committees—that boards can use to wrest control over litigation.13 Section 220 has risen to prominence in part because Delaware courts often insist that plaintiffs exercise their inspection rights before filing suit.14 While some criticize Section 220 for turning books and records litigation into a surrogate proceeding to litigate the merits of the suit, recent

13 See Jessica Erickson, Gatekeepers of Shareholder Litigation, 70 OKLA. L. REV. 237, 264-66 (2017) [hereinafter Erickson, Gatekeepers of Shareholder Litigation] (describing the gatekeeping functions of the demand requirement and SLCs). Information rights are important in overcoming the demand requirement because plaintiffs must plead with particularity that demand would be futile. See Geis, Information Litigation in Corporate Law, supra note 3, at 420 (noting how plaintiffs often must rely on information rights to show that demand would be futile). For special litigation committees, information rights are also often necessary to challenge SLC decisionmaking. See Zapata Corp. v. Maldonado, 430 A.2d 779, 788-89 (Del. 1981) (holding that a judicial inquiry into SLC decisionmaking should begin with a presumption of good faith and reasonableness of the investigation).

14 See supra note 6 (describing Delaware’s insistence that plaintiffs utilize Section 220).
research has supported the benefits of Section 220 to address the age-old problem in shareholder derivative litigation: sorting out meritorious cases from frivolous ones and ultimately generating more successful claims to hold managers accountable.\textsuperscript{15}

A. Information Rights in Shareholder Derivative Litigation

Shareholders have three primary rights—the right to vote, sell, or sue\textsuperscript{16}—and they have information rights so that they can effectively exercise those rights.\textsuperscript{17} Because “[e]ffective corporate governance cannot occur in an information vacuum,” shareholders need access to corporate information to know “when something rotten might have occurred in the boardroom.”\textsuperscript{18} Shareholder inspection rights can be thought of as a tool for driving down the agency costs that result from the separation of ownership and control in a corporation.\textsuperscript{19} In Delaware, Section 220 provides for shareholder inspection rights.\textsuperscript{20} The statute provides a right for “[a]ny stockholder . . . upon written demand under oath stating the purpose” to inspect “[t]he corporation’s stock ledger, a list of its stockholders, and its other books and records.”\textsuperscript{21}

Information rights are particularly important in derivative litigation because of the fight over control of the litigation. The corporate board is the traditional gatekeeper of shareholder derivative litigation.\textsuperscript{22} This is because shareholder derivative claims ultimately belong to the corporation, and the board is charged with managing the business and affairs of the corporation.\textsuperscript{23} However, shareholder derivative suits often challenge director misconduct, so corporate law must balance the power of directors with shareholders’ ability to monitor how directors use that power.\textsuperscript{24}

\textsuperscript{15} See Cox, Martin & Thomas, supra note 2, at 2127 (“Our results are consistent with the view that broad use of the tools at hand doctrine provides a valuable mechanism for sorting strong cases from others . . ..”).

\textsuperscript{16} See Strougo v. Hollander, 111 A.3d 590, 595 n.21 (Del. Ch. 2015) (“Modern corporate law recognizes that stockholders have three fundamental, substantive rights: to vote, to sell, and to sue.”).

\textsuperscript{17} See Geis, Information Litigation in Corporate Law, supra note 3, at 449 (“[S]hareholders in Delaware . . . possess a fundamental right of information access related to forensic governance activity.”).

\textsuperscript{18} Id. at 416.

\textsuperscript{19} Id. at 440.


\textsuperscript{21} Id.

\textsuperscript{22} See Erickson, Gatekeepers of Shareholder Litigation, supra note 13, at 263 (“Corporate boards have long been the primary gatekeepers in shareholder derivative suits.”).

\textsuperscript{23} See id. at 263 (“[T]hese claims ultimately belong to the corporation, and directors normally make decisions on behalf of the corporation.”); see also Del. Code. Ann. tit. 8, § 141(b) (2022) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of the board.”).

\textsuperscript{24} Erickson, Gatekeepers of Shareholder Litigation, supra note 13, at 263.
Thus, there are two procedural mechanisms for boards to take control of a lawsuit. First, a shareholder who wants to bring a derivative suit must make pre-suit demand on the board or allege with particularity why demand should be excused. The demand requirement provides the board with an opportunity to bring the lawsuit on its own. If the shareholder makes demand, the plaintiff-shareholder waives any right to contest board independence and can no longer argue that demand is excused. When a shareholder makes demand, the board can accept or reject the demand, and its decision is typically subject to the business judgment rule. The shareholder-plaintiff can only argue that demand was wrongfully excused by rebutting the business judgement rule, which is unlikely to be successful. To avoid this fate, well-counseled shareholders plead that demand is futile. As a result, the demand futility stage is frequently a significant component of shareholder derivative litigation.

Even if the plaintiff-shareholder can show that demand would be futile, the board has yet another chance to retain control over the suit. The board can form a special litigation committee (SLC) of independent directors to decide whether the suit is in the best interests of the corporation. Analyzing the best interests of the corporation, the SLC can recommend that the board take the suit, or more commonly, the SLC can recommend that the court dismiss the suit. As gatekeeping mechanisms, the demand and SLC

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25 See id. at 264-66 (introducing the demand requirement and special litigation committees).
26 See CHANCERY CT. R. 23.1(a) (“The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff’s failure to obtain the action or for not making the effort.”); see also FED. R. CIV. P. 23.1(b) (requiring the same).
27 Erickson, Gatekeepers of Shareholder Litigation, supra note 13, at 264.
29 See id. (“Recent authority accords the board’s actions deference under the business judgment rule unless the complaint alleges with particularity facts raising a reasonable doubt that the board acted in good faith or with due care.”).
30 Id. § 5:11.
31 See Geis, Information Litigation in Corporate Law, supra note 3, at 419-20 (explaining that because the nature of the dispute often involves high-level misconduct and because a board can refuse to pursue the case, well-advised shareholder-plaintiffs will directly argue that demand should be excused).
32 See Erickson, Gatekeepers of Shareholder Litigation, supra note 13, at 267 (“Almost all published opinions in derivative litigation concern demand futility or [special litigation committee] recommendations or other procedural battles.”).
33 Id. at 265.
34 Id. at 265-66.
36 The historical view is that SLCs overwhelmingly dismiss claims. See James D. Cox, Searching for the Corporation’s Voice in Derivative Suit Litigation: A Critique of Zapata and the ALI Project, 1982 DUKE L.J. 959, 963 (“[A]lthough there have been more than a score of special litigation committee cases to date, in all but one the committee concluded that the suit in question was not in the
requirements “mean that shareholders must run a gauntlet of procedural hurdles before they can present the substance of their claims.” Indeed, nearly all published opinions in derivative litigation concern these threshold procedural battles.

To be successful in these procedural battles, shareholders often need expanded access to information. For instance, the demand requirement requires pleading facts with particularity. To challenge a decision of the SLC, the shareholder often needs to show that the SLC lacked independence, thereby requiring information about the board members. How can a shareholder who has access to little corporate information plead particularized facts to overcome the demand requirement or challenge an SLC decision? Delaware’s consistent answer has been that shareholders should utilize the “tools at hand” found in Section 220, and plaintiffs in the past decade have increasingly begun to heed that advice.

B. Section 220’s Rise to Prominence

Since the early 2000s, Section 220 requests have increasingly become a mainstay in shareholder derivative litigation. Changes in substantive law, that front-loaded litigation with stringent pleading requirements, the corresponding liberalization of the scope of Section 220 to meet those stringent standards, and Delaware’s insistence that plaintiffs utilize the “tools at hand” available in Section 220 all help to explain how and why Section 220...
220 has achieved its central role in shareholder derivative litigation.46 While some have questioned the desirability of Section 220’s current prominence,47 recent research suggests that the use of Section 220 is valuable because it operates as an effective screening tool for the derivative cases most likely to be meritorious.48

1. Stringent Pleading Requirements: Fulfilling the Need for Information

One reason that plaintiffs have increasingly turned to Section 220 is to meet the stringent pleading standards required by doctrinal shifts in both derivative litigation and deal litigation.49 During the 2000s, there was an explosion in deal litigation, and because plaintiffs were able to proceed to discovery even when bringing weak claims, nuisance claims took over.50 Responding to these abusive litigation tactics and seeking to encourage plaintiffs to investigate before racing to the courthouse, courts and lawmakers developed stringent pleading requirements in derivative litigation and deal litigation.51

In derivative actions, the demand requirement calls for pleading with particularity that the directors were interested or lacked independence.52 Specifically, in complaints that charge directors with failure of oversight, commonly known as Caremark claims, the plaintiff faces “the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.”53 To meet this onerous burden, plaintiffs must plead that the

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46 See Shapira, Corporate Law, Retooled, supra note 12, at 1955 (discussing Section 220’s features that make it a “potent tool to which plaintiffs frequently resort”).
47 See id. at 1974 (describing an objection that the expansion of Section 220’s “merely substitutes the enormous costs of post-filing discovery with those of pre-filing discovery”).
48 See Cox, Martin & Thomas, supra note 2, at 2127 (“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 . . . .”); see also Shapira, Corporate Law, Retooled, supra note 12, at 1990-91 (noting that Delaware courts have been careful to manage and limit the scope of documents available in prefiling discovery, and so prefiling discovery may end up benefiting defendants given the advantages of a more informed complaint).
49 See Shapira, Corporate Law, Retooled, supra note 12, at 1955 (“[P]laintiffs who wish to survive the motion to dismiss now have to be able to extract quality information about the misbehavior in question before they even file their complaint.”).
50 See id. at 1960-61 (stating that fast-filing plaintiffs were able to threaten defendants with costs of discovery and extract quick settlements, resulting in a wasteful “deal tax”).
51 See id. at 1955-63 (outlining doctrinal developments that have raised the pleading bar).
directors utterly failed to implement any reporting or information system.\textsuperscript{54} Or, if directors have implemented such a system, plaintiffs must plead that the board consciously failed to monitor or oversee its operations, thereby disabling themselves from being informed of risks or problems requiring their attention.\textsuperscript{55} Importantly, the plaintiffs must show that the board knew of their shortcomings but consciously disregarded their fiduciary duties.\textsuperscript{56} Showing board-level misconduct and scienter can be difficult, and in many cases impossible, without access to corporate books and records.\textsuperscript{57} Recent cases such as In re Marchand v. Barnhill, In re The Boeing Company Derivative Litigation, and In re Clovis Oncology, Inc. Derivative Litigation demonstrate the utility of books and records in surviving motions to dismiss for Caremark claims.\textsuperscript{58} The increasing use of inspection rights provides shareholders with an “increasingly potent investigatory tool” to meet the high Caremark bar.\textsuperscript{59}

In addition to the demand for corporate books and records in adequately pleading failure of oversight claims, changes to the dynamics of deal litigation also encouraged the use of Section 220. In the 2000s, plaintiffs who sought quick settlement rewards often filed cases within days of the public disclosure of a deal, resulting in an explosion of deal litigation.\textsuperscript{60} Because of the urgency in deal litigation, plaintiffs did not frequently use Section 220 to uncover

\textsuperscript{54} See Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (articulating the necessary conditions for director oversight liability).

\textsuperscript{55} Id.

\textsuperscript{56} See id. ("In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations."). For a discussion of the evolution of the Caremark doctrine, see Elizabeth Pollman, Corporate Oversight and Disobedience, 72 VAND. L. REV. 2013, 2021–25 (2019).

\textsuperscript{57} As noted, several plaintiffs have recently been successful at surviving a motion to dismiss under Caremark, likely in part due to prefiling investigations that built their complaints. See Shapira, A New Caremark Era, supra note 53, at 1866–67 (arguing that the recent success in Caremark shareholder litigation can be attributed to plaintiffs’ use of inspection rights).


\textsuperscript{59} Shapira, A New Caremark Era, supra note 53, at 1867. It is also worth noting that the plaintiffs’ ability to survive a motion to dismiss in Marchand, Boeing, and Clovis is likely attributable to the particularly egregious facts at issue. See Meredith Kotler, Pamela Marcogliese & Marques Tracy, Recent Delaware Court of Chancery Decision Sustains Another Caremark Claim at the Pleading Stage, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 26, 2020), https://corpgov.law.harvard.edu/2020/05/25/recent-delaware-court-of-chancery-decision-sustains-another-caremark-claim-at-the-pleading-stage [https://perma.cc/QH65-GCFY] ("It remains unlikely that these recent decisions signal some change in the law, but rather reflect allegations of unique or extreme examples of certain corporate behavior.").

\textsuperscript{60} See Cox, Martin & Thomas, supra note 2, at 2136 (“One study found that the vast majority of acquisition-oriented class actions was filed within three days of the public disclosure of the deal.”).
more information to bolster their claims.\textsuperscript{61} But a few doctrinal developments changed that. First, deal litigation shifted away from injunction practice and disclosure-only settlements and towards Section 220.\textsuperscript{62} In \textit{C&J Energy}, the Delaware Court of Chancery significantly decreased the likelihood of receiving an injunction.\textsuperscript{63} There, the court held that a preliminary injunction should be issued only where the plaintiffs have a “particularly strong” showing of a reasonable probability of success on the merits.\textsuperscript{64} The court held that the plaintiffs in \textit{C&J Energy} could not show that the defendants breached their \textit{Revlon} duties of care with regards to the transaction “so long as interested bidders have a fair opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal.”\textsuperscript{65} In addition, in \textit{In re Trulia, Inc. Stockholder Litigation}, the Court of Chancery announced that it would “disfavor” disclosure-only settlements unless those disclosures addressed plainly material misrepresentations or omissions and the release is narrowly circumscribed to the claims.\textsuperscript{66} As a result of both \textit{C&J Energy} and \textit{In re Trulia}, plaintiffs were unlikely to get injunctions or win approval for disclosure-only settlements, which meant that they no longer had access to the expedited discovery that comes along with seeking an injunction.\textsuperscript{67}

\textsuperscript{61} Id.


\textsuperscript{63} Id.


\textsuperscript{65} Id. at 1067-68. In \textit{Revlon}, the court held that when it becomes "apparent to all that the break-up of the company was inevitable . . . that the duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit . . . . The directors’ role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." \textit{Revlon}, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

\textsuperscript{66} 129 A.3d 884, 898 (Del. Ch. 2016). Disclosure-only settlements became popular in response to prolific merger litigation. Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon & Randall S. Thomas, \textit{Essay, Shifting Tides of Merger Litigation}, 71 VAND. L. REV. 604, 613 (2018). In a disclosure-only settlement, the target company agrees to provide additional disclosures in the proxy statement and not to oppose a plaintiff’s request for a fee award. Importantly, the parties also agree to a release of all further merger-related claims. \textit{Id.} at 612. In \textit{Trulia}, the court found that such disclosure-only settlements provided only “marginal value.” \textit{Trulia}, 129 A.3d at 894 (“[T]he Court’s willingness in the past to approve disclosure settlements of marginal value and to routinely grant broad releases to defendants and six-figure fees to plaintiffs’ counsel in the process . . . have caused deal litigation to explode in the United States beyond the realm of reason.”).

\textsuperscript{67} Micheletti, Parker & David, \textit{supra} note 62.
Then, in the 2010s, Delaware courts established pathways to avoid enhanced judicial scrutiny in transactions involving shareholder ratification.\textsuperscript{68} Corwin limited Revlon’s impact by holding that in a post-closing suit for damages, the business judgment rule applies to a board’s decision to engage in a transaction where there was informed and uncoerced approval by disinterested shareholders.\textsuperscript{69} Similarly, in the context of a merger with a controlling shareholder, M\&F Worldwide (MFW) provided a path to business judgement rule protection of a merger decision, bypassing the entire fairness standard set out in Weinberger.\textsuperscript{70} In MFW, the Delaware Supreme Court stated that a controller buyout transaction could be subject to the business judgment rule if the transaction was conditioned \textit{ab initio} on the approval of an empowered and independent special committee and a majority vote of the minority shareholders.\textsuperscript{71} Given the generous protection of the business judgment rule in reviewing substantive decisionmaking, the focus in both Corwin and MFW on shareholder ratification invited further inquiry into whether a shareholder vote was independent and fully informed. To show that the vote was not fully informed, public disclosures are often insufficient, but access to books and records can reveal discrepancies between public disclosures and other available facts regarding the transaction to support claims that the shareholder vote was not informed.\textsuperscript{72} Thus, Section 220 gained a renewed importance for plaintiffs engaged in deal litigation.\textsuperscript{73}

\section*{2. Liberalization of Section 220: Proper Purpose and Scope}

In addition to doctrinal shifts that encouraged the use of Section 220 to meet the onerous Caremark pleading demands or to examine whether shareholder votes were informed, Delaware courts simultaneously broadened the scope of Section 220: they adopted a broad view of the “proper purpose”

\textsuperscript{68} See Corwin v. KKR Fin. Holdings, 125 A.3d 304, 308 (Del. 2015) (holding that a fully informed, uncoerced vote of disinterested stockholders on a merger invokes the business judgment rule standard of review).
\textsuperscript{69} Id.
\textsuperscript{70} Compare Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (establishing the entire fairness standard of review to a cash-out merger with a controlling shareholder due to concerns about protecting the minority shareholder), with Kahn v. M\&F Worldwide Corp. (MFW), 88 A.3d 635, 643-45 (Del. 2014) (allowing business judgment rule review in controller buyouts where the controller conditions the merger on approval of both a special committee and the majority of the minority shareholders).
\textsuperscript{71} MFW, 88 A.3d at 644.
\textsuperscript{72} Cox, Martin & Thomas, supra note 2, at 2140.
\textsuperscript{73} See, e.g., Appel v. Berkman, 180 A.3d 1055, 1057-58 (Del. 2018) (holding that stockholders are not adequately informed of the company’s merger without knowing the founder’s views regarding the wisdom of the sale).
requirement and expanded the scope of records available beyond formal board materials to informal electronic materials, including text messages and emails.

Per the statute, plaintiffs seeking books and records must demonstrate a “proper purpose,” meaning “a purpose reasonably related to such person’s interest as a stockholder.” Investigating corporate wrongdoing and mismanagement is a proper purpose, but the plaintiff must provide a “credible basis” from which to infer the wrongdoing occurred. Notably, Delaware courts have identified that the credible basis standard “imposes the lowest burden of proof known in our law[,]” asking whether the stockholder presented “some evidence to support an inference of wrongdoing.” Even further, the Delaware Supreme Court recently held that Section 220 actions are not limited to investigating actionable wrongdoing. As a result, establishing a proper purpose is a low bar for plaintiffs to meet.

In addition to establishing a proper purpose, plaintiffs need to demonstrate that each category of documents is “necessary and essential” for meeting their proper purpose. Courts approved the inspection of primarily formal board-level documents initially but later extended the scope to include informal company communications. In KT4 Partners v. Palantir Technologies, the court found that the plaintiff met its burden of showing that emails were necessary to accomplish the purpose of investigating potential wrongdoing. This finding resulted from the defendant’s failure to observe corporate formalities, as well as from evidence that the company had conducted official business related to the alleged wrongdoing over email. Similarly, in Amalgamated Bank v. Yahoo! Inc., the court ordered the production of the CEO’s private emails to investigate wrongdoing related to the hiring and firing of an executive officer because these documents were necessary to

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74 DEL. CODE ANN. tit. 8, § 220 (2022).
76 Id. at *2 (internal quotation marks omitted).
77 See Amerisource Bergen Corp. v. Lebanon Cty. Emps. Ret. Fund, 243 A.3d 417, 430, 437 (Del. 2020) (stating that courts may be justified in denying inspection in the rare case where stockholder’s sole reason for inspection is to pursue litigation and resolve a purely procedural obstacle).
79 See Shapira, Corporate Law, Retooled, supra note 12, at 1967 (“The first wave of broadening the scope requirement came when courts started routinely ordering provision of a wide swath of documents that could implicate the alleged wrongdoing, such as board minutes and spreadsheets . . . . [D]iscovery shifted from providing technical documents . . . to providing access to internal company communications, broadly defined.”).
80 See KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 755-56, 758 (Del. 2019) (“If a respondent in a § 220 action conducts formal corporate business without documenting its actions in minutes and board resolutions or other formal means, but maintains its records of the key communications only in emails, the respondent has no one to blame but itself for making the production of those emails necessary.”).
81 Id. at 755-56.
determine the CEO’s knowledge and what she told Yahoo’s board of directors.\textsuperscript{82} The court emphasized that “[a] corporate record retains its character regardless of the medium used to create it.”\textsuperscript{83} As exemplified by both of these cases, the range of documents available has widened in recent years, encouraging plaintiffs to push harder for access to documents beyond formal board-level materials.\textsuperscript{84}

3. Delaware’s Encouragement to Utilize the “Tools at Hand”

Along with the stringent pleading requirements and the expanding scope of inspection, Delaware courts have not been shy to encourage plaintiffs to utilize the “tools at hand” available in Section 220.\textsuperscript{85} Nearly three decades ago in \textit{Rales v. Blasband}, the Delaware Supreme Court suggested that plaintiffs could utilize Section 220 to meet the demand futility test: \textsuperscript{86}

Surprisingly, little use has been made of section 220 as an information-gathering tool in the derivative context. Perhaps the problem arises in some cases out of an unseemly race to the court house, chiefly generated by the “first to file” custom seemingly permitting the winner of the race to be named lead counsel. The result has been a plethora of superficial complaints that could not be sustained. Nothing requires the Court of Chancery, or any other court having appropriate jurisdiction, to countenance this process by penalizing diligent counsel who has employed these methods, including section 220, in a deliberate and thorough manner in preparing a complaint that meets the demand excused test of \textit{Aronson}.\textsuperscript{87}

A few years later, the Delaware Supreme Court, dismissing a case for failing to establish demand futility, again highlighted the utility of Section 220: “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.”\textsuperscript{88}

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\item \textsuperscript{82} 132 A.3d 752, 792 (Del. Ch. 2016).
\item \textsuperscript{83} Id. at 793.
\item \textsuperscript{84} See \textit{id.} at 793 n.42 (listing other instances where production of electronic documents was ordered).
\item \textsuperscript{85} See Cal. State Teachers’ Ret. Sys. v. Alvarez, 179 A.3d 824, 839 (Del. 2018) (“[T]his Court has repeatedly admonished plaintiffs to use the ‘tools at hand’ and to request company books and records under Section 220 . . . .”).
\item \textsuperscript{86} 634 A.2d 927, 934 n.10 (Del. 1993).
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Grimes v. Donald, 673 A.2d 1207, 1216 (Del. 1996) (footnotes omitted).
\end{itemize}
However, plaintiffs did not heed the court’s advice and start regularly exercising their rights under Section 220 until after *Brehm v. Eisner*. In *Brehm*, shareholders of Disney challenged the board’s decision of approving an employment contract for then-president of Disney, Michael Ovitz, which included a no-fault termination provision that paid him $140 million dollars for fourteen months of work. The complaint was built on conclusory allegations and public information. As a result, the Delaware Court of Chancery held that plaintiffs failed to establish demand futility. On appeal to the Delaware Supreme Court, the plaintiffs complained that requiring them to plead particularized facts was unfair without access to discovery. The court rejected this argument, as it had in *Rales* and *Grimes*, and directed plaintiffs to the “tools at hand.” Ever since, the Delaware courts continue to “repeatedly admonish[] plaintiffs to use the ‘tools at hand[].’”

C. The Benefits of Section 220’s Role in Shareholder Litigation

Although the increasingly prominent role of Section 220 in shareholder litigation has raised concerns, recent evidence suggests that Delaware is right to insist that plaintiffs utilize the “tools at hand” because of the significant benefits that come from greater use of Section 220. Indeed, plaintiffs have listened to the court’s pleas. Compared to before *Brehm v. Eisner*, when the court reminded plaintiffs to utilize the tools at hand, there was a thirteen-fold increase in the number of books and records requests filed in the Delaware Chancery Court from 2004 to 2018. Among the requests included in the sample, the most commonly stated purpose was to investigate alleged management wrongdoing. Parties also put markedly more effort into books and records requests: filings by both plaintiffs and defendants were two to three times longer than before *Brehm v. Eisner* was decided in 2000, and

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89 746 A.2d 244 (Del. 2000); see also Cox, Martin & Thomas, supra note 2, at 2135 ("[P]laintiffs 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*.").
90 *Brehm*, 746 A.2d at 248, 253.
91 Id. at 249.
92 Id. at 266.
93 Id.
94 Id.
96 See, e.g., Cox, Martin & Thomas, supra note 2, at 2150-51 (noting the increased number of filings and longer resolution period in Section 220 litigations).
97 See id. at 2127 (describing the screening benefits of Section 220).
98 Id. at 2147.
99 Id.
the average duration of a request was around ten months. Plaintiffs’ efforts proved to be worthwhile: those who obtained books and records through a Section 220 request often filed subsequent lawsuits, and when they did, they were more successful in the merits-based litigation than they were unsuccessful.

Many have acknowledged that Section 220 front-loads corporate litigation into books and records requests, which, as the data indicates, requires more effort and can no longer be characterized as summary proceedings. However, recent data also suggests that the “tools at hand” doctrine is operating as a “winnowing process” that “provides a valuable mechanism for sorting strong cases from others.” Further, Section 220 allocates resources more efficiently by encouraging plaintiffs to use the tools at hand to uncover information that bolsters their claims rather than expend time and resources adjudicating an incomplete complaint. This recent scholarship suggests that Section 220 can both lead to dismissal or non-pursuit of weak claims and help strengthen the claims that eventually move forward to litigation. Though Section 220 is instrumental to sorting out meritorious claims from frivolous ones, thereby addressing an age-old problem in shareholder litigation, it remains vulnerable to perverse incentives.

II. PERVERSE INCENTIVES IN SECTION 220

The import of Section 220 in derivative litigation is threatened by misbalanced incentives deriving from the nature of multijurisdictional derivative litigation and the increasing intensity and misuse of Section 220 proceedings. In multijurisdictional litigation, plaintiffs are incentivized to forego careful pre-filing investigations in favor of hastily filing suit out of fear that a faster-moving plaintiff in another jurisdiction may do so first. Thus, a Delaware plaintiff who conducts a diligent investigation would lose the chance to bring a claim arising from the same underlying facts. Trouble persists even if the claims remain in Delaware. Both defendants and plaintiffs are incentivized to turn summary litigation over books and records into

100 Id. at 2149-50.
101 See id. at 2154 tbl.5 (showing that out of ninety suits filed after the conclusion of a Section 220 action, plaintiffs won forty-five merits-based actions compared to defendants winning in twenty-nine merits-based actions).
102 See, e.g., Shapira, Corporate Law, Retooled, supra note 12, at 1973 (discussing the increasing reliance on section 220 as a vehicle for “pre-filing investigations”).
103 Cox, Martin & Thomas, supra note 2, at 2127.
104 Id.
105 Id. at 2166.
106 Id. at 2127.
107 See id. at 2136 (explaining that M&A transactions involving Delaware corporations frequently draw “frivolous [] lawsuits” often filed “without evidence of wrongdoing”).
surrogate litigation over the merits of their claims. Defendants can employ overly aggressive defensive tactics by stubbornly refusing to provide responsive documents where a proper purpose has been established, while plaintiffs can push the boundaries of the scope of documents provided and seek a sort of expansive pre-filing discovery. These incentives, abundant in Section 220 proceedings, threaten the known benefits of Section 220 as a screening mechanism and burden both the courts and the parties.

A. Multijurisdictional Litigation and the Preclusion Problem

Section 220 interacts with multijurisdictional litigation to create perverse incentives to forego pre-filing investigations in favor of racing to the courthouse to seek control over the suit. Because Section 220 litigation is long in duration, and because shareholders frequently file suit for the same underlying facts in multiple jurisdictions, shareholder plaintiffs face a dilemma regarding the timing of filing. By way of illustration, consider a major corporate event at a large public company that stimulated allegations of managerial wrongdoing. Plaintiff A takes a measured approach to litigation by seeking books and records in Delaware to investigate and increase their chances of surviving demand futility. Plaintiff B moves forward swiftly in another jurisdiction, relying only on publicly available information. Predictably, a court dismisses Plaintiff B’s lawsuit for failing to establish demand futility because Plaintiff B could not plead facts with particularity that demand should be excused. Even if the lawsuit may have been meritorious had Plaintiff A filed it, Plaintiff A is now bound by the court’s demand futility holding in Plaintiff B’s suit. In California State Teacher’s Retirement System v. Alvarez, the Delaware Supreme Court held that the Full Faith and Credit Clause requires such a result.110

1. California State Teacher’s Retirement System v. Alvarez

The story in Alvarez begins familiarly but ends anomalously. In April 2021, the New York Times broke a story about Walmart de Mexico (WalMex), Walmart’s largest foreign subsidiary, engaging in a bribery scheme to obtain

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108 See Cox, Martin & Thomas, supra note 2, at 2149-50 (observing a mean delay of ten months and a median delay of six months in Section 220 litigation).
109 See Leo E. Strine, Jr., Lawrence A. Hamermesh & Matthew C. Jennejohn, Putting Stockholders First, Not the First-Filed Complaint, 69 BUS. LAW. 1, 9 (2013) (“Multi-forum litigation occurred in 50.6 percent of litigated deals in 2012, compared to 8.3 percent in 2005.”).
110 See 179 A.3d 824, 835 (Del. 2018) (“Our state’s interest in governing the internal affairs of Delaware corporations must yield to the stronger national interests that all state and federal courts have in respecting each other’s judgments.” (internal quotation marks and citations omitted)).
permits for their stores in Mexico.\textsuperscript{111} The article alleged that once Walmart executives became aware of the scheme, they briefly investigated and uncovered evidence of the scheme, but decided to bury the problem.\textsuperscript{112} Shareholders quickly responded by filing derivative suits in federal district court in Arkansas and the Delaware Court of Chancery alleging breaches of fiduciary duty and claims under the federal securities laws.\textsuperscript{113}

Initially, the federal district court in Arkansas stayed the proceeding while the suits proceeded in Delaware.\textsuperscript{114} The Delaware plaintiffs sought books and records in response to Chancellor Strine’s admonition.\textsuperscript{115} But the ensuing battle over those books and records was “unusually contentious” and lasted nearly three years.\textsuperscript{116} Meanwhile, the Eighth Circuit vacated the Arkansas federal district court’s stay out of concern for the stalled securities claims.\textsuperscript{117} Ruling on a motion to dismiss for failure to plead demand futility, the Arkansas court dismissed the case.\textsuperscript{118} Because of the Arkansas district court’s decision, the Court of Chancery dismissed the Delaware plaintiffs’ suit based on issue preclusion.\textsuperscript{119} Notably, although they were aware of the Arkansas proceedings, the Delaware plaintiffs did not attempt to intervene.\textsuperscript{120}

On appeal, the Delaware Supreme Court first examined whether the procedures in pre-certified class actions should be applied to derivative suits.\textsuperscript{121} To protect nonparty due process rights, class actions that are proposed or rejected cannot bind nonparties until the court certifies the class according to Rule 23.\textsuperscript{122} Given the similarities between a pre-demand futility derivative action and a pre-certified class action, the court questioned whether there should also be no preclusive effect for decisions dismissing a case because of a failure to plead demand futility.\textsuperscript{123} Highlighting the “troubling nature of this case,” the Delaware Supreme Court sought a supplemental opinion on


\textsuperscript{112} Id.

\textsuperscript{113} Alvarez, 179 A.3d at 830.

\textsuperscript{114} Id.

\textsuperscript{115} Id. at 831.

\textsuperscript{116} Id.

\textsuperscript{117} See id. (ruling that the Arkansas district court’s continued, blanket abstention was not proper because Delaware courts have no jurisdiction to directly address the merits of Arkansas plaintiffs’ securities claims).

\textsuperscript{118} Id. at 832-33.

\textsuperscript{119} Id. at 833.

\textsuperscript{120} The Delaware plaintiffs raised their concerns about the Arkansas proceedings with the Delaware court, but they never intervened in the Arkansas proceedings. Id. at 832.

\textsuperscript{121} Id. at 838-39.

\textsuperscript{122} Id. at 838.

\textsuperscript{123} Id. at 838-39.
this issue from the Court of Chancery.\textsuperscript{124} The Chancellor ultimately recommended that the Delaware Supreme Court adopt a rule where the complaint would be dismissed with prejudice only as to the named plaintiff, and a derivative plaintiff could not bind later plaintiffs unless the first derivative plaintiff survived a motion to dismiss.\textsuperscript{125}

The Delaware Supreme Court rejected the Chancellor’s recommendation, and held that the Delaware plaintiffs’ due process rights were not violated by a demand futility ruling’s preclusive effect so long as their interests were adequately represented by the Arkansas plaintiffs.\textsuperscript{126} The court explained that due process rights of subsequent derivative plaintiffs are protected upon dismissal based on issue preclusion “when their interest were aligned with and were adequately represented by prior plaintiffs.”\textsuperscript{127}

The court first provided an extensive analysis of the privity question in shareholder suits, examining whether the plaintiffs’ interests were aligned.\textsuperscript{128} It concluded, consistent with other jurisdictions,\textsuperscript{129} that the Delaware and Arkansas shareholder plaintiffs were in privity with one another because they were enforcing the same legal rights related to the same underlying alleged misconduct.\textsuperscript{130} Thus, Delaware plaintiffs and Arkansas plaintiffs shared an identity of interest for the same real party in interest—the corporation.\textsuperscript{131}

Satisfied that the elements calling for preclusion existed, the Delaware Supreme Court turned to the federal due process requirement to analyze the adequacy of representation. The Delaware Supreme Court concluded that the Arkansas plaintiffs were adequate representatives because their representation was not “grossly de\textsuperscript{132}icient.”\textsuperscript{132} The court rejected the Delaware

\textsuperscript{124} See id. at 839 (internal quotation marks omitted) (recognizing that the Delaware plaintiffs duly requested company books and records under Section 220 to substantiate their allegations while the Arkansas plaintiffs did not).

\textsuperscript{125} See id. at 835 (suggesting that the Delaware Supreme Court consider adopting the approach suggested in EZCORP); cf. In re EZCORP Inc. Consulting Agreement Derivative Litig., 130 A.3d 934, 949 (Del. Ch. 2016) (dismissing a case with prejudice as to the named plaintiff only), rev’d, Alvarez, 179 A.3d at 840.

\textsuperscript{126} Alvarez, 179 A.3d at 840.

\textsuperscript{127} Id.

\textsuperscript{128} Id. at 842-47.

\textsuperscript{129} See id. at 848 n.134 (compiling circuit courts reaching this conclusion).

\textsuperscript{130} Id. at 847.

\textsuperscript{131} Id.

\textsuperscript{132} See id. at 853 (noting that failure to exploit all possible legal theories and a simple mistake are not sufficient to deny preclusion). Other scholars have argued that reforms to the doctrinal foundations of “adequate representation” in this context are needed in order to solve the shareholder preclusion problem and its impact on Section 220. See Lawrence A. Hamermesh & Jacob J. Fredechko, Forum Shopping in Bargain Aisle: Wal-Mart and the Role of Adequacy of Representation in Shareholder Litigation, in \textit{RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION} 156, 166-71 (Sean Griffith, Jessica Erickson, David H. Webber & Verity Winship eds., 2016) (proposing doctrinal refinements to the adequacy of representation analysis in preclusion.
plaintiffs’ contention that the Arkansas plaintiffs were grossly deficient because of their failure to seek books and records.\textsuperscript{133} The Arkansas plaintiffs had considered a books and records request, but ultimately decided against it because they believed they had enough information from the \textit{New York Times} article.\textsuperscript{134} The Delaware Supreme Court characterized the Arkansas plaintiffs’ decision as a “tactical error” that “\textit{in this instance does not rise to the level of constitutional inadequacy}” because it was a reasonable decision to make.\textsuperscript{135}

Affirming the dismissal of the Delaware case, the Delaware Supreme Court concluded that Delaware’s interest in “governing the internal affairs of Delaware corporations must yield to the stronger national interests that all state and federal courts have in respecting each other’s judgments” in accordance with the Full Faith and Credit Clause.\textsuperscript{136} \textit{Alvarez} clarified long-standing questions in Delaware about preclusion in a multijurisdictional derivative suit, but its result also promoted perverse incentives for plaintiffs seeking to diligently pursue derivative claims in Delaware.

2. \textit{Alvarez}’s Implications: Undermining Section 220 with Perverse Incentives

The decision in \textit{Alvarez} likely pressures plaintiffs to file quickly and to file outside of Delaware to avoid the “ticking time bomb of preclusion” even though they often lack information which can be obtained through a books and record request to substantiate their allegations.\textsuperscript{137} The lesson of \textit{Alvarez} to plaintiffs facing multijurisdictional litigation is clear: bypass the prefiling investigation or risk losing the case due to actions taken by other shareholder plaintiffs. For defendants, the lesson that “a Machiavellian corporate defender might take away from the Walmart saga is that a sound legal strategy involves stalling on a shareholder inspection request until a bumbling plaintiff in a different state can save the day by blowing demand excusal and precluding the more diligent plaintiff.”\textsuperscript{138} As previously established, Section 220 is a beneficial tool in Delaware for generating successful claims, sorting meritorious lawsuits from frivolous ones and bolstering the corporate

\footnotesize{cases); see also Cox, Martin & Thomas, supra note 2, at 2169-70 (“[I]n considering whether there was adequate representation, the deciding court should give close attention to the efforts competing plaintiffs took to flesh out their complaints.”).}

\textsuperscript{133} \textit{Alvarez}, 179 A.3d at 853-54.

\textsuperscript{134} See id. at 854 (“Arkansas Plaintiffs’ counsel stated, ‘we thought about [obtaining documents through Section 220] long and hard,’ but determined that, ‘[i]n this case we didn’t need it because we had these underlying documents.’”).

\textsuperscript{135} Id.

\textsuperscript{136} Id. at 839, 855 (internal quotation marks omitted).

\textsuperscript{137} See Shapira, \textit{Corporate Law, Retooled}, supra note 12, at 2001-02 (discussing the trend of filing outside of Delaware to avoid the need to investigate prefiling).

\textsuperscript{138} Geis, \textit{Information Litigation in Corporate Law}, supra note 3, at 436.
governance mechanism of the shareholder suit.\textsuperscript{139} But bypassing prefilings investigations produces perverse incentives that are detrimental overall because it “rewards plaintiff attorneys who are quick to capitalize on public information without adding much to the mix.”\textsuperscript{140}

This arrangement may be desirable from the perspective of some plaintiffs and defendants. Plaintiffs who file first can take control over the litigation.\textsuperscript{141} Further, filing outside of Delaware allows plaintiffs to avoid the Delaware courts’ insistence to exercise their information rights and potentially get away with pleading only publicly available information.\textsuperscript{142} Defendants can use the preclusion problem to their advantage and hold a reverse auction among the plaintiffs’ attorneys to get the easiest dismissal or the cheapest settlement.\textsuperscript{143} Defendants can reasonably expect that allegations in the Delaware complaint that relied on their books and records will likely be more substantiated than pleadings in another jurisdiction based only on public information.\textsuperscript{144} This will incentivize a defendant to go to the non-Delaware jurisdiction and aggressively pursue the dismissal of a less developed claim or seek a cheap settlement.\textsuperscript{145} Plaintiffs’ attorneys may well accept that unfair settlement offer to prevent the defendant from settling with a competing plaintiff.\textsuperscript{146} Either a dismissal or a settlement will preclude the claim by diligent Delaware plaintiffs, even when the claim may have been successful.

The economic realities in shareholder litigation further incentivize the filing of meritless suits without prefilings litigation because plaintiffs have little to lose. In shareholder derivative litigation, most claims are “tag-along” suits following “corporate mishaps” such as securities fraud class actions or

\textsuperscript{139} See discussion supra Section I.C.
\textsuperscript{140} Shapiro, Corporate Law, Retooled, supra note 12, at 2002.
\textsuperscript{141} See Strine, Hamermesh & Jennejohn, supra note 109, at 46-47 (“[T]he first-filed rule provides that, when parallel litigation has been initiated in separate courts, the suit that commences first has priority, and subsequent actions are to be stayed or dismissed in deference to it.”).
\textsuperscript{142} See Shapiro, Corporate Law, Retooled, supra note 12, at 2001-02 (“Instead of filing in Delaware, where they have to invest vast resources in pre-filing investigations . . . some plaintiffs opt to file elsewhere, where they can more easily get away with pleading based on news clippings and other pre-cooked packages of publicly available information.”).
\textsuperscript{143} See Jessica Erickson, Investing in Corporate Procedure, 99 B.U. L. REV. 1367, 1390-91 (2019) [hereinafter Erickson, Investing in Corporate Procedure] (describing multijurisdictional suit settlement auctions and associated incentives for plaintiff’s attorneys, such as attorneys’ fees).
\textsuperscript{144} See Cox, Martin & Thomas, supra note 2, at 2167 (stating that complaints filed in Delaware have greater factual development than complaints from other jurisdictions because of the tools available to plaintiffs in Delaware).
\textsuperscript{145} See id. at 2168 (“[T]he defendant who wishes to rid itself of the [multi-forum] 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.”).
\textsuperscript{146} See Erickson, Investing in Corporate Procedure, supra note 144, at 1390-91 (explaining how incentives created by Section 220 can lead to both preclusion for other plaintiffs and unideal settlement figures).
enforcement actions by regulators or prosecutors.\textsuperscript{147} Most often, these cases do not produce significant monetary relief and relief often focuses on corporate governance or compliance reforms—sometimes referred to as corporate “therapeutics.”\textsuperscript{148} Even though monetary recovery is uncommon, the corporate defendant can get a broad release of claims through settlement and the plaintiff can recover fees from the corporate defendant on the basis of the settlement’s therapeutic benefit.\textsuperscript{149} As a result, the settlement patterns are not influenced by the plaintiff’s investigatory efforts but rather by how strongly a corporate defendant desires to get a release of claims.\textsuperscript{150} Since filing a poorly researched claim may nonetheless confer attorney’s fees to plaintiffs, financial realities of shareholder derivative litigation exacerbate the perverse incentives to forego prefiling investigation.

Altogether, \textit{Alvarez} undermines one of the chief benefits of Section 220: sorting out the worthwhile derivative suits from the frivolous ones.\textsuperscript{151} But some question whether \textit{Alvarez} is simply an anomalous result.\textsuperscript{152} After all, the books and records request in \textit{Alvarez} lasted three years, which was much longer than the ten-month average in Delaware for Section 220 cases.\textsuperscript{153} However, while the average delay is around ten months, some cases during the study time period lasted longer, with the longest one lasting over seven years.\textsuperscript{154} Further, trends have indicated that the duration and intensity of Section 220 suits are increasing, so \textit{Alvarez} is in fact less of an outlier with regards to duration.\textsuperscript{155}

Additionally, some may consider \textit{Alvarez} an outlier because the Delaware plaintiffs failed to intervene in the Arkansas proceedings.\textsuperscript{156} While the court acknowledged that the Delaware plaintiffs had no obligation to intervene, the court ultimately had little sympathy for the Delaware plaintiffs: “there were other potential avenues to ensure that they would not be precluded, or at least have a more compelling argument before this Court that the Arkansas

\begin{itemize}
  \item 148 Id. at 10.
  \item 149 Id. at 10, 16; see also id. at 22 n.119 (stating that under the corporate benefit doctrine, a litigant is entitled to an allowance of fees and expenses if the litigant confers benefit to a class).
  \item 150 See id. at 25 (concluding that litigation filings cluster around public events, like mergers or regulatory investigations, and litigation settlements are dictated by timing considerations of the underlying transaction or regulatory action).
  \item 151 See Cox, Martin & Thomas, \textit{supra} note 2, at 2127 (“[T]he broad use of the tools at hand doctrine provides a valuable mechanism for sorting strong cases from others . . . ”).
  \item 152 See id. at 2167 n.203 (“Some have argued that \textit{Alvarez} is limited to situations where there is a long delay in completing a Section 220 action . . . ”).
  \item 153 Id. at 2149-50.
  \item 154 Id. at 2150 tbl.3.
  \item 155 Id. at 2149-50.
\end{itemize}
plaintiffs failed to adequately represent them.”\textsuperscript{157} While these circumstances raise questions about whether \textit{Alvarez} is an outlier, the proposal suggested in this Comment is a limited one that allows for a court to exercise discretion and account for cases with analogous facts.\textsuperscript{158}

\textbf{B. Increasing Intensity and Misuse of Section 220 in Delaware}

Even if litigation proceeds only in Delaware, incentives remain for both plaintiffs and defendants to misuse Section 220. Because the duration and intensity of books and records proceedings have significantly increased in recent years, many have expressed concern that these proceedings have been transformed into surrogate litigation for the underlying claims,\textsuperscript{159} and the data support this criticism.\textsuperscript{160} Plaintiffs complain that defendants utilize overly aggressive tactics such as refusing to provide documents where plaintiffs have clearly met the required standard and advancing strained arguments to do so, thus “plac[ing] obstacles in the plaintiffs’ way to obstruct them from employing [books and records requests] as a quick and easy prefiling discovery tool.”\textsuperscript{161} On the other hand, defendants complain that the scope of Section 220 unfairly burdens defendant corporations, especially if plaintiffs can access informal materials.\textsuperscript{162}

Most criticism of parties’ tactics in Section 220 litigation has been directed at defendants.\textsuperscript{163} The Delaware Court of Chancery has recently addressed the increasing trend of overly aggressive defendants in Section 220 proceedings. For example, in \textit{Pettry v. Gilead Sciences, Inc.}, shareholders sought Gilead’s books and records in connection with possible wrongdoing surrounding the development and marketing of an HIV drug, Truvada.\textsuperscript{164} The complaint alleged that Gilead had violated numerous laws in an effort to protect its market dominance for Truvada, which had generated billions in

\textsuperscript{157} Id. at 832 n.29.

\textsuperscript{158} See \textit{discussion infra} subsection III.B.2 (suggesting that Delaware courts streamline access to books and records when plaintiffs have stated a proper purpose).

\textsuperscript{159} See Cox, Martin & Thomas, \textit{supra} note 2, at 2150 (“Our data are consistent with the belief that Section 220 litigation is a surrogate for litigating the merits of the claim.”).

\textsuperscript{160} Id.

\textsuperscript{161} Id. at 2150.


\textsuperscript{163} In this Comment, I primarily focus on the use of Section 220 for prefiling investigations for follow-on derivative suits. For a useful discussion of Section 220 in the public company merger context and its differences from the derivative context, see Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, \textit{Optimizing the World’s Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead}, 77 BUS. LAW. 321, 371-79 (2022).

revenue, by thwarting the market entry of generic competitors and delaying the development of a safer alternative drug.165 In the ensuing fight for books and records, Gilead fiercely contested the scope of documents to be provided.166

After rejecting Gilead’s arguments, Chancellor McCormick took a notable additional step: she granted leave to the plaintiffs to move for fee-shifting.167 Although Delaware Courts typically follow the American Rule for litigation expenses where each party pays for their own fees, the court recognized that an exception exists under the American Rule to shift fees for bad faith conduct “to deter abusive litigation and protect the integrity of the judicial process” in situations where the party’s conduct was glaringly egregious.168 The court went on to describe the “regrettable reaction” of defendant corporations to display “massive resistance” to Section 220 actions.169 Because the Chancellor observed “[i]t seems that defendants like Gilead think that there are no real downsides to overly aggressive defense campaigns at the Section 220 phase,”170 the Chancellor imposed a downside by granting plaintiffs leave to move for their expenses.171

When the court granted the plaintiff’s request for fees, the Chancellor noted that “although there is a fine line between glaringly egregious conduct and an aggressive litigation position, Gilead crossed the line in this case,”172 further explaining that:

Gilead exemplified the trend of overly aggressive litigation strategies by blocking legitimate discovery, misrepresenting the record, and taking positions for no apparent purpose other than obstructing the exercise of Plaintiffs’ statutory rights. Gilead’s pre-litigation failure to provide any Plaintiff with even a single document despite the ample evidence of a credible basis and the obvious responsiveness of certain categories of documents amplifies the court’s concerns.173

Practitioners lauded the Court of Chancery’s decision, citing their agreement that defense tactics can go too far.174

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165 Id. at *1.
166 Id. at *2.
167 Id. at *30.
168 Id. at *29.
169 Id.
170 Id. at *30.
171 Id.
Plaintiffs, too, can contribute to the intensity and misuse of Section 220 by expanding the scope of documents they seek and prolonging the litigation, thereby increasing the burden on the courts and litigants.\textsuperscript{175} Admittedly, there is room within the caselaw for plaintiffs to validly make these arguments, as Delaware has allowed access to informal documents such as text messages and emails under limited circumstances.\textsuperscript{176} But the access provided to these informal communications in the few outlier cases has had an appreciable effect on the scope of documents plaintiffs set out to obtain.\textsuperscript{177} Sometimes plaintiffs seek informal documents even when formal records are available.\textsuperscript{178} Because of the burden on corporate defendants,\textsuperscript{179} some have suggested that

\footnotesize{([Gilead acknowledges that] when pursuing the statutory rights that Section 220 appears to allow, one can easily be stymied by the gamesmanship of companies who can play a war of attrition, usually with impunity, in light of the asymmetrical economics involved.); Gregory V. Varallo, Andrew Blumberg & Alla Zayenchik, Sharpening the Tools at Hand: New Rulings Provide Sensible Balance to Section 220 Litigation, \textit{Harv. L. Sch. F. on Corp. Governance} (June 2, 2020), https://corp gov.law.harvard.edu/2020/06/02/sharpening-the-tools-at-hand-new-rulings-provide-sensible-balance-to-section-220-litigation [https://perma.cc/2ZH2-TVKR] ("[I]ssuers have responded [to Section 220 litigation] by attempting to make what was designed as a 'summary' and 'streamlined' proceeding into protracted, burdensome and expensive litigation . . . the apparent desire to test the boundaries of the statute and to develop methods to slow the stream of investigations seems to be high on the list of the defense bar."); see also Hamermesh, Jacobs & Strine, \textit{supra} note 163, at 372 ("[P]laintiffs have too often met 'overly aggressive' responses from corporate defendants, including arguments having no plausible grounding in the statute or precedent under it.").}

\textsuperscript{175} \textit{See}, e.g., \textit{In re Lululemon Athletica Inc. 220 Litig.}, C.A. No. 9039-VCP, 2015 WL 1957196, at *1 (Del. Ch. Apr. 30, 2015) (seeking not only the electronic documents already provided by the court but also the personal emails of non-employee directors); Schnatter v. Papa John's Int'l, Inc., C.A. No. 2018-0542-AGB, 2019 WL 194634, at *16 (Del. Ch. Jan. 15, 2019) (seeking emails and text messages from director's personal devices and accounts, which the court noted "present greater challenges for collection and review than others, and thus may impose more expense on the company to produce"), \textit{abrogated} by Tiger v. Boast Apparel, Inc., 214 A.3d 933 (Del. 2019).

\textsuperscript{176} \textit{See}, e.g., KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 753 (Del. 2019) (ruling that the court should order emails to be produced if non-email books and records are insufficient); \textit{In re Lululemon Athletica}, 2015 WL 1957196, at *15 (granting Plaintiffs' request to review particular emails); Schnatter, 2019 WL 194634, at *16 (ordering the production of text messages and emails where the company's CEO used a personal device to conduct business); see also Edward B. Micheletti, Elisa Klein & Stefania A. Rosca, \textit{Delaware Courts Expand Plaintiff's Rights in Section 220 Case}, SKADDEN (June 25, 2021), https://www.skadden.com/insights/publications/2021/06/insights-the-delaware-edition/delaware-courts-expand-plaintiffs-rights [https://perma.cc/HP2V-E7AE] ("The rise in Section 220 demands (and related lawsuits) has resulted in several recent opinions that continue a trend in favor of greater access for stockholders to corporate books and records.").

\textsuperscript{177} \textit{See} Hamermesh, Jacobs & Strine, \textit{supra} note 163, at 374 ("This phenomenon exponentially increases the potential grist for the § 220 mill, including more informal and less guarded communications which are of natural interest to plaintiffs’ lawyers and of course legitimately discoverable if a plenary complaint survives dismissal.").

\textsuperscript{178} \textit{See} id. at 375 (noting that defendants' protests that plaintiffs seek documents that are too broad in scope are "regrettably made credible" by plaintiffs seeking informal documents where formal documents are available and had already been produced).

\textsuperscript{179} \textit{See} id. ("This tug and pull of the most unreasonable has exposed companies that do keep adequate formal books and records to the increased risk that the Court of Chancery will require
there is a need for the court to balance the broad access to books and records with the production burden on defendants.\footnote{See, e.g., Beyoud, supra note 1 (quoting Professor Benjamin Edwards’s belief that courts should “balance plaintiffs [sic] access to information with defendant’s cost in document management and production”).}

III. LEGISLATIVE REFORM TO RECALIBRATE SECTION 220: LIMITED FEE-SHIFTING AND STREAMLINING SECTION 220

Recalibration is needed to address the perverse incentives at play in the operation of Section 220 in Delaware, both with respect to Section 220’s interaction with multijurisdictional litigation and the increasing intensity and misuse of Section 220 litigation. Although some have suggested that private ordering could solve the problems facing Section 220, the solutions proposed are largely implausible and ineffective. Thus, legislative action is more appropriate. To address the preclusion problem in multijurisdictional litigation, which discourages careful investigation, Delaware should consider a statutory amendment to Section 220, providing a limited opportunity for a court to allow fee-shifting where plaintiffs unreasonably forego prefiling investigations. A limited fee-shifting provision would help encourage diligence among plaintiffs, thereby more effectively screening cases without unduly deterring all litigation. To cope with the increasing intensity and misuse of Section 220 proceedings, Delaware should streamline Section 220 by providing presumptive access to formal board-level materials to plaintiffs that state a proper purpose.\footnote{For a discussion of a different approach to solving the incentive problems facing Section 220 that would replace the Section 220 process with pleadings-stage discovery in the context of prefiling investigations for derivative actions, see Geeyoung Min & Alexander M. Krischik, Realigning Stockholder Inspection Rights, 27 STAN. J.L. BUS. & FIN. 225, 261 (2022).}

A. Limitations of Private Ordering

Although some scholars have proposed private ordering solutions to address problems in shareholder derivative litigation,\footnote{See Erickson, Investing in Corporate Procedure, supra note 143, at 1387-1406 (advocating the benefits of adopting “portable procedures” in corporate bylaws and charters, including nonwaivable} private ordering is
unlikely to be successful in this context. Scholars have considered both forum selection bylaws and fee-shifting bylaws as potential private ordering solutions to the preclusion problem. While many corporations have adopted exclusive forum selection bylaws that could in theory bring most litigation to Delaware and therefore avoid multijurisdictional problems, the majority of such bylaws have a waiver provision, which means that corporations can still elect to litigate in other jurisdictions where it may be cheaper and quicker for them to do so, thus undermining any potential benefit to address the preclusion problem. Some have also proposed fee-shifting bylaws in shareholder derivative litigation. But the reality is that it would be implausible to believe that many, if any, corporations would adopt a bylaw that encourages inquiry into the corporation's books and records. Finally, private ordering solutions are not always standardized or efficient, which is not desirable in Section 220 where streamlining and efficiency are needed.

1. Forum Selection Bylaws

Some have suggested that forum selection bylaws may solve the preclusion problem in multijurisdictional litigation by bringing all litigation to specified forums, often exclusively Delaware. Forum selection clauses have increased in popularity in recent years: a study conducted in 2014 found that the adoption of exclusive forum selection clauses had grown at a constant linear rate of more than fifteen percentage points each year since the

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184 See Robert Romano & Sarath Sanga, The Private Ordering Solution to Multiforum Shareholder Litigation, J. EMPIRICAL LEGAL STUD. 31, 46 tbl.1 (2017) (showing that 83% of IPOs with forum selection clauses had elective clauses and 91% of companies that adopted forum selection clauses after an IPO adopted elective clauses). I am unaware of any data identifying the frequency with which corporations in fact utilize such waivers.

185 See Erickson, Investing in Corporate Procedure, supra note 143, at 1400-03 (suggesting a construction of fee-shifting bylaws that would be consistent with Delaware law, but ultimately concluding that corporations are likely to consider other procedural tools before adopting fee-shifting provisions due to various concerns).


187 See George S. Geis, Shareholder Derivative Litigation and the Preclusion Problem, 100 VA. L. REV. 261, 302 (2014) [hereinafter Geis, Shareholder Derivative Litigation and the Preclusion Problem] (“A reasonable . . . prediction is that Chevron will lead to the rapid adoption of bylaw forum selection provisions for many Delaware firms.”); id. at 303 (“[B]roader use of forum selection provisions would undoubtedly mitigate the preclusion problem . . . by channeling lawsuits into a single adjudicative body.”).
Delaware Court of Chancery invited their use in Revlon. By August 2014, the adoption rate for forum selection clauses in Delaware IPOs had reached eighty percent. However, the vast majority of forum selection clauses contain a waiver provision that revives the possibility of taking advantage of preclusion by filing suit in multiple jurisdictions.

Although forum selection clauses might have been a promising idea to address the preclusion problem, the existence of waiver provisions undermines this promise. Research has shown that eighty-three percent of the clauses adopted at the IPO stage by Delaware corporations were elective, meaning that the board can waive the clause. For public companies that adopt forum selection provisions "midstream," meaning after an IPO, ninety-one percent were elective. This elective discretion makes sense because there are some instances where litigation in a different forum is more practical for the corporation, meaning that a cheaper settlement may be available or that litigation is more convenient elsewhere, and the ability to consent to suit elsewhere can provide a "fiduciary out." The elective discretion also means that defendants can simply waive the forum selection clause if they see a cheaper solution outside of Delaware, therefore undoing any benefits that

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188 Romano & Sanga, supra note 184, at 50; see also In re Revlon, Inc. S’holder Litig., 990 A.2d 940, 960 (Del. Ch. 2010) (“[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”). The increasing popularity of forum selection clauses can also be explained by the migration of corporate litigation away from Delaware. See Joseph A. Grundfest, The History and Evolution of Intra-Corporate Litigation, 37 DEL. J. CORP. L. 333, 378 (2012) (“Delaware corporations face both an increased probability of litigation and an increased probability that the litigation will be filed and resolved outside of Delaware, hence, an increase in the demand for intra-corporate forum selection provisions.”).

189 Romano & Sanga, supra note 184, at 50.

190 See id. at 46 tbl.1 (showing that the vast majority of the studied forum selection clauses were elective).

191 See Erickson, Investing in Corporate Procedure, supra note 143, at 1391 (“[T]he mere possibility of waiver undercuts the effectiveness of these [forum selection] clauses.”).

192 Romano & Sanga, supra note 184, at 44, 46 tbl.1; see also Grundfest, supra note 188, at 365 (2012) (finding a move away from the use of mandatory forum selection clauses during the Revlon-Chevron era and toward an increasing use of elective forum selection clauses).

193 Romano & Sanga, supra note 184, at 33, 46 tbl.1.

194 See Erickson, Investing in Corporate Procedure, supra note 143, at 1390-91 (explaining that corporations facing litigation in multiple jurisdictions may have a forum selection clause waiver because "there may be times when it makes more sense for these suits to be litigated elsewhere," such as when corporations can negotiate lower settlement prices outside the selected forum); Grundfest, supra note 188, at 383 (“It thereby operates as a form of a ‘fiduciary out,’ which creates the flexibility necessary to preserve directors’ obligations to fulfill their fiduciary duties to shareholders if it is in the best interests of the shareholders and the corporation that the litigation proceed outside of Delaware.”).
Plaintiff’s attorneys are also aware of this reality, and are therefore incentivized to file meritless claims outside of Delaware in hopes that the corporation will find it cheaper to waive the forum selection clause and settle. Therefore, the widespread use of elective waivers in forum selection clauses interacts with the tools at hand doctrine to “promote[] 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.”

2. Fee-Shifting Bylaws

Others have pointed to the potential benefits of fee-shifting bylaws to address various problems in shareholder derivative litigation, including the preclusion problem, and to decrease the volume of litigation. However, the Delaware legislature has made its disapproval of fee-shifting bylaws known. The legislature responded swiftly after the Delaware Court of Chancery expressed approval of fee-shifting bylaws, enacting new legislation limiting the ability of corporations to privately order in this way. As a result, while there are some proposals that would still allow certain types of fee-shifting bylaws, the reality remains that it is implausible that corporations would adopt them and invite plaintiffs to seek their books and records.

Prior to 2014, the Delaware Supreme Court had never addressed the propriety of fee-shifting provisions in governing corporate documents. But

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195 See Grundfest, supra note 188, at 383 (“[T]he savings clause in the elective form of the provision expressly grants authority to the corporation to consent to jurisdiction in a forum other than the one designated by the forum selection provision.”).

196 Erickson, Investing in Corporate Procedure, supra note 143, at 1390-91; see also Sean J. Griffith & Alexandra D. Lahav, The Market for Preclusion in Merger Litigation, 66 VAND. L. REV. 1053, 1074 (2013) (“It has long been recognized that plaintiffs’ attorneys sometimes use forum selection to increase the value of their clients’ claims.”).

197 Cox, Martin & Thomas, supra note 2, at 2166.

198 Geis, Shareholder Derivative Litigation and the Preclusion Problem, supra note 187, at 267-68; see also Stephen M. Bainbridge, Fee-Shifting: Delaware’s Self-Inflicted Wound, 40 DEL. J. CORP. L. 851, 868 (2016) (“There is substantial reason to believe that widespread adoption of fee-shifting bylaws would have substantially reduced the volume and settlement value of shareholder litigation.”).


200 See, e.g., Erickson, Investing in Corporate Procedure, supra note 143, at 1401 (suggesting, although ultimately preferring other avenues, that fee-shifting bylaws could comply with Delaware law by imposing liability on the plaintiff’s attorney, rather than the stockholder).
that changed in 2014 when the Delaware Supreme Court approved fee-shifting bylaws in *ATP Tour, Inc. v. Deutscher Tennis Bund.* ATP was a Delaware non-stock membership corporation that operated a professional men’s tennis tour; one of its members was Deutscher Tennis Bund. In 2006, the ATP board amended its bylaws to include a fee-shifting provision that required unsuccessful litigants to reimburse ATP for litigation expenses. Following subsequent unsuccessful litigation over the ATP board’s decision to change the tour schedule and format, the district court refused to enforce the fee-shifting provision, arguing that federal antitrust law preempted its enforcement. Analyzing whether the fee-shifting bylaw was enforceable in intra-corporate litigation, the Delaware Supreme Court first held that the bylaw was facially valid because no provision in Delaware law forbade the bylaw and it satisfied the DGCL’s requirements. Further, although Delaware typically follows the American Rule, which requires each party to pay for its own litigation costs, the court recognized that there is an exception for contracting parties, and held that corporate bylaws are a contract among shareholders.

Although ATP was a non-stock member corporation, many feared that the court’s reasoning would be extended to for-profit stock corporations. Following the decision in *ATP*, more than fifty Delaware corporations adopted fee-shifting bylaws. Pushed by Delaware’s corporate attorneys, the Delaware legislature quickly responded to limit the reach of *ATP*. The Delaware legislature passed S.B. 75, which enacted Section 102(f) and amended Section 109(b) of the DGCL to eliminate the use of certain fee-shifting provisions in both a corporation’s bylaws and its certificate of incorporation.

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201 91 A.3d 554, 557-58 (Del. 2014).
202 Id. at 555.
203 Id. at 556.
204 Id.
205 Id. at 558.
206 Id.
207 See Bainbridge, *supra* note 198, at 857 (“The Court’s opinion cited both statutes and cases governing for-profit stock corporations, however. Accordingly, it seems likely that the decision would be extended to for-profit stock corporations.”); Henry duPont Ridgely, *The Emerging Role of Bylaws in Corporate Governance*, 68 SMU L. REV. 317, 327 (2015) (“Since the Court’s decision in *ATP Tour*, a number of commentators have assumed that it applies equally to for-profit, stock corporations.”); Richman & Noreuil, *supra* note 199 (“The *ATP* case involved a Delaware nonstock membership corporation, but the Delaware Supreme Court’s reasoning in its opinion was sufficiently broad as to raise the possibility that the *ATP* decision might cover public corporations as well.”).
208 Bainbridge, *supra* note 198, at 858.
209 Id. at 875 (“[A]ll corporate lawyers—litigators and transactional—have a strong incentive to oppose fee-shifting bylaws. Hence, it was no surprise that the General Assembly—dominated in this area by the Delaware bar—leaped to ban such bylaws.”).
incorporation may not contain any provision that would impose liability on a stockholder for the attorneys’ fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title.” Section 109(b) creates an identical rule applicable to corporate bylaws. As a result of the Delaware legislature’s firm retort to ATP, fee-shifting provisions in corporate governing documents do not stand on solid ground in Delaware.

Still, some have proposed that fee-shifting bylaws could still be possible within the current statute. Professor Erickson suggests that, because the Delaware provisions prohibit fee-shifting “on a stockholder,” fee-shifting bylaws could instead shift fees onto counsel instead of plaintiffs. While this would have the benefit of providing portable procedure—meaning that the bylaw would be enforced in any forum because it is in the corporate charter—in a multijurisdictional context, it is likely an implausible solution because few corporations would find it in their interest to adopt such a bylaw that invites plaintiffs to seek their books and records.

211 DEL. CODE. ANN. tit. 8, § 102(f) (2022). Section 115 defines internal corporate claims as those “(i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.” DEL. CODE. ANN. tit. 8, § 115 (2022). As a result, shareholder derivative litigation based on breaches of fiduciary duty are considered internal corporate claims and implicated here. Section 220 proceedings, over which the Court of Chancery retains exclusive jurisdiction, are also included. Section 210 (b) creates an identical rule applicable to corporate bylaws.

213 Some scholars have argued that Delaware made a serious mistake in amending the DGCL after ATP. Professor Stephen Bainbridge argues that public policy favors fee-shifting because of the need to curb frivolous shareholder litigation in the wake of an explosion of shareholder litigation that derives mostly from strike suits and not from breaches of duty by corporate actors. Bainbridge, supra note 198, at 860-61. Further, as discussed above, because some contend that shareholder litigation does not effectively compensate shareholders for managerial wrongdoing or deter that wrongdoing, Professor Bainbridge argues that fee-shifting could address the transfer of wealth from shareholders to lawyers in shareholder derivative litigation. Id. at 864-65. There is also evidence that the explosion of shareholder litigation is a detriment to the competitiveness of capital markets, in part because of shareholder litigation and the litigious nature of the United States. Publicly traded companies in the U.S. may shift securities offerings away from U.S. capital markets and overseas firms with little exposure to U.S. securities laws could be deterred from doing business here. Id. at 865-66.

214 Erickson, Investing in Corporate Procedure, supra note 143, at 1401-02.

215 See DEL. CODE. ANN. tit. 8, § 109(b) (2022); id. § 102(f).

216 Erickson, Investing in Corporate Procedure, supra note 143, at 1401-02. Professor Erickson also suggests that any such provision should be coupled with awarding counsel higher fees to balance the deterrent effect of fee-shifting. Increasing both the risk and reward of shareholder lawsuits creates greater incentives for plaintiffs’ attorneys to choose wisely when deciding which cases to file. Id. at 1402. However, Professor Erickson ultimately advises that “shareholders should exercise caution when adopting fee- and cost-shifting rules” because of the potential “unanticipated consequences” on the economic incentives of shareholder litigation such as creating costly litigation over fee amounts or incentivizing defendants to drive up discovery costs to gain leverage in settlement negotiations. Id.

217 See id. at 1388 (“[I]ncluding new procedures in corporate charters or bylaws has the unappreciated benefit of making these procedures portable.”).
3. Standardization and Efficiency in Private Ordering

Finally, private ordering solutions such as forum selection bylaws and fee-shifting bylaws are ultimately undesirable to address the perverse incentives at play with Section 220 because they cannot provide a standardized or efficient approach. Private ordering happens on a “company-by-company basis” and are vulnerable to creating an inefficient piecemeal response. Scholars have suggested that private ordering can be advantageous in some contexts by allowing “firm-specific tailoring of corporate governance rather than a one-size-fits-all approach.” Indeed, many scholars further contend that “[p]rivate ordering allows efficient customization in corporate structures” and “innovation and experimentation.” However, while it is undoubtedly true that private ordering is efficient in some contexts, it can certainly produce inefficient results in others because the firms that are most likely to benefit from a particular governance term often do not adopt them. As a result, the dichotomy between private ordering or mandatory regulation may be more complicated and requires a case-by-case assessment “of the costs of applying a one-size mandatory law to different firms against the costs of relying solely on private ordering.”

4. Necessity of Legislative Reform

In the case of Section 220, mandatory regulation through legislation is a better route because corporations are unlikely to act on their own. First, while corporations may adopt forum selection provisions, they are likely to do so with waiver provisions. Second, fee-shifting bylaws are ultimately an implausible solution because corporations are unlikely to adopt them in meaningful numbers. It is not in a corporation's interest to adopt a bylaw that would encourage plaintiffs to initiate books and records requests, which have only become more voluminous and expansive in scope. Corporations

218 Id.
221 See Michal Barzuza, The Private Ordering Paradox in Corporate Law, 8 HARV. BUS. L. REV. 131, 181 (2018) (challenging the assumption that “firms self-select efficiently” because “firms that could benefit from governance terms do not adopt them, and firms for whom they did not matter much are the first in line to have them”).
222 Id. at 178.
223 See supra notes 184, 187–197 and accompanying text (exploring waiver provisions).
224 See supra notes 213–217 and accompanying text (discussing fee-shifting bylaws and why they are likely to be unpopular among corporations).
225 See Cox, Martin & Thomas, supra note 2, at 2149-50 (demonstrating an increasing duration for case resolution and increased length of filings in books and records cases); see infra notes 245-253
would rationally prefer the hastily filed unsubstantiated claims that they can cheaply settle for limited monetary recovery and a broad release of claims. As a result, most corporations will not adopt the governance that is needed to have a meaningful impact. Relying on private ordering, then, risks maintaining the status quo.

By contrast, a legislative approach is promising because it can provide the standardization and efficiency that is particularly necessary to ensure that Section 220 does not continue to trend towards surrogate litigation and to streamline the process altogether. Legislation provides a standardized solution that applies to all corporations. Further, legislation does not run the same risks of structural bias as private ordering. Boards adopting litigation-limiting bylaws and charter provisions face structural biases because directors have an incentive to include provisions that would reduce litigation in which they are often defendants. Additionally, legislatures have more expertise in rulemaking. Unlike the piecemeal approach of private ordering which may not have cumulative impact on the incentive problems of Section 220, legislation provides the uniform approach needed to address the far-reaching incentive problems currently facing Section 220.

B. Proposals for Fee-Shifting and Streamlining

Delaware should consider two legislative actions to recalibrate Section 220. First, Delaware should consider a limited fee-shifting provision in Section 220 for plaintiffs that unreasonably forego prefilings to discourage them from hastily filed scantly researched complaints. Second, Delaware should streamline Section 220 by providing presumptive access to formal board-level materials. This proposal not only mitigates the increasingly burdensome nature of Section 220 litigation but also refocuses Section 220 inquiries on formal board-level materials as opposed to informal materials.

1. Limited Fee-Shifting for Unreasonable Failure to Investigate

The threat of preclusion incentivizes plaintiffs to forego prefilings investigations in favor of hastily filed complaints consisting of public

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226 Cox, Martin & Thomas, supra note 2, at 2166.
227 Jessica Erickson, The (Un)changing Derivative Suit, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 58, 77 (Sean Griffith, Jessica Erickson, David H. Webber & Verity Winship eds., 2016) [hereinafter Erickson, The (Un)changing Derivative Suit].
228 Id.
229 Id.
information. Fee-shifting is a promising way to recalibrate such perverse incentives and encourage plaintiffs to bring well-researched lawsuits. One of the most prominent criticisms of fee-shifting provisions is that they deter both frivolous and meritorious suits. However, fee-shifting legislation that accounts for prefiling investigation can encourage plaintiffs to bring meritorious suits without overly deterring all shareholder litigation. Accordingly, the Delaware Legislature should adopt a fee-shifting provision specifically tailored to discouraging hastily filed lawsuits brought without any investigation. Such a provision could provide that the court may, in its discretion, order fee shifting onto the plaintiff if it finds that the derivative plaintiff unreasonably failed to incorporate information from a prefiling investigation.

A legislative provision in Section 220 allowing fee-shifting as described above would more effectively distinguish meritorious suits from sparsely investigated ones without overly deterring all shareholder litigation. Overbreadth was one of the biggest criticisms of fee-shifting provisions in the wake of ATP and was a concern that motivated the corporate bar’s campaign to enact the subsequent litigation-limiting fee-shifting provisions. Overbroad fee-shifting provisions deterred shareholder claims per se, rather than more precisely targeting the causes of frivolous litigation. However, a fee-shifting legislation that inspects prefiling investigation would overcome the overbreadth issue and encourage more

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230 See discussion supra subsection II.A.2 (explaining the threat of preclusion and its effects).
231 See Griffith, Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees, 56 B.C. L. REV. 1, 30 (2015) (“The problem with current fee-shifting proposals is not that they deter shareholder litigation, but that they deter it indiscriminately. The extreme loser-pays position of current bylaw proposals takes no account of the merits of the underlying claim and, considering the amplified deterrent effect on representative actions, thus will discourage good and bad cases alike from ever being brought.”).
232 Professor Randall Thomas proposed that inspection statutes could be revised to help streamline the inspection process by reducing the cost to the plaintiff of fighting the case. Randall S. Thomas, Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information, 38 ARIZ. L. REV. 331, 370 (1996). Specifically, Thomas suggested that plaintiffs should be compensated, with complete relief and not merely attorney’s fees, if the corporation frivolously refused. Id. My proposal is similar to Thomas’s proposal in that I also suggest a financial disincentive, but Thomas focuses on wrongful refusals by defendants while my fee-shifting proposal seeks to shape plaintiffs’ prefiling investigation behavior. However, fee-shifting can be, and has been utilized, to shape defendants’ behavior in resisting Section 220 requests as well. See supra notes 164–176 and accompanying text (discussing fee-shifting onto the defendants in Gilead for overly aggressive defensive behavior).
233 See Griffith, supra note 147, at 27.
234 See Erickson, The (Un)changing Derivative Suit, supra note 227, at 71 (“[R]ules that discount all derivative plaintiffs from filing suit do little to sort the good cases from the bad.”); see also Ann M. Lipton, Limiting Litigation Through Corporate Governance Documents, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 156, 184 (Sean Griffith, Jessica Erickson, David H. Webber & Verity Winship eds., 2016) (“Feeshifting is perhaps the most draconian of the proposed litigation limitations.”).
well-researched and well-plead complaints. It is important to note that this proposal does not suggest that plaintiff prefiling behavior is the only factor shaping the perverse incentives. Defendants’ behavior during Section 220 proceedings can and often does contribute to the intensity and misuse of Section 220 as well. However, this proposal focuses on prefiling investigation, which is why the fee-shifting falls upon plaintiffs. Delaware courts have, and should continue to, consider fee-shifting upon defendants for overly aggressive defensive tactics.

Although fee-shifting legislation is a promising approach to recalibrate the perverse incentives of foregoing prefiling investigation, there is a concern that fee-shifting onto shareholder-plaintiffs might restrict shareholders’ access to justice because larger law firms for plaintiffs could absorb the costs of discovery while smaller firms may be unable to take a similar financial risk. As Professor Jessica Erickson suggests in the context of fee-shifting bylaws, one way to address this concern is to cap the fees recoverable. Fee-shifting legislation can also cap the fees recoverable. Making plaintiffs liable for only a certain amount of the corporate defendant’s legal fees limits the risk imposed on less-funded plaintiffs’ attorneys and ensures that the fee-shifting legislation does not only deter smaller firms from bringing suit.

In conclusion, fee-shifting legislation that considers prefiling investigation efforts and places a cap on fees recoverable will encourage the use of Section 220 while deterring frivolous claims. Indeed, such a provision might have made plaintiffs like the Arkansas plaintiffs in Alvarez, had they filed in Delaware, think twice before bringing their suit without conducting a prefiling investigation beyond public documents. Although the Arkansas plaintiffs in Alvarez had considered a books and records request, they ultimately decided against it because they believed they had enough information from the public New York Times article. Ultimately, the article was not enough: because the New York Times article did not provide insight into board-level knowledge of wrongdoing, which was required to meet the Caremark pleading standard, the Arkansas plaintiffs’ claim was predictably dismissed. Whereas the Arkansas plaintiffs had little to lose by filing their

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235 See discussion supra Section II.B (summarizing litigants’ misuse of Section 220).
236 See supra notes 164–176 and accompanying text (discussing fee-shifting onto the defendants in Gilead for overly aggressive defensive behavior).
237 See Erickson, Investing in Corporate Procedure, supra note 143, at 1402 ([F]ee and cost shifting could inhibit shareholders’ access to justice. Larger plaintiffs’ firms could likely absorb the costs of discovery [but] . . . . Smaller firms . . . . may be in a more financially precarious position . . . . ).
238 Id. at 1402-03.
239 See Cal. State Tchrs.’ Ret. Sys. v. Alvarez, 179 A.2d 824, 854 (Del. 2018) (“Arkansas Plaintiffs’ counsel stated, ‘we thought about [obtaining documents through Section 220] long and hard,’ but determined that, ‘[i]n this case we didn’t need it because we had these underlying documents.’”).
240 Id. at 832-33, 833.
suit without fee-shifting legislation in Arkansas, they would face the risk in Delaware of having to cover the defendant’s fees with fee-shifting legislation based on prefiling investigations in place.

2. Streamlining the Scope of Section 220

In addition to giving plaintiffs an incentive to investigate their claims before filing hastily, streamlining the process of making a Section 220 request altogether can also help address the perverse incentives that contributed to the increasing intensity and potential misuse of Section 220 proceedings. In Delaware, the proper purpose requirement, which requires plaintiffs to show they have a proper purpose—such as investigating managerial wrongdoing—in order to seek books and records, is already subject to one of the lowest standards that exists in corporate law. In response, some have recently suggested that the uncertainty surrounding the scope of records available beyond formal board records, particularly concerning electronic records, is unsustainable.

The available evidence supports the concern that books and records litigation has transformed into a “surrogate proceeding to litigate the possible merits of the suit where [defendants] place obstacles in the plaintiffs’ way to obstruct them from employing it as a quick and easy prefiling discovery tool.” As discussed, Section 220 helps sort out meritorious cases from frivolous ones but protracted battles over books and records create unnecessary burdens on litigants and the courts for proceedings that are intended to be summary.

Because of the lenient proper purpose requirements, most recent litigation has focused not on whether the shareholder will be entitled to documents, but on how far the scope of those documents will reach. For each category of books or records that the plaintiff seeks, the plaintiff must

241 Discussions about streamlining Section 220 are not new. In his 1996 article, Professor Randall Thomas proposed automatic access to stock lists and other non-sensitive corporate records for long-term institutional shareholders. See Thomas, supra note 232, at 369. This proposal builds upon these earlier insights given modern context.

242 Beyoud, supra note 1 (quoting Chancellor McCormick’s statement that “one of the greatest impediments to our current system has been the focus of litigants on entitlement to records, as opposed to scope”); see also Shapira, Corporate Law, Retooled, supra note 12, at 1997-98 (suggesting that the front-loaded equilibrium of litigation driven by Section 220 “may not be sustainable” because it will drive litigants away from Delaware or will encourage parties to contract out of prefiling investigations).

243 Cox, Martin & Thomas, supra note 2, at 2150.
demonstrate by a preponderance of the evidence that each category is essential to their proper purpose.\textsuperscript{244}

For electronic documents, the scope of documents available has been gradually broadened by the Delaware courts. In \textit{Saito v. McKesson}, where the shareholder of a parent corporation sought access to the documents of a merging corporation, the court emphasized that the source of the documents is not critical, but rather whether the documents are necessary and essential.\textsuperscript{245} Therefore, the court held that “the stockholder should be given enough information to effectively address the problem” when a claim is based on allegations of wrongdoing.\textsuperscript{246} Grappling with the reach of Section 220 into electronic documents, the court has made clear that documents beyond formal board material are within the scope of Section 220 in at least some circumstances. In \textit{Amalgamated Bank v. Yahoo! Inc.}, the court ordered the corporation to produce emails from a personal account that its CEO had used to conduct business related to the subject of wrongdoing, because the information contained in the emails was not available elsewhere.\textsuperscript{247} The court emphasized that a corporate record falls under the definition of “corporate record” found in Section 220 regardless of whether it was created electronically or otherwise.\textsuperscript{248}

Given the court’s willingness to provide access to electronic documents,\textsuperscript{249} much litigation now centers around battles over the scope of documents available.\textsuperscript{250} As a result, there is a risk that books and records litigation will sink further into a surrogate proceeding on the merits rather than the summary proceeding that it is intended to be. To reduce the burden of Section 220 litigation on both the parties and the courts, Delaware should provide presumptive access to formal board-level materials to plaintiffs that state a proper purpose, subject to confidentiality requirements. This change would address the intensity and potential misuse of litigation in a manner that appropriately balances plaintiff’s rights to information and the burdens on the corporation.

\textsuperscript{244} \textit{Amalgamated Bank v. Yahoo! Inc.}, 132 A.3d 752, 775 (Del. Ch. 2016). The court’s determination of the scope of inspection must be "circumscribed with rifled precision" to the plaintiff’s purpose. \textit{Id.}

\textsuperscript{245} See \textit{Saito v. McKesson HBOC, Inc.}, 806 A.2d 113, 118 (Del. 2002) ("The source of the documents and the manner in which they were obtained by the corporation have little or no bearing on a stockholder’s inspection rights. The issue is whether the documents are necessary and essential to satisfy the stockholder’s proper purpose.").

\textsuperscript{246} \textit{Id.} at 115.

\textsuperscript{247} \textit{Amalgamated Bank}, 132 A.3d at 792.

\textsuperscript{248} \textit{Id.} at 793. The court also cited numerous other decisions similarly contemplating the production of electronic documents and emails. \textit{Id.} at 793 n.42.

\textsuperscript{249} Shapira, \textit{Corporate Law, Retooled}, supra note 12, at 1968 (noting that defendants will argue that the Court of Chancery’s cases providing access to electronic information should be limited to their specific circumstances).

\textsuperscript{250} See supra notes 245–249 and accompanying text.
In a recent speech, Chancellor Kathaleen McCormick expressed her view that books and records litigation was “larding up” the court’s dockets.\textsuperscript{251} Chancellor McCormick further that there is too much emphasis on entitlement to records rather than scope.\textsuperscript{252} Indeed, the Delaware Court of Chancery recently commended parties for focusing primarily on scope.\textsuperscript{253} In a recent opinion ruling that certain nonprivileged electronic communications should be provided to shareholders, the Court stated in a footnote:

The Court commends the parties for attempting to narrow the issues for resolution at trial. Specifically, they agreed to focus trial on the scope of documents to be produced for inspection rather than litigate the propriety of Plaintiff’s stated purposes at the outset. Their conduct stands in marked contrast to the tactics that have prompted expressions of concern by this court regarding ‘overly aggressive’ Section 220 litigation.\textsuperscript{254}

Further, to help manage the scope of Section 220 litigation, Chancellor McCormick proposed that certain types of documents—those that are inexpensive for companies to produce—should be “automatic gives.”\textsuperscript{255} The Delaware legislature should heed Chancellor McCormick’s suggestion and enact a legislative amendment to provide for this streamlined access. As it currently stands, with respect to the scope of the documents requested, the plaintiff must show that the documents requested are “necessary and essential to accomplished the stated, proper purpose.”\textsuperscript{256} Delaware courts have further clarified that that documents are “necessary and essential . . . if they address the crux of the shareholder’s purpose and if that information is unavailable from another source.”\textsuperscript{257} For most types of books and records, this is a “fact specific” inquiry that “necessarily depend[s] on the context in which the shareholder’s inspection demand arises.”\textsuperscript{258} As a result, the dispute over electronic documents and non-formal board-level materials centers around whether those documents are “necessary and essential” according to Delaware caselaw.\textsuperscript{259} While disputes over electronic documents

\textsuperscript{251} Beyoud, \textit{supra} note 1.
\textsuperscript{252} \textit{Id.}
\textsuperscript{254} \textit{Id.} (internal citation omitted).
\textsuperscript{255} \textit{Id.}
\textsuperscript{256} Saito v. McKesson HBOC, Inc., 806 A.2d 113, 116 (Del. 2002).
\textsuperscript{257} Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW, 95 A.3d 1264, 1271 (Del. 2014) (internal quotation marks omitted).
\textsuperscript{258} \textit{Id.}
Recalibrating Section 220

will undoubtedly continue, the Delaware legislature should provide in Section 220 that formal board-level materials as presumptively “necessary and essential,” and provide them as a matter of course to plaintiffs that state a proper purpose. As a result, the court’s time can be spent on determining the scope of production rather than challenging the propriety of the plaintiff’s purpose.

Providing streamlined access to formal board-level materials would help address the problem of drawn-out surrogate litigation over books and records by providing easier access to the documents that are typically easily available and least expensive for corporations to provide, thereby representing an appropriate balance of shareholder’s inspection rights and the defendant’s costs. In *Amalgamated Bank*, the court recognized that “[t]he starting point—and often the ending point—for a sufficient inspection will be board level documents evidencing the directors’ decisions and deliberations, as well as the materials that the directors received and considered.” Because most corporations keep centralized files for board business, the court acknowledged that these types of documents can typically be collected and provided “with minimal burden.” By contrast, electronic documents like emails and text messages “present greater challenges for collection and review than others, and thus may impose more expense on the company to produce.” As a result, providing formal board-level materials presumptively to plaintiffs that

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260 At the very least, formal board level materials include board minutes and resolutions, along with any documents that board members reviewed in their decisionmaking. It is possible that other categories of documents may be appropriate. In the context of public company merger litigation, Hamermesh, Jacobs, and Strine suggest that formal board-level materials could include “board and committee minutes, resolutions, manager and advisor presentations, and corporate contracts . . . .” Id. at 376. For a similar suggestion made specifically in the context of the use of Section 220 in public company merger litigation, see Hamermesh, Jacobs & Strine, supra note 163, at 372-73, 377. Hamermesh, Jacobs, and Strine suggest that to address these issues, Section 220 could be amended to give a non-competitor stockholder a presumptive right to receive certain materials such as “board and committee minutes, resolutions, manager and advisor presentations, and corporate contracts, without having to identify a particular purpose.” Id. at 376. Further, there would be a presumption in Section 220 that materials outside of that scope are not essential and need not be produced. Id. Hamermesh, Jacobs, and Strine suggest that such an approach would balance unreasonable plaintiff demands with defendant companies’ legitimate concern about the misusing Section 220 as discovery. Id. at 377. Further, such an approach would encourage good corporate documentation and allow the Delaware courts to handle Section 220 demands more efficiently. Id.

262 Beyoud, supra note 1 (quoting Professor Benjamin Edwards of the University of Nevada, Las Vegas School of Law).

263 132 A.3d at 790.

264 Id.

state a proper purpose would help mitigate defendant’s overly aggressive resistance for inspection and encourage plaintiffs to rely on the formal materials provided to them, thereby managing the duration and intensity of 220 litigation.\textsuperscript{266} Admittedly, this presumptive access would not prohibit plaintiffs from requesting further documents or defendants from overly aggressive defense tactics or resisting even the production of formal documents. However, it is a step in the right direction of returning the focus of Section 220 litigation back towards where it was intended—formal board-level materials—and away from informal documents. In this way, streamlining will help to reduce the “potential grist for the [Section] 220 mill,”\textsuperscript{267} thus recalibrating the perverse incentives for misuse.

\textbf{CONCLUSION}

The importance of Section 220 in shareholder derivative litigation has dramatically increased over the past few decades, and for good reason—Section 220 can help plaintiffs generate successful claims that will help hold managers accountable. But perverse incentives, namely incentives to forego utilizing Section 220 out of fear for preclusion in multijurisdictional litigation and to draw out Section 220 proceedings with overly aggressive defensive and offensive tactics, must be recalibrated. Otherwise, Section 220 will continue to devolve into increasingly long and intense litigation. To avoid this fate, Delaware should consider instituting a fee-shifting provision in Section 220, accounting for plaintiffs’ prefiling investigations, while including a cap on fees, to encourage diligent investigation without overly deterring all litigation. Delaware should also consider streamlining Section 220 altogether by providing presumptive access to formal board-level materials to mitigate the misuse that has resulted in increasingly prolonged and intense litigation. Together, these two legislative proposals will provide tailored solutions to the incentive problems facing Section 220 and help make Section 220 a useful and efficient tool in holding corporate managers accountable.

\textsuperscript{266} Corporations will likely object to streamlined access to these documents because of confidentiality concerns. Thomas, supra note 232, at 368–69. Section 220 provides that “[t]he Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection.” DEL. CODE. ANN. tit. 8, § 220 (2022). Accordingly, the court can order confidentiality conditions, and even financial requirements, to mitigate these concerns. Thomas, supra note 232, at 368. If the corporation is concerned about access to proprietary business information, bond requirements can work in tandem with confidentiality agreements to protect corporate information. Id. at 370.

\textsuperscript{267} Hamermesh, Jacobs & Strine, supra note 163, at 374.