

Stockholders Obtain Books and Records Through Statutory Appraisal Proceeding, and Other Section 220 Developments

A Practical Guidance® Article by

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Introduction

Delaware courts have recently refined and limited defenses to Section 220 books and records actions. No longer does a stockholder need to specify the ends to which it might use the books and records or demonstrate that the alleged wrongdoing or mismanagement it seeks to investigate is actionable.

At the same time, the Delaware courts confirmed as well-settled law that a stockholder must strictly adhere to the statutory requirements under Section 220, including by having proper standing to make a demand: A stockholder must be a stockholder at the time of seeking books and records and have a proper purpose. See 8 Del. C. § 220(c) (1), (3). Despite this, three recent decisions allowed stockholders access to company books and records through unconventional means where those stockholders would not have been able to obtain them in a direct 220 action. This article discusses recent Delaware cases related to stockholder books and records access.

Books and Records Obtained in Appraisal Action After 220 Rights Were Extinguished by Merger

Delaware courts have held that loss of standing through a merger either prevents a stockholder's access to books and records entirely or may limit a stockholder's proper purposes. See *Weingarten v. Monster Worldwide, Inc.*, 2017 Del. Ch. LEXIS 31 (Del. Ch. Feb. 27, 2017); *Cutlip v. CBA Int'l, Inc.*, 1995 Del. Ch. LEXIS 136 (Del. Ch. Oct. 27, 1995). This standing rule has been applied strictly, even where a stockholder loses standing through no fault of its own. However, in *Wei v. Zoox, Inc.*, 268 A.3d 1207 (Del. Ch. 2022), the Delaware Court of Chancery allowed stockholders access to books and records through an appraisal action, even though they lacked standing to pursue a 220 action.

In *Zoox*, two stockholders served a Section 220 demand to inspect books and records in order to investigate possible wrongdoing in connection with a merger. But the merger closed before the five-day deadline under the statute for the company to respond to the demand, cutting off the stockholders' 220 rights. *Id.* at 1210-11. The stockholders, concerned that they had lost standing under Section 220, filed an appraisal action and served discovery requests to obtain the same documents they sought originally through their 220 demand. The stockholders even admitted that one of their aims with document discovery in the appraisal action was to investigate potential fiduciary duty claims.

Although the court expressed some reservations, and acknowledged that the stockholders lost standing under Section 220, it permitted the stockholders access to

documents they had sought in their books and records demand. *Id.* at 1222. In doing so, the court acknowledged competing policy issues—ordinarily, stockholders who are cashed out in a merger lose standing to obtain books and records. *Id.* at 1218. In addition, plaintiffs generally are not permitted to file litigation solely for the purpose of developing new causes of action. *Id.* at 1216. But the court noted a third policy consideration—that fiduciary duty breaches may go unremedied if stockholders seeking appraisal cannot file claims based on documents they obtain in discovery. *Id.* at 1220.

The court recognized that the stockholders in *Zoox* were unique, as they had obviously filed the appraisal action to (by analogy to Section 220) investigate suspected fiduciary breaches and had no real interest in appraising their shares. *Id.* at 1222, 1223. Yet the court granted discovery because of the disadvantages faced by stockholders of private companies where mergers may close in a very short time frame, cutting off standing to pursue 220 actions. *Id.* at 1222.

Recognizing that its holding could encourage stockholders to prefer appraisal over Section 220 as a means of pre-suit investigation (because broader discovery is available in appraisal), the court limited the stockholders to documents they could have received in a 220 action. *Id.* at 1223.

On the other hand, the court also expressed concern that defense attorneys would use the ruling to their advantage and “engage in wasteful discovery and motion practice” in the hope of limiting discovery in appraisal actions. The court emphasized that the facts of *Zoox* were “unusual” and warned that “[i]t would be a mistake to conclude from this decision that it is open season on an appraisal petitioner’s purposes.” *Id.* at 1223, n.83.

Federal Securities Plaintiff Subject to PSLRA Automatic Stay Successfully Challenged Confidential Treatment of Information Obtained From Books and Records

Another long-standing rule in Delaware is that a federal securities plaintiff subject to the Private Securities Litigation Reform Act (PSLRA) cannot use Section 220 to circumvent the federal law’s automatic stay on discovery. See *Beiser v. PMC-SIERRA, Inc.*, 2009 Del. Ch. LEXIS 36, (Del. Ch. Feb. 26, 2009). Yet, in two recent cases, the Court of Chancery allowed federal securities plaintiffs access to books and

records information where they challenged the confidentiality of court filings that made use of documents other stockholders had obtained through Section 220. *Cormier v. Burns*, No. 2021-1049-MTZ (Del. Ch. Jan. 24, 2022); *In re Lordstown Motors Corp. Stockholders Litigation*, No. 2021-1066-LWW (Del. Ch. Feb. 28, 2022).

In connection with the merger of a special purpose acquisition company (SPAC) with Lordstown Motors Corp., a company developing an electric pickup truck, stockholders of the SPAC filed a class action in the Court of Chancery. Stockholders of the combined entity filed a separate derivative complaint. Both complaints cited information from documents that Lordstown had produced in response to 220 demands. Because those documents were protected by confidentiality agreements, the stockholders filed their complaints under seal pursuant to Rule 5.1.

A week after the Court of Chancery actions were filed, a non-party who was a plaintiff in a related consolidated federal securities class action against Lordstown filed a challenge to the confidential treatment of the complaints, seeking to access information from the 220 productions that had been redacted from the Delaware case filings.

Because the securities plaintiff was subject to the PSLRA automatic stay (it had lost a motion in federal court to lift that), it would have been barred from using Section 220 itself to obtain the documents. Yet the securities plaintiffs prevailed in their challenges under Chancery Court Rule 5.1, which provides for public access to court records, and the confidentiality restrictions were lifted for parts of both state court complaints.

In the derivative case, Vice Chancellor Zurn ruled in a summary order that the information the securities plaintiff sought was “not tantamount to discovery,” so the policies supporting the PSLRA stay would not be undermined by granting the motion. The court also ruled that the confidentiality agreement the parties had entered had to yield to Rule 5.1 when 220 materials are used in a stockholder action. *Cormier*, No. 2021-1049-MTZ.

In the class action, Vice Chancellor Will sustained the confidentiality challenge in part because Rule 5.1 permits anyone to bring a challenge. *Lordstown*, No. 2021-1066-LWW, at 2-3, 17. Although the court explained that the challenger’s motives should be a factor to consider in balancing the public’s interests with the corporation’s, *Id.* at 18, it still required the corporation to meet the good cause standard to maintain confidentiality and ordered most of the complaint to be unredacted because the information related to core issues in the litigation. *Id.* at 11-14. However, the court noted that the securities plaintiff’s “unique goals

[we]re not indicative of a broader public interest, and left protections in place for some information because it might prejudice Lordstown, which operates in a hyper-competitive market. Id. at 14-16, 19.

Key Takeaways

- In addition to limiting merits-based defenses to Section 220 demands, Delaware courts have made it even easier for stockholders to access books and records by allowing other policy considerations to override the usual standing requirements under Section 220. Given the trend toward greater access, stockholders may seek even more creative ways to obtain books and records.
- Although an appraisal petitioner's motives in seeking discovery may be relevant, the Chancery Court still expects companies to be judicious and mindful about probing their purposes, and to avoid "wasteful" motion practice and discovery in an effort to limit or avoid production of company books and records.
- Protections may be available for particularly sensitive company information contained in public filings. But corporations should take care to limit what they agree

to produce to truly necessary and essential documents, understanding that the documents may be used by individuals other than those who requested them—even individuals who would ordinarily be barred from obtaining the same documents under Section 220.

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Ms. Parker — who was named to The Best Lawyers in America 2023 — represents public and private companies, their directors and advisers in litigation including derivative and class actions, corporate governance disputes, M&A-related actions, books and records matters, appraisal proceedings, advancement and indemnification actions, other Delaware statutory matters, federal securities laws and complex contractual disputes. She has achieved success for her clients at all stages of litigation, including motion practice, preliminary and permanent injunctions, and trials. She also has unique experience in utilizing a recent and novel Delaware statute to obtain judicial validation of certain corporate acts.

In addition, she frequently provides corporate governance and transactional advice on the Delaware law of corporations, limited partnerships and limited liability companies.

Ms. Parker represents clients in a wide variety of industries. Recent clients have included Wayfair, Intel, SmileDirectClub, Devon Energy, Panera Bread Company, Pine Brook Capital Partners, Delek US, Cineworld Group, Regal Entertainment Group, Dentsply Sirona, Express Scripts Holding Company, Goldman Sachs, Apax Partners, Trimaran Capital Partners, Vantiv, Baxter International Inc., American Apparel and CME Group.

She has written numerous articles on Delaware corporation law issues and is on the board of editors of the treatise Mergers and Acquisitions Deal Litigation Under Delaware Corporation Law.

Ms. Parker is a member of the Delaware Court of Chancery Rules Committee and the Delaware State Bar Association Judicial Appointments Committee, which is involved in the selection of Delaware Supreme Court, Chancery Court and Superior Court judges. Twice-appointed by the Delaware Supreme Court, she served two four-year terms on the Delaware Bar Foundation, including a two-year term as president.

Ms. Parker has done a significant amount of pro bono work and currently leads Skadden's Wilmington office adult guardianship project, representing individuals in Court of Chancery guardianship proceedings. She also is on Skadden's Global Women's Initiatives Committee and the Wilmington office's Diversity, Equity and Inclusion Committee. Ms. Parker was named a Delaware Lawyer on the Fast Track by The Delaware Law Weekly.

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