

INSPECTING CORPORATE "BOOKS AND RECORDS" IN A
DIGITAL WORLD: THE ROLE OF ELECTRONICALLY STORED
INFORMATION

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ABSTRACT

This Article examines Section 220 of Delaware General Corporation Law ("DGCL") which generally provides limited rights to shareholders seeking "books and records" of a corporation. The Article presents an argument that encourages Delaware's Legislature and courts to address the archaic nature of the phrase "books and records" by modernizing and making more meaningful the statute and case law which do not reflect the current world of electronically stored information ("ESI") and the fact that nearly all information in today's digital world is created and maintained exclusively in electronic form and is not reduced to "hard copy." While certain judicial decisions have reflected a reluctance to consider ESI in this context, no Delaware court has directly and authoritatively addressed the issue of whether ESI must be produced in connection with a proper Section 220 demand. This Article provides persuasive reasoning why the Delaware Legislature and the Delaware courts should require the production of appropriate ESI in response to a proper Section 220 demand in order for Section 220 to maintain any practical usefulness.

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I. INTRODUCTION

Delaware's shareholder inspection statute, Section 220 of the Delaware General Corporation Law ("Section 220"),¹ once classified by the Delaware Supreme Court as an under-utilized information-gathering tool,² has evolved into a common device for shareholders to obtain corporate documents.³ The scope and current pre-trial value of a Section 220 demand (also called a "books-and-records demand") to the litigation process in today's digital world, however, is uncertain. Some sections of the Delaware General Corporation Law ("DGCL"), including Section 220, have not enjoyed the same modernization as rules governing the use of electronically stored information ("ESI") in the discovery process.⁴

While discovery requests, in theory, could entitle the seeker to every form of ESI, shareholders making a books-and-records demand pursuant to Section 220 must rely on a statute that merely refers to "books and records"—an archaic term of art that, without an amendment to the statute or new case law, could cause Section 220 to become obsolete or ineffective.

The current ambiguity surrounding the scope of books-and-records demands might prevent shareholders from properly obtaining precisely what they need: information. Books and records contain information. But, the phrase "books and records," much like a "manila folder," refers to the

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¹Section 220 reads in pertinent part:

Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from: (1) The corporation's stock ledger, a list of its stockholders, and its other books and records; and (2) A subsidiary's books and records

DEL. CODE ANN. tit. 8, § 220(b) (2006).

²*See Rales v. Blasband*, 634 A.2d 927, 935 n.10 (Del. 1993) ("Surprisingly, little use has been made of section 220 as an information-gathering tool . . ."). DEL. CODE ANN. tit. 8, § 220(b) (2006).

³*See, e.g., King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011) ("Delaware courts have strongly encouraged stockholder-plaintiffs to utilize Section 220 before filing a derivative action, in order to satisfy the heightened demand futility pleading requirements of Court of Chancery Rule 23.1.").

⁴*See* David F. Levi, Judicial Conference of the U.S., Summary of Proposed Amendments to the Federal Rules, (Sept. 30, 2005), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/suptct1105/Summary_Proposed_Amendments.pdf; *see also* FED. R. CIV. P. 26(b)(2)(B) (updating federal discovery rules to encompass electronically stored information in the 2006 amendments); FED. R. CIV. P. 34(b)(1)(C).

container that holds the information, rather than the content that the shareholder is actually interested in obtaining. In a world of e-mail, thumb drives, digital downloads, e-readers, and iPads, books and records are not what they used to be, and it is time that the courts and the legislature acknowledge the need to amend Section 220 of the DGCL.

A decade ago, former Chancellor Chandler found persuasive the federal view that "if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk," and the corporation is accountable for that choice.⁵ This Article explores the limited nuance of what, if any, limitations exist as to the format of information that a corporation must produce in response to a Section 220 request *after* the court has determined, *or* the parties have agreed to, the specific categories of information that must be produced.

II. "BOOKS" DO NOT EXIST IN TODAY'S DIGITAL WORLD

The overwhelming majority of information today is created and stored electronically as e-mails, text messages, word processing documents, and web pages.⁶ Information that historically would have been kept in "hard copy" in a filing cabinet, now originates and largely remains in electronic format, perhaps never reduced to paper.⁷

Theoretically, "books" as we know them may cease to exist in the evolution of the Information Age. Even before iPads existed, more than 90% of business documents were created electronically.⁸ "As individuals and corporations increasingly do business electronically—using computers to create and store documents, make deals, and exchange e-mails—the universe of discoverable material has expanded exponentially."⁹ Moreover, the definition of a "record" may also be confusing in today's digital world.

⁵Kaufman v. Kinko's, Inc., 2002 WL 32123851, at *2 & n.2 (Del. Ch. Apr. 16, 2002) (Chandler, C.) (quoting *In re Brand Name Prescription Drug Antitrust Litig.*, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995)).

⁶THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE, vi (Charles R. Ragan et al. eds., 2005), available at http://www.thosedonaconference.org/dltForm?did=TSG9_05.pdf.

⁷*Id.*

⁸"[A]t least 93% of business documents are created electronically and more than 35% of corporate communications never reach paper." MARY MACK, A PROCESS OF ILLUMINATION: THE PRACTICAL GUIDE TO ELECTRONIC DISCOVERY 37 (2008), available at <http://www.fiosinc.com/livefiles/1/586/Fios-eBook-A-Process-of-Illumination.pdf>; see also THE SEDONA CONFERENCE, *supra* note 6, at vi.

⁹Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (citation omitted).

For record retention purposes, a "record" is information or data that the company deems to be important enough (based on legal, regulatory, and business reasons) to be retained for a specific period of time. There can be no universal definition of "record" because that term is subjectively determined by the company based on its specific needs and the individual business. The same is true for the differences between "document" and "record." "Document" which is a defined term in the Federal Rules of Civil Procedure, is historically used to indicate data or information stored in a particular format, while a "record" could be much broader than a document and can include electronic information related to stored data or information such as system metadata.

Some courts are slowly adapting to this new frontier by trying to incorporate mechanisms for handling ESI into the existing discovery framework.¹⁰ Nevertheless, constant technological developments make the concepts of what categories and forms of information are "reasonably accessible," ever-changing. What is not reasonably accessible today may be reasonably accessible by the end of next year.¹¹

In 2006, the Federal Rules of Civil Procedure ("FRCP") were revised to reflect the predominance of ESI in the corporate world, acknowledging that people today use, store, and access information differently.¹² Federal rules governing discovery speak directly to the production of electronic information, and even to the costs (*i.e.*, fee shifting) involved when the burden of production is extraordinary.¹³ Some state courts have been forced to create local rules for handling ESI due to mandatory electronic filing of court documents. Still, state courts have not embraced a uniform method to handle ESI. Despite the excellent framework provided by the federal rules, state courts have been (and continue to be) slow to adopt these necessary changes.

¹⁰For example, the Federal Rules of Civil Procedure provide that requests for electronically stored information may specify the form in which the information is to be produced, and that in the absence of a specific form, it must be produced in its ordinarily maintained form or reasonably usable form. See FED. R. CIV. P. 26, 34. A party need not produce ESI that is not "reasonably accessible," except by court order. *Id.*

¹¹See Patricia Groot, Note, *Electronically Stored Information: Balancing Free Discovery with Limits on Abuse*, 2009 DUKE L. & TECH. REV. 002, at ¶¶ 39–40, available at <http://www.law.duke.edu/journals/dltr/articles/pdf/2009dltr002.pdf>.

¹²See Levi, *supra* note 4.

¹³FED. R. CIV. P. 26(b)(2)(B), 34(b)(1).

III. THE CURRENT SCOPE OF SECTION 220

Delaware courts have defined the scope of a books-and-records demand through volumes of case law, making it a common and well-understood right under the DGCL.¹⁴ Section 220 provides stockholders of a Delaware corporation the right to inspect a corporation's books and records by making a demand in the proper form and manner for a proper purpose;¹⁵ however, there is no Delaware authority that has conclusively and directly decided whether a corporation is required to produce ESI in response to a Section 220 demand. There have been cases where Delaware courts have ordered corporations to produce e-mails and other ESI in response to Section 220 demands, but the Delaware courts have never directly ruled on the issue of whether they view ESI as a subset of information that a corporation must produce under Section 220.¹⁶

In these uncharted situations, it is helpful to look to what other states have done. Unfortunately, no other state court has directly addressed a corporation's duty to produce ESI in response to a shareholder demand.¹⁷

The lack of guidance leaves many questions unanswered: Do shareholders of Delaware corporations (as well as Delaware attorneys) have to wait for specific guidance from the courts or the legislature to determine whether ESI falls within the definition of the books and records that a corporation must produce in response to a Section 220 demand? Does a basis currently exist to support the position that a proper Section 220

¹⁴See, e.g., *Amalgamated Bank v. NetApp, Inc.*, 2012 WL 379908, at *3 (Del. Ch. Feb. 6, 2012); *Graulich v. Dell Inc.*, 2011 WL 1843813, at *5 (Del. Ch. May 16, 2011); *Madison Real Estate Immobilien-Anlagegesellschaft Beschränkt Haftende KG v. KanAm USA XIX Ltd. P'ship*, 2008 WL 1913237, at *4-*9 (Del. Ch. May 1, 2008); *Arbor Place, L.P. v. Encore Opportunity Fund L.L.C.*, 2002 WL 205681, at *2-*7 (Del. Ch. Jan. 29, 2002).

¹⁵*King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011) (citing DEL. CODE ANN. tit. 8, § 220 (2006)).

¹⁶See *Tanyous v. Happy Child World, Inc.*, 2008 WL 2780357, at *7 & n.50 (Del. Ch. July 17, 2008), reprinted in 34 DEL. J. CORP. L. 406, 419-20 & n.50, 421 (2009) (requiring defendant company to produce e-mails in response to a proper and narrowly-tailored Section 220 demand, which sought, *inter alia*, defendant's "[c]orrespondence file with Citizens Bank including all e-mails, letters, reports, etc."); *Dobler v. Montgomery Cellular Holding Co.*, 2001 WL 1334182, at *2, *4-*5 (Del. Ch. Oct. 19, 2001), reprinted in 27 DEL. J. CORP. L. 887, 890, 894-97 (2002) (permitting inspection of narrowly tailored requests for books and records, which specifically included request for e-mails); see, e.g., *Paul v. China MediaExpress Holdings, Inc.*, 2012 WL 28818 (Del. Ch. Jan. 5, 2012) (no mention of ESI in recent Section 220 matter).

¹⁷A fifty-state survey of shareholder inspection demand statutes revealed no informative case law on requiring the inclusion (or exclusion) of ESI in response to a shareholder inspection demand. See *infra* Appendix.

demand that is narrowly-tailored requires the production of ESI? Does mandating the production of ESI broaden the scope of a demand?

As a reference point, consider the following situation: A corporation maintains its stock list on an Excel spreadsheet on the corporate treasurer's computer. Would a stockholder have a right to inspect the company's servers because that is where the stock list is maintained in the ordinary course of business? Must the corporation produce an electronic version of the stock list if that is the format in which it is maintained? Would the production of the printed list suffice in response to a Section 220 demand? What about in response to a formal discovery request? If the court ruled that the corporation would not have to produce any ESI in response to a targeted Section 220 demand, would the corporation be justified in withholding the stock list? It is, after all, electronically stored. For the time being, these questions remain unanswered by any controlling authority on point.

IV. SECTION 220 AND THE DISCOVERY STANDARD FOR ESI

A. *The Differences Between Rule 34 Discovery and Section 220.*

The rules of civil procedure relating to discovery, such as Rule 34, are *not* applicable to Section 220 demands.¹⁸ The reason for the distinction is simple: Section 220 demands are statutory summary proceedings that precede plenary litigation, while Rule 34 discovery typically applies in plenary litigation.¹⁹ The Delaware Supreme Court explains: "The two procedures are not the same and should not be confused. A Section 220 proceeding should result in an order circumscribed with rifled precision. Rule 34 production orders may often be broader in keeping with the scope of discovery under Court of Chancery Rule 26(b)."²⁰ The Court of Chancery points out that "Section 220 is not intended to supplant or circumvent discovery proceedings, nor should it be used to obtain that discovery in advance of the . . . action itself."²¹

A Section 220 demand merely provides for a shareholder's access to "[t]he corporation's stock ledger, a list of its stockholders, and its other books

¹⁸See *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 165 (Del. Ch. 2006) ("Section 220 and discovery under Rule 34 are entirely different procedures" (citing *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 569-70 (Del. 1997))).

¹⁹See *id.* at 164-65.

²⁰*Sec. First Corp.*, 687 A.2d at 570.

²¹*Polygon Global Opportunities Master Fund v. W. Corp.*, 2006 WL 2947486, at *5 (Del. Ch. Oct. 12, 2006).

and records."²² This is comparatively a much smaller universe of information than permitted by Rule 34(a)(1)(A), which allows the discovery of "any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form."²³ Although Section 220 does not provide for the same breadth of discovery as Rule 34, it also does not limit the production of information to a particular format, and thus, should not preclude the production of ESI.

In 2006, FRCP 34, which has long governed the production of information in discovery, was amended to include "electronically stored information" within the meaning of "documents and things."²⁴ Rule 34 allows a party to serve document requests—within the scope of FRCP 26(b)—on another party for the production of any designated documents or electronically stored information.²⁵ FRCP 26(b)(2)(B) limits the scope of discovery of ESI, stating in part: "A party need not provide discovery of electronically stored information from sources that the party identifies as *not reasonably accessible because of undue burden or cost*."²⁶ When adopting these changes to the FRCP in 2006, the Advisory Committee noted:

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.²⁷

²²DEL. CODE ANN. tit. 8, § 220(b)(1) (2006).

²³FED. R. CIV. P. 34(a)(1)(A).

²⁴See Levi, *supra* note 4, at 3; FED. R. CIV. P. 34(a)(1)(A).

²⁵FED. R. CIV. P. 34(a).

²⁶FED. R. CIV. P. 26(b)(2)(B) (emphasis added).

²⁷ADVISORY COMM. ON THE FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 39 (2005), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_CV_Report.pdf.

B. *The "Reasonably Accessible" Standard*

One possible solution for defining the limits of ESI production in response to a Section 220 request is to use the "reasonably accessible" standard developed in the discovery context. After the 2006 amendments to the FRCP 26, the accessibility of ESI in plenary litigation is now defined by the "reasonably accessible" standard.²⁸ Although Delaware courts have applied this federal standard to discovery requests,²⁹ there is not yet any Delaware case law directly addressing the issue of whether ESI in a Section 220 case is or is not "reasonably accessible."³⁰

"Reasonable accessibility is best understood in terms of whether the ESI 'is kept in an accessible or inaccessible format (a distinction that corresponds closely to the expense of production).'"³¹ While case law on this standard is informative, "reasonable accessibility" must be determined on a case-by-case basis.³² In a recent decision, *General Steel Domestic Sales, LLC v. Chumley*,³³ a federal court in Colorado defined "reasonably accessible" by comparing the facts and outcomes of prior case law, and found that non-searchable audio recordings requiring at least 8,000 man hours to review and produce were not reasonably accessible.³⁴

²⁸FED. R. CIV. P. 26(b)(2).

²⁹*See Omnicare, Inc. v. Mariner Health Care Mgmt. Co.*, 2009 WL 1515609, at *7 (Del. Ch. May 29, 2009) (applying "reasonably accessible" standard to case governed by Delaware law). Interestingly, although Delaware courts have utilized the "reasonably accessible" standard, the Court of Chancery rules have not been updated to incorporate the 2006 amendments to the FRCP, from which this standard derives.

³⁰*See id.* (discussing what is "reasonably accessible" for a cost-shifting determination).

³¹*Johnson v. Neiman*, 2010 WL 4065368, at *1 (E.D. Mo. Oct. 18, 2010) (deciding a Rule 26 discovery motion) (quoting *Helmert v. Butterball, LLC*, 2010 WL 2179180, at *8 (E.D. Ark. May 27, 2010)).

³²*See Genger v. TR Investors, LLC*, 26 A.3d 180, 193-94 (Del. 2011) (citing *Rimkus Consult. Grp. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)).

³³2011 WL 2415715, at *1 (D. Colo. June 15, 2011).

³⁴*Id.* at *2-*3. In *Chumley*, the court reviewed relevant case law defining the contours of Federal Rule of Civil Procedure 26's "reasonably accessible" standard, which included:

Semsroth v. City of Wichita, 239 F.R.D. 630, 637 (D. Kan. 2006) (noting that an electronic storage medium can be classified as inaccessible if it cannot be searched for relevant information); *EEOC v. Boeing Co.*, No. CV 05-03034-PHX-FJM, 2007 WL 1146446, at *3 (D. Ariz. Apr. 18, 2007) (unreported decision) (noting that the court had previously denied a motion to compel production of e-mails because the estimated \$55,000 cost of production was too high); *Rodriguez-Torres v. Gov't Dev. Bank of Puerto Rico*, 265 F.R.D. 40, 44 (D.P.R. 2010) (denying a motion to compel production of ESI because the estimated \$35,000 cost of production was too high); [and] *Johnson v. Nieman* [sic], No. 4.09CV00689 AGF, 2010 WL 4065368, at *1 (E.D. Mo. Oct. 18, 2010) (finding that production of ESI would be unduly burdensome because it would require more than 15,000 hours of

A landmark case pertaining to ESI production analysis is *Zubulake v. UBS Warburg LLC*.³⁵ Years before the 2006 amendment of FRCP 26, Judge Scheindlin initiated the development of the "reasonably accessible" standard for the production of ESI. In the context of preservation obligations and litigation, Judge Scheindlin held:

As a general rule, [a] litigation hold does not apply to *inaccessible* backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are *accessible* (i.e., *actively used for information retrieval*), then such tapes *would* likely be subject to the litigation hold.³⁶

Essentially, "reasonably accessible" is defined in relation to the monetary cost and effort, or burden, required to retrieve, search, and produce certain types and categories of information.³⁷

Recently, one court limited the definition of "reasonably accessible," holding that "[s]ources reasonably accessible to the parties include any ESI currently stored on the producing party's computer systems."³⁸ If Delaware courts accepted this narrow definition of "reasonably accessible" then that standard would be well-suited to Section 220 cases.

V. AN ALTERNATIVE TO THE "REASONABLY ACCESSIBLE" STANDARD

The "reasonably accessible" standard, which Delaware courts have applied in a Rule 26 discovery context,³⁹ may not be the only solution for handling ESI in a Section 220 case. Another possible solution is to limit the necessary production of information for Section 220 demands to information that is *readily* accessible to the corporation—much like the discovery limitation on the ESI in *REC Solar Grade Silicon LLC v. Shaw Group Inc.*⁴⁰ This would involve a less stringent standard than is applied to information

cataloging, restoration, and file conversion work).

Id. at *2.

³⁵220 F.R.D. 212, 218 (S.D.N.Y. 2003).

³⁶*Id.* (emphasis added).

³⁷*See, e.g., id.*

³⁸*REC Solar Grade Silicon, LLC v. Shaw Grp. Inc.*, 2011 U.S. Dist. LEXIS 51459, at *27 (E.D. Wash. May 13, 2011).

³⁹*See supra* note 29.

⁴⁰*REC Solar Grade Silicon LLC*, 2011 U.S. Dist. LEXIS 51459, at *27 (holding that "reasonably accessible" sources are limited in regard to what is currently within the producing party's computer database).

that is "reasonably accessible" under the FRCP. The definition of readily is "promptly; quickly; easily,"⁴¹ or "with fairly quick efficiency[;] . . . with a fair degree of ease."⁴² Given the statutorily mandated five-day response time for a Section 220 demand, readily accessible information that can be produced for inspection within that period would fall within the meaning of "readily accessible." This definition provides an alternative framework for corporations to follow when faced with a Section 220 demand.

Under a "readily accessible" standard, a corporation would have to determine what information it could access promptly, requiring the involvement of either the company's information technology specialist or an external technology expert with working knowledge of the company's information technology. Like the "reasonably accessible" standard, a "readily accessible" standard would be circumscribed to limit the cost and burden associated with retrieving, searching, and producing information, in proportion to the issues presented in each case.

Delaware would not be the first state to use a "readily accessible" standard, but it could be the first state to define the standard.⁴³

VI. A SHAREHOLDER'S ENTITLEMENT TO ESI IS SUPPORTED BY CASE LAW

Section 220, which was modeled after the common law and enacted to provide stockholders with a fundamental right to inspect the books and records of a corporation in which they owned stock, has always been broadly construed.⁴⁴ Courts have held that once a shareholder establishes a proper

⁴¹*Readily*, DICTIONARY.COM, <http://dictionary.reference.com/browse/readily> (last visited Mar. 19, 2012).

⁴²WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1889 (Philip Babcock Gove ed. 1986).

⁴³*See* Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc., 2011 WL 1002835, at *3 (E.D. Mich. Feb. 17, 2011) (using "readily accessible" and "reasonably accessible" interchangeably in Rule 34 litigation); Helmert v. Butterball, LLC, 2010 WL 2179180, at *7 (E.D. Ark. May 27, 2010) (using the phrase "readily accessible" in Rule 34 litigation); Whitlow v. Martin, 263 F.R.D. 507, 513 (C.D. Ill. 2009) (using "readily accessible" and "reasonably accessible" interchangeably in Rule 45 litigation concerning the burden imposed by a subpoena); Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC, 244 F.R.D. 614, 638 (D. Colo. 2007) ("Defendants shall certify that they have searched for and have produced all reasonably accessible . . . reports existing in either printed or readily accessible electronic form."); *In re* Seroquel Prods. Liab. Litig., 2007 WL 219989, at *5 (M.D. Fla. Jan. 26, 2007) ("[E]ach Party will bear the costs to process and review its own documents and readily accessible ESI.").

⁴⁴*See* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 8.06[a][2], at 8-97 (2011).

purpose for a Section 220 demand, that shareholder "is entitled to the same lists and data relating to stockholders as is available to the corporation."⁴⁵

Corporations must respond to a Section 220 demand within five days⁴⁶—a swift response for most businesses. This limited time frame ensures that shareholders "quickly receive all the information generated by the competing interests," and also limits the amount of work a corporation must do to respond to a shareholder's demand.⁴⁷ As with any form of discovery, corporations are not required to prepare "lists, data, or computer tapes which are not readily available to it."⁴⁸

In *dicta* included in a transcript of proceedings in *Highland Select Equity Fund, L.P. v. Motient Corp.*,⁴⁹ former Vice Chancellor Lamb speculated six years ago that "[it is v]ery unlikely that—unless some other court tells me I have to—that I'm going to make Delaware corporations start searching their e-mail systems in response to [Section] 220 requests."⁵⁰ In *Highland Select*, the stockholder drafted its Section 220 demand broadly like a Rule 34 discovery request, and did not specifically tailor the demand to "necessary and essential" information as required for a proper Section 220 demand.⁵¹ Moreover, the court was not addressing whether ESI was discoverable, but whether the container for ESI (*i.e.*, e-mail in this case) was beyond the scope of the information requested.⁵²

When there is little or no guidance from the courts or legislature on a particular issue, it is often helpful to turn to treatises. Unfortunately, the trusted treatises on Delaware corporate law provide no guidance with respect to whether the production of ESI is required pursuant to a Section 220 demand.⁵³ None of these treatises illuminates the specific issue addressed in this Article.⁵⁴

⁴⁵*RB Assocs. of N.J., L.P. v. Gillette Co.*, 1988 WL 27731 (Del. Ch. Mar. 22, 1988), reprinted in 13 DEL. J. CORP. L. 1220, 1226 (1988) (quoting *Hatleigh Corp. v. Lane Bryant, Inc.*, 428 A.2d 350, 354 (Del. Ch. 1981)).

⁴⁶DEL. CODE ANN. tit. 8, § 220(c) (2006).

⁴⁷*R.B. Assocs. of N.J.*, 1988 WL 27731, 13 DEL. J. CORP. L. at 1227 (quoting *Hatleigh*, 428 A.2d at 355).

⁴⁸*Hatleigh*, 428 A.2d at 355 (implying that computer tapes which were *readily available* to the corporation would have to be made available for inspection in response to a Section 220 demand).

⁴⁹906 A.2d 156 (Del. Ch. 2006).

⁵⁰Transcript of Argument on Motion to Compel & Exclude Evidence at 56, *Highland Select*, C.A. No. 2092-N (Del. Ch. June 1, 2006).

⁵¹*See, e.g.*, *Norfolk Cnty. Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, 2009 WL 353746, at *6-*7 (Del. Ch. Feb. 12, 2009) (discussing the information that was "necessary and essential" to shareholder's Section 220 demand).

⁵²*Highland Select*, 906 A.2d at 157.

⁵³*See* R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF

In similar situations, courts have devised approaches to "balance the need for discovery of all relevant facts against the burden of retrieval. Courts have been mindful of abusive discovery techniques that seek to raise the cost of retrieval[,] . . . potentially affecting the outcome of a particular case."⁵⁵ Ample Delaware decisions already require narrow tailoring of Section 220 requests.⁵⁶ Similar specificity should apply for ESI. A Section 220 demand that includes requested ESI should not and cannot be used to pursue every piece of information on a given topic, but should have the same rifled precision as more conventional Section 220 requests.

VII. PRESERVATION

In connection with the interfacing of ESI and Section 220 demands, we must ask another important but unanswered question: Is a corporation required to take affirmative steps to preserve information once a Section 220 demand is made? A corporation undoubtedly has a preservation duty when litigation is expected or initiated,⁵⁷ but is a books-and-records demand pursuant to Section 220 enough to trigger those duties? As with many things in the law, it depends on the facts of the situation.⁵⁸

The Delaware Court of Chancery recently adopted guidelines that provide: "[T]he duty to preserve potentially relevant ESI is triggered when litigation is commenced or when litigation is 'reasonably anticipated,' which could occur before litigation is filed."⁵⁹ The point in time when litigation

CORPORATIONS & BUSINESS ORGANIZATIONS §§ 7.45, 7.50 (3d ed. Supp. 2011); 2 DAVID A. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE §§ 27.01, 27.04 (2010); EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW: FUNDAMENTALS § 220.3 (2009 ed. 2009); 1 DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 8.06[a], [f], (i) (2011).

⁵⁴Leading Delaware treatises on Delaware's Limited Liability Company Act and Delaware's Limited Liability Partnership Act, which include provisions that are analogous to the DGCL's Section 220, do not provide guidance on the role of ESI in member/partner demands for company records. See MARTIN I. LUBAROFF & PAUL M. ALTMAN, DELAWARE LIMITED PARTNERSHIPS § 5.6 (Supp. 2011); ROBERT L. SYMONDS, JR. & MATTHEW J. O'TOOLE, SYMONDS & O'TOOLE ON DELAWARE LIMITED LIABILITY COMPANIES § 12.07[D][1] (Supp. 2011).

⁵⁵Groot, *supra* note 11, at ¶ 39.

⁵⁶See *Highland Select*, 906 A.2d at 164-65.

⁵⁷See generally *Genger v. TR Investors, LLC*, 26 A.3d 180, 190-91, 193 (Del. 2011) (upholding trial court's imposition of sanctions and finding of contempt for spoliation during a period that the company had an affirmative obligation to preserve information).

⁵⁸See *Court of Chancery Guidelines for Preservation of Electronically Stored Information*, DEL. CT. OF CHANCERY (Jan. 18, 2011), <http://courts.delaware.gov/forms/download.aspx?id=50988> ("Counsel oversight of identification and preservation processes is very important and the adequacy of each process will be evaluated on a case-by-case basis.").

⁵⁹*Id.*

becomes "reasonably anticipated" has been litigated in other related contexts.⁶⁰

Shareholders and corporate boards often share a mutuality of interest: what is best for the corporation.⁶¹ At some point, however, those interests may diverge.⁶² Case law has identified the "point in time when mutuality of interest diverges" as "the point in time when the parties can reasonably anticipate litigation over a particular action."⁶³ Should a Section 220 demand alleging corporate wrongdoing or threatening litigation, either to enforce the shareholder's rights or to remedy a violation of the board's (or management's) fiduciary duties, put a corporation on notice of potential impending litigation?⁶⁴

"A party . . . who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit."⁶⁵ So, if litigation is "reasonably expected" at the time a Section 220 demand is made, is a duty to preserve triggered by a Section 220 demand? That question deserves more attention than can be paid to it in this Article, but it is a necessary issue to analyze.

VIII. LITIGATION OF A SECTION 220 DEMAND

Once a Section 220 demand is refused or ignored and litigation is threatened or enforced,⁶⁶ Delaware's Court of Chancery ESI Guidelines

⁶⁰See *Hernandez v. Pride Court Apartments*, 2005 WL 1950797, at *2 (Del. Super. July 29, 2005); *HMG/Courtland Props., Inc. v. Gray*, 729 A.2d 300, 311 & n.12 (Del. Ch. 1999); *Lone Star Indus. v. Liberty Mut. Ins. Co.*, 1990 WL 127826, at *1 (Del. Super. Aug. 28, 1990).

⁶¹*In re Fuqua Indus. S'holder Litig.*, 2002 WL 991666, at *3 (Del. Ch. May 2, 2002), *aff'd sub nom.* *Abrams v. Sachnoff & Weaver, Ltd.*, 922 A.2d 414 (Del. 2007).

⁶²*Id.*

⁶³*Id.*

⁶⁴See *ATR-Kim Eng Fin. Corp. v. Araneta*, 2006 WL 3783520, at *6, *9 (Del. Ch. Dec. 21, 2006) (finding that demand letters warning the board that the shareholder would file suit to protect its interests if its demands were denied put board on notice of impending litigation), *aff'd*, 930 A.2d 928 (Del. 2007); *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC*, 244 F.R.D. 614, 623 (D. Colo. 2007) ("[A] demand letter alone may be sufficient to trigger an obligation to preserve evidence and support a subsequent motion for spoliation sanctions.").

⁶⁵*Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009), *aff'd sub nom.* *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010).

⁶⁶Making a Section 220 demand does not automatically thrust a shareholder into plenary litigation; rather, it is the corporation's reaction (*e.g.*, refusing to allow a shareholder to inspect documents or failing to respond to a demand) that will transform a Section 220 demand into a Section 220 action. See DEL. CODE ANN. tit. 8, § 220(c) (2006). A corporation's only options with respect to a Section 220 demand are to (1) produce the requested information, or (2) refuse to produce the information and defend that decision at trial. Once a complaint is filed under Section 220, the shareholder and the corporation have become parties to a summary proceeding, and the

would impose a duty to preserve potentially relevant information.⁶⁷ These guidelines focus on the preservation of ESI in response to actual or potential litigation.⁶⁸ This heightened duty serves as a deterrent for corporations to refuse to produce ESI in response to a Section 220 demand.⁶⁹

Further, if the Section 220 demand is ultimately litigated, Delaware courts could follow the lead of the federal courts and require the company's information technology professional to certify that the information made available to the shareholder was information determined to be reasonably accessible or readily accessible within the confines of the company's technological capabilities.⁷⁰ This would avoid the need to conduct an analysis, as did the Southern District of New York in *Zubulake v. UBS Warburg LLC*,⁷¹ to determine whether cost-shifting was proper for the production of inaccessible ESI.⁷²

IX. CONCLUSION

Section 220 must adapt to the modern digital reality that most information is created and stored electronically and never printed.⁷³ Delaware courts have restrained themselves from directly ruling that ESI is included in the definition of books and records that must be produced pursuant to Section 220.⁷⁴ Other jurisdictions have not been so reserved.⁷⁵ Judge Scheindlin, who authored the well-known *Zubulake* series of opinions in the Southern District of New York, has verbalized her confusion as to why other courts have not accepted and adapted to the ongoing technological advances that are indisputably changing legal discovery.⁷⁶

rules of the Court of Chancery apply.

⁶⁷*Court of Chancery Guidelines for Preservation of Electronically Stored Information*, *supra* note 58.

⁶⁸*Id.*

⁶⁹*See id.*

⁷⁰*See, e.g., Keithley v. Homestore.com, Inc.*, 2009 WL 55953, at *4 (N.D. Cal. Jan. 7, 2009) ("On August 11, 2008, the Court ordered Plaintiffs, *inter alia*, to certify that all documents responsive to the hard drive request had been produced . . . and to provide a declaration from an information technology expert regarding the search done for documents on Plaintiffs' hard drive and other electronic media.").

⁷¹216 F.R.D. 280 (S.D.N.Y. 2003).

⁷²*Id.* at 284 (implementing a seven-factor test to determine whether cost-shifting is appropriate for the discovery of inaccessible information).

⁷³*See supra* Part III.

⁷⁴*See supra* Part IV.

⁷⁵*See supra* Parts V-VI.

⁷⁶*See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) ("Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be

Whether talking about producing documents, data, information, or books and records under Section 220, the focus should be on the corporation's obligation to produce the required information to the requesting shareholder, rather than focusing on which "container" holds that information. Simply put, the 2006 updates to discovery obligations under the FRCP should guide Delaware courts to require the production of appropriate ESI in response to a proper Section 220 demand.

APPENDIX

Fifty-State and District of Columbia Survey of Shareholder Inspection Statutes Not Specifically Addressing ESI	
State	Statute(s)
Alabama	ALA. CODE §§ 10A-2-16.02 to 16.03 (Westlaw through 2011 Reg. Sess.).
Alaska	ALASKA STAT. ANN. § 10.06.430 (West, Westlaw through 2011 First Reg. Sess.).
Arizona	ARIZ. REV. STAT. ANN. §§ 10-1602 to -1603 (Westlaw through 2011 First Reg. Sess.).
Arkansas	ARK. CODE ANN. § 4-26-715 (West, Westlaw through 2011 General Sess.).
California	CAL. CORP. CODE § 1601 (West, Westlaw through 2011 Reg. Sess.).
Colorado	COLO. REV. STAT. ANN. §§ 7-116-101, -103 (West, Westlaw through 2011 Reg. Sess.).
Connecticut	CONN. GEN. STAT. ANN. §§ 33-946 to -947 (West, Westlaw through 2011 Oct. Spec. Sess.).
Delaware	DEL. CODE ANN. tit. 8, § 220 (2006).
District of Columbia	D.C. CODE §§ 29-313.02 to 313.03 (Westlaw through Sept. 13, 2011).
Florida	FLA. STAT. ANN. §§ 607.1602 to 1603 (West, Westlaw through 2011 First Reg. Sess.).
Georgia	GA. CODE ANN. §§ 14-2-1602 to -1603 (West, Westlaw through 2011 Reg. & Spec. Sess.).

run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying." (internal citation omitted).

Hawaii	HAW. REV. STAT. § 414-470 (West, Westlaw through 2011 Reg. Sess.).
Idaho	IDAHO CODE ANN. §§ 30-1-1602 to -1603 (West, Westlaw through 2011).
Illinois	805 ILL. COMP. STAT. ANN. 5/7.75 (West, Westlaw through 2011 Reg. Sess.).
Indiana	IND. CODE ANN. § 23-1-52-2 (West, Westlaw through 2011 First Reg. Sess.).
Iowa	IOWA CODE ANN. §§ 490.1602 to 1603 (West, Westlaw through 2011 Reg. Sess.).
Kansas	KAN. STAT. ANN. § 17-6510 (West, Westlaw through 2011 Reg. Sess.).
Kentucky	KY. REV. STAT. ANN. §§ 271B.16-020 to -030 (West, Westlaw through 2011 Legis.).
Louisiana	LA. REV. STAT. ANN. § 12:103 (Westlaw through 2011 First Extraordinary Sess.).
Maine	ME. REV. STAT. ANN. tit. 13-C, § 1602 (Westlaw through 2011 First Reg. Sess.).
Maryland	MD. CODE ANN., CORPS. & ASS'NS §§ 2-512 to -513 (West, Westlaw through 2011 Reg. Sess.).
Massachusetts	MASS. GEN. LAWS ANN. ch. 156D, §§ 16.02-03 (West, Westlaw through Ch. 175 of 2011 First Ann. Sess.).
Michigan	MICH. COMP. LAWS ANN. § 450.1487 (West, Westlaw through P.A. 2011 of 2011 Reg. Sess.).
Minnesota	MINN. STAT. ANN. § 302A.461 (West, Westlaw through 2011 First Spec. Sess.) (Subsection 6 permits a corporation to utilize any information storage technique provided the computerized records can be reconstituted into a visually legible form.).
Mississippi	MISS. CODE ANN. §§ 79-4-16.02 to -16.03 (West, Westlaw through 2011 Reg. Sess.).
Missouri	MO. ANN. STAT. § 351.215 (West, Westlaw through 2011 First Extraordinary Sess.).
Montana	MONT. CODE ANN. §§ 35-1-1107 to -1108 (Westlaw through 2011 Legis. Sess.).

Nebraska	NEB. REV. STAT. § 21-20,183 (Westlaw through 2011 First Reg. Sess.).
Nevada	NEV. REV. STAT. ANN. § 78.257 (West, Westlaw through 2010 Spec. Sess.).
New Hampshire	N.H. REV. STAT. ANN. §§ 293-A:16.02 to -A:16.03 (Westlaw through 2011 Reg. Sess.).
New Jersey	N.J. STAT. ANN. § 14A:5-28 (West, Westlaw through L. 2011, c. 136 & J.R. No. 8).
New Mexico	N.M. STAT. ANN. § 53-11-50 (West, Westlaw through 2011 First Reg. Sess.).
New York	N.Y. BUS. CORP. LAW § 624 (McKinney, Westlaw through L. 2011, chs. 1 -54, 57-495).
North Carolina	N.C. GEN. STAT. ANN. §§ 55-16-02 to -03 (West, Westlaw through Ch. 18).
North Dakota	N.D. CENT. CODE ANN. § 10-19.1-84 (West, Westlaw through 2011 Reg. Sess.).
Ohio	OHIO REV. CODE ANN. § 1701.37 (West, Westlaw through 2011 Legis. Sess.).
Oklahoma	OKL. STAT. ANN. tit. 18, § 1065 (West, Westlaw through 2011 First Reg. Sess.).
Oregon	OR. REV. STAT. ANN. §§ 60.774, 60.777 (West, Westlaw through 2011 Reg. Sess.).
Pennsylvania	15 PA. STAT. ANN. § 1508 (West, Westlaw through 2011 Acts 1 to 81).
Rhode Island	R.I. GEN. LAWS ANN. § 7-1.2-1502 (West, Westlaw through 2011 Reg. Sess.).
South Carolina	S.C. CODE ANN. §§ 33-16-102 to -103 (Westlaw through 2010 Reg. Sess.).
South Dakota	S.D. CODIFIED LAWS §§ 47-1A-1602 to -1603 (Westlaw through 2011 Spec. Sess.).
Tennessee	TENN. CODE ANN. §§ 48-26-101 to -103 (West, Westlaw through 2011 First Reg. Sess.).
Texas	TEX. BUS. ORGS. CODE ANN. § 3.152 (West, Westlaw through 2011 Reg. Sess.).
Utah	UTAH CODE ANN. §§ 16-10a-1602 to -1603 (West, Westlaw through 2011 Second Spec.

	Sess.).
Vermont	VT. STAT. ANN. tit. 11A, §§ 16.02 to 16.03 (West, Westlaw through 2011-2012 First Sess.).
Virginia	VA. CODE ANN. §§ 13.1-771 to -772 (West, Westlaw through 2011 Reg. Sess.).
Washington	WASH. REV. CODE ANN. §§23B.16.020 to 16.030 (West, Westlaw through 2011 Legis.).
West Virginia	W. VA. CODE §§ 31D-16-1602 to -1603 (Westlaw through 2011 Second Extraordinary Sess.).
Wisconsin	WIS. STAT. ANN. §§ 180.1602-03 (West, Westlaw through 2011 Acts 31, 33-36, 38-44).
Wyoming	WYO. STAT. ANN. §§ 17-16-1602 to -1603 (West, Westlaw through 2011 General Sess.).