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## 'Rifled Precision': Using E-Discovery Technology to Streamline Books and Records Litigation

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# “Rifled Precision”: Using E-discovery Technology to Streamline Books and Records Litigation

## ABSTRACT

*In 1993, the Delaware Supreme Court urged stockholders to use the “tools at hand” to flesh out complaints in derivative lawsuits. The plaintiffs’ bar got the message. In the years since that proclamation, the Delaware Court of Chancery has seen dramatic increases in so-called Section 220 litigation—stockholders exercising their statutory right to inspect a company’s books and records. As Delaware courts have made it harder for stockholders to challenge merger transactions, this trend has only intensified. Due to increased filings, as well as other structural hurdles, these “summary proceedings” have begun to drag, with many requiring full trials. Because of these issues, commentators have long called for streamlining the inspection process. As the “next big thing” in Delaware litigation continues to grow, legislatures and courts should consider integrating technology into the process. Artificial intelligence, which already is used in e-discovery applications, is well suited to document management and production. The Delaware courts, known for their expert judges and willingness to embrace technology, are uniquely well positioned to take advantage of such developments.*

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*“At least when there’s an evil dictator, that human is going to die. But for an AI, there will be no death—it would live forever. And then you would have an immortal dictator from which we could never escape.”*

—Elon Musk<sup>1</sup>

Elon Musk is good for lawyers. The eccentric genius behind Tesla, SpaceX, and a variety of other technology companies often takes to Twitter to broadcast his thoughts and feelings to his twenty-four million followers.<sup>2</sup> He does not hold back. Whether he is tweeting about

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1. Mark Matousek, *Elon Musk Said He Wants to ‘Nuke’ Mars—These Are 37 of His Other Wildest Quotes*, BUS. INSIDER (Aug. 7, 2019, 8:34 AM), <https://www.businessinsider.com/elon-musk-shocking-quotes-tweets-2018-10> [<https://perma.cc/57P5-UC63>].

2. Elon Musk (@elonmusk), TWITTER, <https://twitter.com/elonmusk> [<https://perma.cc/XV8N-47ZR>] (last visited Feb. 12, 2020).

closing Tesla down,<sup>3</sup> taking it private,<sup>4</sup> or criticizing the Securities and Exchange Commission (SEC),<sup>5</sup> Musk is unafraid to use his platform to influence his businesses. Predictably, this creates some problems. In 2018, Musk's tweets brought him (and his team of lawyers) to Wilmington, Delaware—the largest city in a state with more chickens than people.<sup>6</sup> The man who plans missions to Mars in his free time found himself sitting in state court.

On August 1, 2016, Tesla announced its acquisition of another Musk-owned company, SolarCity.<sup>7</sup> Musk was the largest shareholder in both companies and sat on both boards.<sup>8</sup> On the day of the acquisition of SolarCity, Musk referred to Tesla on Twitter as “my company,”<sup>9</sup> which caught the attention of shareholders who believed he was a “controlling stockholder” in Tesla.<sup>10</sup> Several shareholders sued the company (and codefendant Musk) in the Delaware Court of Chancery (the “Court of Chancery”), asserting derivative claims relating to the acquisition of SolarCity and the stockholder vote that approved it.<sup>11</sup> The first suit was filed on September 1, 2016, and the court ultimately consolidated the cases for consideration.<sup>12</sup>

After months of expedited litigation, Tesla moved to dismiss the consolidated case in March of 2017.<sup>13</sup> The matter was submitted to the court for consideration in December of that year, and Vice Chancellor

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3. Elon Musk (@elonmusk), TWITTER (Apr. 1, 2018, 5:02 PM), <https://twitter.com/elonmusk/status/980566101124722688> [<https://perma.cc/F7GW-WR3J>] (“Despite intense efforts to raise money, including a last-ditch mass sale of Easter Eggs, we are sad to report that Tesla has gone completely and totally bankrupt. So bankrupt, you can’t believe it.”).

4. Elon Musk (@elonmusk), TWITTER (Aug. 7, 2018, 11:48 AM), <https://twitter.com/elonmusk/status/1026872652290379776?lang=en> [<https://perma.cc/R6GA-H42N>] (“Am considering taking Tesla private at \$420. Funding secured.”).

5. See Elon Musk (@elonmusk), TWITTER (Oct. 4, 2018, 3:16 PM), <https://twitter.com/elonmusk/status/1047943670350020608> [<https://perma.cc/6AJF-54HA>] (“Just want to that [*sic*] the Shortseller Enrichment Commission is doing incredible work. And the name change is so on point!”).

6. It is not even close. There are just under a million people living in Delaware, while there are some two hundred million chickens populating the first state. Compare Mark Eichmann, *Delaware’s Growing Poultry Industry*, WHYY (Aug. 11, 2014), <https://whyy.org/articles/delawares-growing-poultry-industry/> [<https://perma.cc/6QKD-5NZE>], with *Delaware Population 2020*, WORLD POPULATION REV., <http://worldpopulationreview.com/states/delaware-population/> [<https://perma.cc/9JCN-NQXH>] (last visited Feb. 12, 2020).

7. *In re Tesla Motors, Inc. Stockholder Litig.*, C.A. No. 12711–VCS, 2018 WL 1560293, at \*10 (Del. Ch. Mar. 28, 2018).

8. *Id.* at \*2.

9. *See id.*

10. *See id.* at \*1.

11. *Id.*

12. *Id.* at \*11.

13. *Id.*

Slights issued an opinion in March of 2018.<sup>14</sup> In a “close call,” the court found for the plaintiffs, allowing the case to move forward.<sup>15</sup> Though Musk’s tweets on the subject proved to be important, ultimately, Tesla’s internal books and records saved the plaintiffs’ case. Because the lead plaintiff<sup>16</sup> previously obtained Tesla documents relating to the deal through a books and records (“Section 220”) demand,<sup>17</sup> these documents were incorporated by reference into the complaint and were part of the court’s record.<sup>18</sup> The court specifically cited these documents as helping support the plaintiffs’ claims.<sup>19</sup>

Though Mr. Musk may caution against the overuse of artificial intelligence (AI), it is increasingly prevalent in modern life. This Note considers whether books and records litigation can be improved by using such technology. Part I surveys the use of AI in e-discovery applications<sup>20</sup> and in the courtroom. It also delves into the problems caused by the increased use of electronically stored information (ESI) and the solutions AI can offer to solve them. Part II then explores the unique features of the Delaware Court of Chancery, which make it a good forum for such an innovative application. It summarizes the essentials of books and records litigation, emphasizing recent trends and their potential causes. It culminates with an analysis of whether and how electronic records can be inspected through that process. Part III suggests that artificial intelligence and other e-discovery technology can be used to help litigants and the court wrangle the often-broad scope of books and records demands. It builds on the example of a 2012 case<sup>21</sup> where the Court of Chancery ordered the use of predictive coding to manage discovery in a stockholder derivative suit. While such an

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14. *Id.* at \*1.

15. *Id.*

16. When the case was consolidated, the court selected the 220 plaintiffs to be the lead plaintiffs and their counsel to be lead counsel. *Id.* at \*11 (“[T]he [c]ourt selected a leadership team that had filed a complaint *enhanced by the incorporation of Section 220 Documents.*”) (emphasis added). A different plaintiff was unsuccessful in a Section 220 action against Tesla earlier that year. See *Haque v. Tesla Motors, Inc.*, C.A. No. 12651–VCS, 2017 WL 448594 (Del. Ch. Feb. 2, 2017). That action was unrelated to the litigation regarding SolarCity. See *id.* at \*1.

17. See DEL. CODE ANN. tit. 8, § 220(b)(1)–(2) (2019). This Note interchangeably uses “Section 220 demand” and “books and records demand.”

18. *In re Tesla Motors*, 2018 WL 1560293, at \*1.

19. See, e.g., *id.* at \*19.

20. This Note refers to e-discovery and similar artificial intelligence–aided discovery technology (such as predictive coding) broadly as “e-discovery.” When differentiation is required, references to particular applications and concepts will be made for clarity.

21. See *EORHB, Inc. v. HOA Holdings LLC*, No. 7409–VCL, 2012 WL 4896670 (Del. Ch. Oct. 15, 2012).

application may be aspirational today, this Note aims to open a broader discussion on how to leverage technology to manage inspection cases.

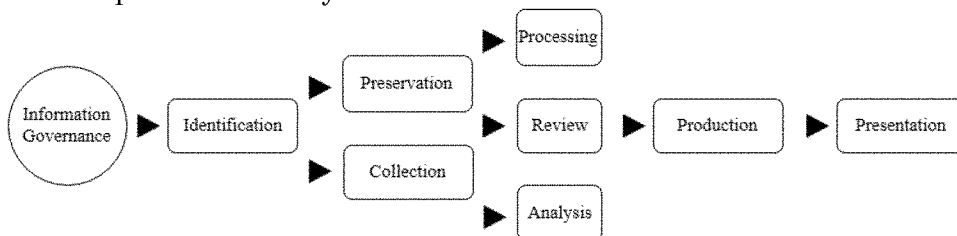
## I. E-DISCOVERY AND TECHNOLOGY IN THE COURTROOM

### A. *E-discovery Technology*

Before considering how e-discovery and AI can be applied to books and records actions, it is necessary to examine these technologies and generally how they work. The following Section presents a preliminary overview of these topics, as well as a look into how they have developed to meet the needs of businesses and litigators.

#### 1. What Is E-discovery?

E-discovery is broadly defined as “a procedure by which parties involved in a legal case preserve, collect, review, and exchange information in electronic formats for the purpose of using it as evidence.”<sup>22</sup> E-discovery is not a single action but rather a process that involves multiple key steps.<sup>23</sup> Today, all of these components are integrated into a single software platform,<sup>24</sup> helping to streamline the process. The Electronic Discovery Reference Model (EDRM) shows the nine steps of e-discovery<sup>25</sup>:



This Note will focus primarily on e-discovery’s “identification” and “collection” features, rather than its ability to aid corporate compliance and internal record preservation.

The development of e-discovery technology has been traced by some<sup>26</sup> to the 1970 amendments to the Federal Rules of Civil Procedure

22. EXTERRO, *THE BASICS OF E-DISCOVERY* 4 (2d ed. 2018) (ebook) [hereinafter EXTERRO I].

23. *Id.*

24. *See id.* at 5.

25. *See id.* at 11–12.

26. *See* Nicholas Barry, Note, *Man Versus Machine Review: The Showdown Between Hordes of Discovery Lawyers and a Computer-Utilizing Predictive-Coding Technology*, 15 VAND. J. ENT. & TECH. L. 343, 347 (2013).

(FRCP) that made documents stored on a computer discoverable.<sup>27</sup> Today, e-discovery can be used to access not only electronically stored documents from a company server but other electronically stored information (ESI) from sources including social media profiles, email messages, and smartphone apps.<sup>28</sup> Early e-discovery models involved keyword searches, similar to those used by Westlaw, Lexis, and Google.<sup>29</sup> Though these processes were groundbreaking at the time, they have become comparatively less efficient as time goes on.<sup>30</sup> Today, e-discovery is more sophisticated, and it includes various forms of AI, such as predictive coding.<sup>31</sup>

## 2. Predictive Coding

Predictive coding, also known as “technology-assisted review,” “computer-aided review,” and “content-based advanced analytics,” is one of the most important developments in e-discovery in some time.<sup>32</sup> It is essentially a form of machine learning, combining human instruction with complex algorithms to create a model that improves its accuracy as it consumes more data.<sup>33</sup> Over time, these mechanisms can automatically sort documents into “responsive” and “nonresponsive” categories in a particular query.<sup>34</sup> This technology makes document review faster, cheaper, and more accurate than ever before.<sup>35</sup>

Though the exact mechanisms of predictive coding vary from platform to platform, it can be generally described as a four-step process: culling, training, prediction, and review.<sup>36</sup>

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27. See *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 461 (D. Utah 1985) (“It is now axiomatic that electronically stored information is discoverable under Rule 34 of the Federal Rules of Civil Procedure if it otherwise meets the relevancy standard prescribed by the rules.”).

28. EXTERRO I, *supra* note 22, at 4.

29. See Barry, *supra* note 26, at 345.

30. See Search & Retrieval Scis. Special Project Team, Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 197 (2007) [hereinafter *Best Practices*]; Barry, *supra* note 26, at 345.

31. See Barry, *supra* note 26, at 344, 354.

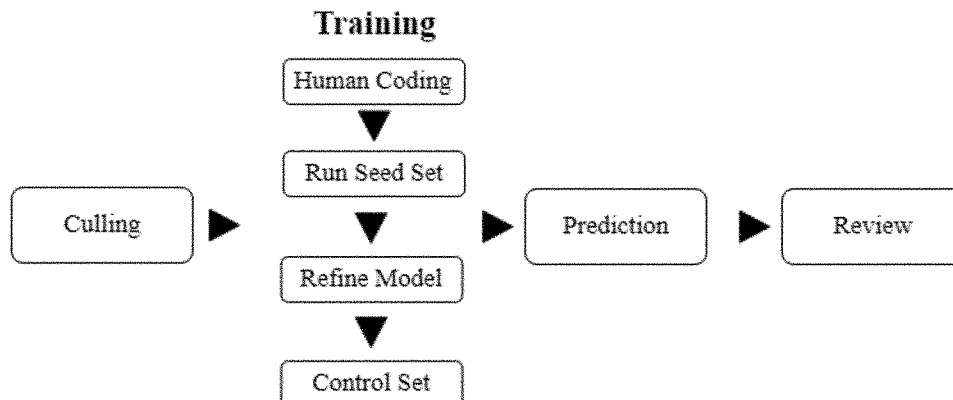
32. See Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 S.C. L. REV. 633, 634 (2013).

33. See *id.* at 634, 637–38. Though machine learning is only now being integrated in legal technology applications, it has long been used in other fields. See *id.* at 637. Outside of the law, machine learning is being used in diverse applications, including on the International Space Station. See generally Jacob Manning et. al., *Machine Learning Space Applications for SmallSat Platforms with TensorFlow*, SMALL SATELLITE CONF., <https://digitalcommons.usu.edu/small-sat/2018/all2018/458/> [https://perma.cc/76YC-E3PG] (last visited Feb. 19, 2020).

34. Barry, *supra* note 26, at 345.

35. See *id.* at 364.

36. See Yablon & Landsman-Roos, *supra* note 32, at 637–41.



At the culling stage, human reviewers remove documents that are clearly irrelevant, or otherwise “junk.”<sup>37</sup> This step helps reduce costs in models where customers pay based on the volume of documents reviewed.<sup>38</sup> At the next step, the model is trained, learning which documents are relevant, privileged, or responsive to a particular inquiry.<sup>39</sup> The process generally starts with humans coding a “seed set.”<sup>40</sup> The seed set is the “initial training set provided to the learning algorithm,” which is used to teach the program which documents meet the selected parameters.<sup>41</sup> Once the results are reviewed, the model is adjusted and ultimately refined through iterative testing.<sup>42</sup> The model is finally tested on the “control set,” which is separate from the initial training set in order to avoid biases.<sup>43</sup> The trained model can then analyze all documents in a given set and predict their responsiveness.<sup>44</sup> Most systems then involve a final human review, which helps determine which specific documents to produce.<sup>45</sup> Typically, this uses the system’s prediction scores, producing documents that are above a certain threshold.<sup>46</sup>

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37. *Id.* at 638.

38. *Id.* at 638–39.

39. *Id.* at 637; see also J.B. Ruhl et al., *Topic Modeling the President: Conventional and Computational Methods*, 86 GEO. WASH. L. REV. 1243, 1273 (2018).

40. Yablon & Landsman-Roos, *supra* note 32, at 639.

41. *Id.* (citing Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV. 1, 29 (2013)).

42. *Id.* at 639–40.

43. *Id.* at 640.

44. *See id.*

45. *See id.* at 641.

46. *See id.* at 641–42.



The onset of predictive coding has improved e-discovery. The Sedona Principles,<sup>47</sup> which are regarded as best practices within the e-discovery field, note problems regarding the searchability of ESI dispersed across many platforms.<sup>48</sup> Predictive coding is helpful in addressing these problems, as it is capable of searching across various electronic sources.<sup>49</sup> Another useful development in predictive coding has been “clustering,” where the model groups documents with similar content together.<sup>50</sup> These features are particularly helpful to the solution proposed herein.

### *B. Developments in E-discovery*

In 2006, amendments to the FRCP placed limits on the discoverability of ESI.<sup>51</sup> These updates required courts to balance the accessibility of ESI against the cost of production.<sup>52</sup> The advisory committee encouraged courts to consider systems that make ESI more available in achieving this balance, such as e-discovery.<sup>53</sup> Today, courts embrace the use of e-discovery, allowing parties to use keyword searching and predictive coding to manage document production.<sup>54</sup>

Why are more courts beginning to integrate e-discovery? First, e-discovery is getting better. Faster processing and better search technologies<sup>55</sup> have made the software easier, quicker, and more effective.<sup>56</sup> As a result, e-discovery is being deployed to handle

47. *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018) [hereinafter *The Sedona Principles*].

48. *See id.* at 8, 213–14.

49. Barry, *supra* note 26, at 348.

50. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259 n.9 (D. Md. 2008) (“In addition to keyword searches, other search and information retrieval methodologies include . . . ‘Clustering’ searches (searches of documents by grouping them by similarity of content, for example, the presence of a series of same or similar words that are found in multiple documents).”).

51. *See* Barry, *supra* note 26, at 349–50.

52. *See id.*

53. *See id.*; *see also* FED. R. CIV. P. 26(b)(2) advisory committee’s note to subdivision (b)(2) (noting that Rule 26(b)(2)(C) “balance[s] the costs and potential benefits of discovery”).

54. *See* Barry, *supra* note 26, at 353.

55. One of the most significant developments in searching is natural language processing (NLP). *See* John E. Davis, *E-Discovery – AI: E-Discovery Gets Smarter*, LEXOLOGY (Jan. 9, 2019), <https://www.lexology.com/library/detail.aspx?g=fdb9ad5f-b4c4-4d44-b939-5bbfa93b2da3> [<https://perma.cc/2QZ7-U7FX>]. NLP allows “computers to effectively communicate in the same language as their users,” which improves searching. *Id.*

56. LIGHTHOUSE, THE ART OF EDISCOVERY: NOT ALL PROVIDERS ARE CREATED EQUAL 1 (2018), <https://lighthouseglobal.com/wp-content/uploads/2014/01/The-Art-of-eDiscovery.pdf> [<https://perma.cc/2F64-X4X3>] [hereinafter THE ART OF EDISCOVERY].

increasingly complex data, taking on these challenges with ease.<sup>57</sup> These improvements in technology have helped contribute to increasing efficiency.<sup>58</sup> Moreover, attorneys are becoming more capable with the technology, and judges are taking notice.<sup>59</sup> In response, judges themselves are taking a more active role and engaging with e-discovery.<sup>60</sup>

E-discovery is also becoming more accessible, thanks to decreasing costs.<sup>61</sup> In 2007, analysis of one gigabyte of data exceeded \$30,000.<sup>62</sup> Just five years later, research found that this figure had dropped dramatically to about \$18,000 per gigabyte.<sup>63</sup> Once thought of as a tool only available to large firms, e-discovery is increasingly seen as a cost-effective option at small firms as well.<sup>64</sup> Though costs are decreasing, e-discovery is still generating tremendous revenues.<sup>65</sup> According to a leading e-discovery and legal software company,<sup>66</sup> e-discovery generated \$9.24 billion in 2017—more than three times the ticket sales of the National Football League.<sup>67</sup> The same report suggests these revenues are trending upwards.<sup>68</sup>

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57. *Id.*

58. Rob Robinson, *State of E-Discovery Report Shows Focus on Efficiency and Technology Is Fueling Progress for Industry*, COMPLEX DISCOVERY (June 6, 2018), <https://complexdiscovery.com/state-of-e-discovery-report-shows-focus-on-efficiency-and-technology-is-fueling-progress-for-industry/> [<https://perma.cc/9GY6-BB3Q>].

59. See EXTERRO, 4TH ANNUAL FEDERAL JUDGES SURVEY: JUDICIAL PERSPECTIVES ON THE STATE OF E-DISCOVERY LAW AND PRACTICE 6 (4th ed. 2018) (ebook) [hereinafter EXTERRO II].

60. See *id.* at 13.

61. See *Best Practices*, *supra* note 30, at 192; NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 20 (2012), [https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf) [<https://perma.cc/JL3Y-PRB8>].

62. See *Best Practices*, *supra* note 30, at 192.

63. See PACE & ZAKARAS, *supra* note 61.

64. See Sid Newby, *How Small Firms Can Leverage Predictive Coding for eDiscovery*, PLATINUM IDS (Jan. 3, 2017), <https://platinumids.com/2017/01/03/predictive-coding-for-ediscovery/> [<https://perma.cc/6JJ9-ZZUH>].

65. See Robert Hilson, *How Much Does eDiscovery Cost the U.S. Every Year?*, LOGIKCULL (July 20, 2015), <https://blog.logikcull.com/estimating-the-total-cost-of-u-s-ediscovery> [<https://perma.cc/BE83-TXPC>].

66. See EXTERRO I, *supra* note 22, at 100.

67. See Rob Robinson, *An eDiscovery Market Size Mashup: 2017–2022 Worldwide Software and Services Overview*, COMPLEX DISCOVERY (Dec. 22, 2017), <https://complexdiscovery.com/an-ediscovery-market-size-mashup-2017-2022-worldwide-software-and-services-overview/> [<https://perma.cc/5WXZ-T2PU>].

68. See *id.*

It is well established that e-discovery presents significant advantages—in time, cost, and accuracy—over manual review.<sup>69</sup> But, of course, e-discovery is far from perfect. In a recent study, a majority of responding judges (and the plurality of responding attorneys) believed that most e-discovery problems occur at the preservation stage.<sup>70</sup> However, the same survey group suggested that the technology was significantly more effective in the identification stage.<sup>71</sup> This suggests that the existing frameworks are well suited to identifying documents for Section 220 production, as this Note posits.

### C. E-discovery Applications

The AI technology behind e-discovery is being broadly employed. As discussed, it is being used in litigation—over 45 percent of law firms reported involvement in a case that used e-discovery in 2016.<sup>72</sup> However, e-discovery already has significant applications out of the courtroom. The federal government, for example, uses e-discovery technology to aid in responding to Freedom of Information Act (FOIA) requests.<sup>73</sup> At the Environmental Protection Agency, integrated AI services have helped reduce costs for both public and congressional document requests, saving taxpayer money.<sup>74</sup> Other departments have reported that increased use of e-discovery and AI technology has made FOIA productions easier for agency employees.<sup>75</sup>

Federal courts have also begun using creative remedies when it comes to ESI and document production.<sup>76</sup> In *Keithley v. Homestore.com, Inc.*, the US District Court for the Northern District of California

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69. See, e.g., Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 1, 48 (2011).

70. EXTERRO I, *supra* note 22.

71. *Id.*; see also Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 112 (2014) (noting that e-discovery is a “classification task”).

72. Bob Ambrogi, *Latest ABA Technology Survey Provides Insights on E-Discovery Trends*, OPENTEXT + CATALYST: E-DISCOVERY SEARCH BLOG (Nov. 10, 2016), <https://catalystsecure.com/blog/2016/11/latest-aba-technology-survey-provides-insights-on-e-discovery-trends/> [https://perma.cc/9ZHU-34S2].

73. See John Moore, *As FOIA Requests Surge, EPA Readies E-Discovery Toolkit*, GCN (June 12, 2014), <https://gcn.com/articles/2014/06/12/epa-ediscovery.aspx> [https://perma.cc/5VRM-LWZR]; see also Tim Klinger, *How to Ease the E-Discovery Impact of FOIA Requests*, FCW (Apr. 3, 2015), <https://few.com/articles/2015/04/03/impact-of-foia-requests.aspx> [https://perma.cc/94ZD-YNTC].

74. Moore, *supra* note 73.

75. See Klinger, *supra* note 73.

76. *Keithley v. Homestore.com, Inc.*, No. C-03-04447 SI (EDL), 2009 WL 55953, at \*4 (N.D. Cal. Jan. 7, 2009).

ordered a plaintiff to produce a hard drive pursuant to a discovery request.<sup>77</sup> To ensure the defendant would have access to all responsive documents, the court ordered that plaintiff “to provide a declaration from an information technology expert regarding the search done for documents on Plaintiffs’ hard drive and other electronic media.”<sup>78</sup> By requiring such a process, courts can ensure that even large and complex document productions are thorough and handled quickly. However, the costs of such productions are significant<sup>79</sup> and often subject to litigation.<sup>80</sup> Any mandatory use of AI in books and records production should thus be accompanied with standard guidelines relating to cost shifting.<sup>81</sup>

#### D. Other Technology in the Courtroom

E-discovery is not the only technology that has made its way into the courtroom.<sup>82</sup> Federal courts have accepted electronic docket filings for over twenty-five years,<sup>83</sup> a practice now standard in state courts as well.<sup>84</sup> As these filing systems improve, scholars believe electronic complaints, answers, and even service of process will follow.<sup>85</sup> Aside from document management, modern courtrooms include a variety of technological gadgets—from video displays to annotation monitors and evidence cameras.<sup>86</sup> These modern innovations have become

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77. *Id.*

78. *Id.*

79. *See supra* Section I.B.

80. *E.g.*, *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (analyzing whether cost shifting would be appropriate in an ESI production during discovery).

81. *Cf.* Francis G.X. Pileggi, Kevin F. Brady & Jill Agro, *Inspecting Corporate “Books and Records” in a Digital World: The Role of Electronically Stored Information*, 37 DEL. J. CORP. L. 163, 176 (2012) [hereinafter Pileggi I].

82. *See, e.g.*, James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241 (2012); Quentin L. Kopp, *Replacing Judges with Computers Is Risky*, HARV. L. REV.: BLOG (Feb. 20, 2018), <https://blog.harvardlawreview.org/replacing-judges-with-computers-is-risky/> [<https://perma.cc/JWS3-R39K>]; Tom Simonite, *How to Upgrade Judges with Machine Learning*, MIT TECH. REV. (Mar. 6, 2017), <https://www.technologyreview.com/s/603763/how-to-upgrade-judges-with-machine-learning/> [<https://perma.cc/8RFR-WVM6>].

83. *See Cabral et al., supra* note 82.

84. *See id.* at 278. Electronic filing is, unsurprisingly, a feature of the Delaware Court of Chancery as well. *See Electronic Filing in the Delaware Judiciary*, DEL. CTS., <https://courts.delaware.gov/efiling/> [<https://perma.cc/TXU7-6UU3>] (last visited Jan. 21, 2020).

85. *See Cabral et al., supra* note 82, at 287–88.

86. Hon. Herbert B. Dixon, Jr., *The Evolution of a High-Technology Courtroom*, NAT'L CTR. FOR ST. CTS. (2011), <https://www.nesc.org/sitecore/content/microsites/future-trends-2011/home/technology/1-4-evolution-of-high-tech-courtroom.aspx> [<https://perma.cc/LK8B-2LSS>].

mainstream, despite initial skepticism about their impact on our justice system.<sup>87</sup>

Perhaps most intriguing is the burgeoning use of AI to aid judges in adjudicating cases. In New York City, predictive analytics and machine learning help judges set bail for criminal defendants, comparing information about the defendant with certain variables in order to create a “risk score.”<sup>88</sup> Early indicators show that these systems are actually better than judges at predicting whether a defendant will reoffend if released on bail.<sup>89</sup> Some studies have suggested that AI has mitigated racial disparities within the prison population.<sup>90</sup> Other states, including New Jersey, New Mexico, California, as well as the District of Columbia, have begun to implement similar technology, using AI to perform pretrial risk assessments on criminal defendants.<sup>91</sup> These practices have been criticized for taking discretion out of the hands of experienced judges and into “half-baked” algorithms.<sup>92</sup> But, as AI becomes increasingly powerful and accessible,<sup>93</sup> automation of these sorts of low-level judicial tasks seems inevitable.

## II. SECTION 220 LITIGATION IN DELAWARE

This Note proposes the use of e-discovery technology to streamline books and records litigation in the Delaware Court of Chancery. To illustrate the unique circumstances that could make such an application possible, it is necessary to discuss the history of this unique court, as well as the nature of the litigation at issue.

### A. *The Delaware Court of Chancery*

Delaware has been called the “corporate capital”<sup>94</sup> of the United States, and rightfully so: nearly two-thirds of Fortune 500 companies

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87. Emily Ittner, Comment, *Technology in the Courtroom: Promoting Transparency or Destroying Solemnity?*, 22 COMMLAW CONSPPECTUS 347, 350 (2014).

88. Simonite, *supra* note 82.

89. *Id.*

90. *See id.* But see Beth Schwartzapfel, *Can Racist Algorithms Be Fixed?*, MARSHALL PROJECT (July 1, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/07/01/can-racist-algorithms-be-fixed> [https://perma.cc/7B9P-DB3H].

91. Kopp, *supra* note 82.

92. *See id.*; see also *Artificial Intelligence Is Coming for Both Judges and Defendants*, N.Y. POST (Jan. 31, 2018, 1:22 PM), <https://nypost.com/2018/01/31/artificial-intelligence-is-coming-for-both-judges-and-defendants/> [https://perma.cc/F2PQ-VNLA].

93. *See supra* Section I.B.

94. Francis G.X. Pileggi, *Can Delaware Maintain Its Corporate Capital Status*, DEL. BUS. TIMES (Mar. 5, 2015), <http://www.delawarebusinesstimes.com/delaware-corporate-capital/>

are incorporated in the First State.<sup>95</sup> The importance of corporate law in Delaware cannot be easily overstated. There are more “corporate citizens” in Delaware than human citizens,<sup>96</sup> accounting for approximately 40 percent of the state’s revenue.<sup>97</sup> Because of the central role of corporations and other alternative business entities, Delaware has a well-developed,<sup>98</sup> and often imitated,<sup>99</sup> body of corporate law. As a result, Delaware’s state bar and state court system are uniquely well versed in corporate law and are rightfully seen as leaders in this area.<sup>100</sup>

The Court of Chancery, perhaps the *raison d’être* for Delaware’s status as “Corporate America’s main street,”<sup>101</sup> is at the center of any discussion of corporate law. A visiting reporter, who, fortunately for her readers, is much more poetic than this Author, describes her first visit:

Wilmington is a sandlot where the World Series is regularly played. And home plate is at 500 N. King Street, where it intersects with 5th Street in downtown

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[<https://perma.cc/6BN7-7DA9>]. Other commentators have gone so far as to call Delaware the “Corporate Capital of the World.” See Randy J. Holland, *Delaware’s Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 772 (2009).

95. *About the Division of Corporations*, DELAWARE.GOV: DEL. DIVISION CORPORATIONS, <https://corp.delaware.gov/aboutagency/> [<https://perma.cc/3X8T-6D9T>] (last visited Jan. 21, 2020).

96. Darren Weaver, *This Tiny Building in Wilmington, Delaware Is Home to 300,000 Businesses*, BUS. INSIDER (Dec. 27, 2018, 10:10 AM), <https://www.businessinsider.com/building-wilmington-delaware-largest-companies-ct-corporation-2017-4> [<https://perma.cc/UU6U-57ZS>]. Once again, chickens somehow outnumber the two combined. See *supra* note 6 and accompanying text.

97. Ben Casselman & Allison McCann, *Where Your State Gets Its Money*, FIVETHIRTYEIGHT (Apr. 16, 2015, 4:03 PM), <https://fivethirtyeight.com/features/where-your-state-gets-its-money/> [<https://perma.cc/6TCQ-66SY>].

98. See Donald F. Parsons, Jr. & Joseph R. Sights III, *The History of Delaware’s Business Courts*, A.B.A.: BUS. L. TODAY (Apr. 2008), <https://www.morrisjames.com/assets/html/documents/History%20of%20Delaware%20Business%20Courts.pdf> [<https://perma.cc/SD7U-8VLN>].

99. See Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 890–92 (1969) [hereinafter *Law for Sale*]. Courts in other jurisdictions look to Delaware jurisprudence as a source of guidance on issues of corporate law. See *TC Invs., Corp. v. Becker*, 733 F. Supp. 2d 266, 282 (D.P.R. 2010) (looking to Delaware law “because Puerto Rico corporate law was modeled after Delaware corporate law”); see also *Marquis Theatre Corp. v. Condado Mini Cinema*, 846 F.2d 86, 91 (1st Cir. 1988) (examining Delaware law for the definition of the business judgment rule under Puerto Rico corporate law).

100. Alana Semuels, *The Tiny State Whose Laws Affect Workers Everywhere*, ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/business/archive/2016/10/corporate-governance/502487/> [<https://perma.cc/6ECT-K489>]. The Delaware bar has long held a sense of pride for its role as a leader in the field of corporate law. See *Law for Sale*, *supra* note 99, at 863–64. In the 1960s, while many states were adopting the Model Business Corporation Act, Delaware lawyers pushed back: “Delaware should not adopt the Model Act because we do not want to be a ‘me too’ state in view of the fact that in the past most of the other States had copied our laws and that we should be a leader not a follower.” See *id.* at 866–67.

101. Katrina Dewey, *Delaware’s Art of Judging*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 14, 2009), <https://corpgov.law.harvard.edu/2009/07/14/delawares-art-of-judging/> [<https://perma.cc/L2RS-NEZ6>].

Wilmington, population 72,826. I walk from the train station to the most powerful corporate court in America against a strong wind with sleet coming down. Though the journey is mostly through corporate towers sprinkled with anonymous blight, I'm still expecting something like the steps of the U.S. Supreme Court to rise before me. Instead, I find a sleek, modern courthouse that accommodates confused jurors, unhappy family law litigants and the entire range of humanity that passes through the legal system. Taking the elevator to the 12th floor, I find the home of Corporate America's Sultans of Swing.<sup>102</sup>

Two other factors make the Court of Chancery stand out: its role as a “business” court and its leadership in technological innovation.

### 1. A “Business” Court

Today, the Delaware Court of Chancery is famous for adjudicating many of the country's most sensitive and complex business cases.<sup>103</sup> However, the misconception that it is a purely “business court” is surprisingly widespread.<sup>104</sup> In fact, the court is significantly more nuanced. Delaware is one of the few US jurisdictions that still retains a separate court of equity.<sup>105</sup> The Delaware Court of Chancery can trace its common-law roots back for centuries to the English courts of equity,<sup>106</sup> which were known for their flexibility and innovation in the face of the rigid writ system.<sup>107</sup> This structure allowed courts of equity to fashion creative remedies, tailored to fit the particular needs of the people that came before them.<sup>108</sup> And though the Court of Chancery still hears cases regarding the “people's concerns in equity,”<sup>109</sup> its jurisdiction over guardianships and trusts has been expanded over time to other fiduciary relationships—namely, stockholder actions.<sup>110</sup>

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102. *Id.*

103. *See* Parsons & Slights, *supra* note 98.

104. *See, e.g.,* Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (June 30, 2012), <https://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html> [<https://perma.cc/Z2H7-YKAG>] (“Of course, business—the legal kind—has been the business of Delaware since 1792, when the state established its Court of Chancery to handle business affairs.”).

105. Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215, 244 (1995) (“Only four states, Arkansas, Delaware, Mississippi, and Tennessee, still have separate courts of equity.”). Arkansas has since merged law and equity. *See* ARK. R. CIV. P. 2.

106. *See Jurisdiction of the Court of Chancery*, DEL. CTS., <https://courts.delaware.gov/chancery/jurisdiction.aspx> [<https://perma.cc/8CN3-D4U9>] (last visited Jan. 21, 2020).

107. *See* William T. Quillen & Michael Hanrahan, *A Short History of the Court of Chancery*, DEL. CTS., <https://courts.delaware.gov/chancery/history.aspx> [<https://perma.cc/VA95-EEAZ>] (last visited Feb. 17, 2020).

108. *See id.*

109. This term refers to classical equitable disputes, such as wills, guardianships, and land disputes. *See Jurisdiction of the Court of Chancery, supra* note 106.

110. *See id.*

Corporations like it that way; the opportunity to resolve disputes before the Court of Chancery is routinely cited as a reason to incorporate in Delaware.<sup>111</sup>

Proceedings before the Court of Chancery are adjudicated by the chancellor or one of the six vice chancellors.<sup>112</sup> These judges routinely deal with complex litigation, and most were experienced practitioners in the area before joining the court.<sup>113</sup> The chancellor and vice chancellors serve as fact-finders, and thus Court of Chancery proceedings do not involve a jury.<sup>114</sup> This allows attorneys to make their arguments directly to the judge, without needing to simplify the intricacies of corporate law for laypeople.<sup>115</sup> Cases in the Court of Chancery are also frequently adjudicated on an expedited basis.<sup>116</sup> This speed is key in the context of so-called deal litigation.<sup>117</sup> These and other considerations<sup>118</sup> make the court popular among litigants with complex corporate claims and, thus, very busy: according to the most recent data, the court routinely disposes of well over a thousand civil actions a year.<sup>119</sup>

## 2. A Cutting-Edge Court

Not only a leader in business, Delaware has long been a trailblazer when it comes to technological innovation. Delaware

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111. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007), [https://corpfiles.delaware.gov/whycorporations\\_web.pdf](https://corpfiles.delaware.gov/whycorporations_web.pdf) [<https://perma.cc/EHG2-2ZLNQ>].

112. *Judicial Officers*, DEL. CTS., <https://courts.delaware.gov/chancery/judges.aspx> [<https://perma.cc/X5F4-FRY7>] (last visited Jan. 21, 2020). The court also employs two masters in chancery, who serve a function similar to magistrates in a federal court. *Id.*

113. *See* Parsons & Slights, *supra* note 98.

114. *Id.*

115. *Id.*

116. *See* Jane Haskins, *Incorporating in Delaware: Advantages and Disadvantages*, LEGALZOOM (Sept. 2014), <https://www.legalzoom.com/articles/incorporating-in-delaware-advantages-and-disadvantages> [<https://perma.cc/C9YA-YKYM>].

117. Parsons & Slights, *supra* note 98; *see also* James D. Cox et al., *The Paradox of Delaware's "Tools at Hand" Doctrine: An Empirical Investigation* 1–5 (Vanderbilt Law Research Paper No. 19-10, 2019) (discussing deal litigation), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3355662](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3355662) [<https://perma.cc/6K3H-WGWQ>].

118. Litigants also value the predictability of outcomes in the Court of Chancery. *See* Brian M. Lutz & Colin B. Davis, *The Virtue of Predictability: Delaware's Place in M&A Practice*, DEL. BUS. CT. INSIDER (Oct. 18, 2017), <https://www.gibsondunn.com/wp-content/uploads/2017/11/Lutz-Davis-The-Virtue-of-Predictability-Delawares-Place-in-MandA-Practice-DBCI-10-18-2017.pdf> [<https://perma.cc/V39T-QWKR>].

119. *Court of Chancery 10-Year Civil Caseload Trend*, DEL. CTS., <https://courts.delaware.gov/aoc/AnnualReports/FY17/doc/ChanceryCivilCaseloadTrendChart.pdf> [<https://perma.cc/VJ3Y-9BTS>] (last visited Sept. 10, 2019). Note that this number only includes “civil” filings—essentially, business cases. *See id.*



Supreme Court Justice Henry duPont Ridgely, who retired from the court in 2014, was noted as “a leader in the integration of technology into the judicial process.”<sup>120</sup> Of course, Justice Ridgely is not the only member of the Delaware bench to be a trailblazer in technology. In 2016, Vice Chancellor Laster spoke to the Council of Institutional Investors about innovations in distributed ledger technologies (blockchain) and their place in Delaware law.<sup>121</sup> He encouraged stockholders to “take the lead” on such technological innovations, emphasizing, “Delaware wants to help you.”<sup>122</sup> The Delaware Blockchain Initiative, referenced by Vice Chancellor Laster, aims to attract and retain companies with “a simplified and more efficient record-keeping system.”<sup>123</sup> As then governor Markell noted, “Delaware has long been the jurisdiction of choice for the most innovative companies in the world. The Delaware Blockchain Initiative demonstrates the state’s commitment to ensuring this remains the case for the growing blockchain technology sector.”<sup>124</sup> The Delaware legislature has also taken action to foster innovation, creating the Delaware Commission on Law and Technology to develop “best practices regarding the use of technology and the practice of law.”<sup>125</sup>

Moreover, as noted above, Delaware is known for its “capacity and willingness” for expedited litigation.<sup>126</sup> In *Hewlett v.*

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120. *Justice Henry duPont Ridgely, Class of 1973, to Retire from Delaware Supreme Court*, COLUMBUS SCH. OF L. (June 1, 2019), available at <https://web.archive.org/web/20190601172911/https://www.law.edu/2014-Fall/Justice-Henry-duPont-Ridgely-Class-of-1973-to-Retire-from-Delaware-Supreme-Court.cfm>.

121. J. Travis Laster, Vice Chancellor, Del. Court of Chancery, Keynote Speech at the Chicago Council of Institutional Investors: The Block Chain Plunger: Using Technology to Clean Up Proxy Plumbing and Take Back the Vote (Sept. 29, 2016), [https://www.cii.org/files/09\\_29\\_16\\_laster\\_remarks.pdf](https://www.cii.org/files/09_29_16_laster_remarks.pdf) [<https://perma.cc/P5JW-J937>].

122. *Id.*

123. Giulio Prisco, *Delaware Blockchain Initiative to Streamline Record-Keeping for Private Companies*, BITCOIN MAG. (May 9, 2016), <https://bitcoinmagazine.com/articles/delaware-blockchain-initiative-to-streamline-record-keeping-for-private-companies-1462812187> [<https://perma.cc/8BV2-REHV>].

124. Press Release, Delaware Office of the Governor, State of Delaware Unveils Blockchain Initiative to Leverage Potential of Smart Contracts (Apr. 5, 2016), <https://www.prnewswire.com/news-releases/state-of-delaware-unveils-blockchain-initiative-to-leverage-potential-of-smart-contracts-300245870.html> [<https://perma.cc/ZTK2-YGGE>].

125. *What Is the DECLT?*, DEL. CTS., <https://courts.delaware.gov/declt/> [<https://perma.cc/TS9S-JJX3>] (last visited Jan. 21, 2020).

126. See, e.g., Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 682 (2005) (“The capacity and willingness of chancery judges to act with speed fit well with the business community’s needs. . . . [A]s a matter of judicial culture, chancery developed a deep commitment to the timely resolution of disputes, however big or small, and whether expedited or not.”).

*Hewlett-Packard Co.*,<sup>127</sup> Chancellor Chandler disposed of both a motion to dismiss a derivative complaint and a full trial on the merits in little more than a month.<sup>128</sup> In a more recent case, Vice Chancellor McCormick managed to issue a full posttrial opinion only forty-eight hours after briefs were filed to accommodate a tight merger deadline.<sup>129</sup> These examples, far from an exhaustive list of expedited Court of Chancery cases, underscore the importance of speed in Delaware litigation.

### B. Books and Records Litigation in Delaware

#### 1. The Statutory Right to Inspect

A stockholder's right to inspect a Delaware corporation's books and records dates back over a century, when it existed as part of the common law.<sup>130</sup> Today, it is codified by statute: stockholders are entitled to inspection upon making a "demand" on the company's board.<sup>131</sup> However, this right is not absolute. A plaintiff stockholder is required to clear several hurdles in order to prevail on a Section 220 action.<sup>132</sup> The text of Section 220 provides three basic requirements.<sup>133</sup> The first two are procedural: stockholder status<sup>134</sup> and proper form.<sup>135</sup> The final requirement, demonstrating a "proper purpose,"<sup>136</sup> is often the key issue during litigation.<sup>137</sup> If the court finds that one or more of the plaintiffs

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127. *Hewlett v. Hewlett-Packard Co.*, No. CIV.A. 19513-NC, 2002 WL 818091 (Del. Ch. Apr. 30, 2002).

128. Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1760 n.43 (2006).

129. *FrontFour Capital Grp. LLC v. Taube*, C.A. No. 2019-0100-KSJM, 2019 WL 1313408, at \*1 n.1 (Del. Ch. Mar. 11, 2019).

130. *See State ex rel. De Julvecourt v. Pan-American Co.*, 61 A. 398 (Del. Super. Ct. 1904), *aff'd mem.*, 63 A. 1118 (Del. 1906).

131. DEL. CODE ANN. tit. 8, § 220(b) (2019). Members of a limited liability company have a similar cause of action. *See* DEL. CODE ANN. tit. 6, § 18-305(a) (2018). Delaware law treats the two rights analogously, and Section 18-305 actions are subject to the same limitations as Section 220 actions. *See Sanders v. Ohmite Holding, LLC*, 17 A.3d 1186, 1193 (Del. Ch. 2011). This Note's references to books and records litigation as "Section 220 actions" is meant to include demands made under Section 18-305 as well.

132. *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002).

133. Tit. 8, § 220(c). It is important to note that these requirements are limited to demands for books and records *beyond* the company's stock ledger. *Id.* § 220(b). This note does not address demands for the ledger only, as they fall outside of the "scope" problem herein discussed.

134. *Id.* § 220(c)(1).

135. *Id.* § 220(c)(2).

136. *Id.* § 220(c)(3).

137. *See Saito*, 806 A.2d at 115.

purposes are permissible, she is then only entitled to inspect documents that are “necessary and essential” to achieving it.<sup>138</sup>

Section 220 defines a proper purpose as “a purpose reasonably related to such person’s interest as a stockholder.”<sup>139</sup> Because of this broad definition, a wide body of case law has developed to fill the gaps.<sup>140</sup> There are many permissible purposes for which a stockholder might seek inspection. For example, “[i]t is well established that a stockholder’s desire to investigate wrongdoing or mismanagement is a ‘proper purpose.’”<sup>141</sup> A stockholder may also seek books and records for the purpose of valuing her interest in the company<sup>142</sup> and contacting other owners,<sup>143</sup> to name a few. Without any further discussion of what constitutes a “proper purpose,” suffice it to say that this area of law is well developed and generally clearly defined.

The “necessary and essential” inquiry is nowhere to be found within the text of Section 220.<sup>144</sup> Instead, it is typically left to the court to narrow the scope of a plaintiff’s demand. Because demands are often incredibly broad,<sup>145</sup> this is no small task. Plaintiffs “bear the burden of showing a proper purpose and make specific and discrete identification, with *rifled precision*, of the documents sought.”<sup>146</sup> All of this is done without anyone, except, perhaps, the defendant corporation, knowing exactly which books and records actually exist and what information is truly contained within them.<sup>147</sup> As a result, Section 220 demands are

138. *Id.* at 116.

139. *See* tit. 8, § 220(b).

140. *See* Fred S. Mcchesney, “*Proper Purpose, Fiduciary Duties, and Shareholder-Raider Access to Corporate Information*,” 68 U. CIN. L. REV. 1199, 1203 (2000).

141. *Seinfeld v. Verizon Commc’ns, Inc.*, 909 A.2d 117, 121 (Del. 2006).

142. *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 817 (Del. Ch. 2007).

143. *Marilyn Abrams Living Tr. v. Pope Invs. LLC*, No. 12829-VCL, 2017 WL 1064647, at \*4 (Del. Ch. Mar. 21, 2017), *aff’d*, 177 A.3d 69 (Del. 2017).

144. *See* tit. 8, § 220.

145. *See, e.g.*, *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 160 (Del. Ch. 2006), *aff’d sub nom.* *Highland Equity Fund, L.P. v. Motient Corp.*, 922 A.2d 415 (Del. 2007) (“[Plaintiff’s] [demand] letter ran for a full 25 pages, and interspersed 47 separate paragraphs of substantive demands.”).

146. *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000) (*emphasis added*).

147. *See* *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 757 (Del. 2019) (“Ultimately, however, the court will be highly dependent on the respondent’s good faith participation in the process, because the respondent is likely to be the only participant in the settle-order process with knowledge of which corporate records are relevant to the petitioner’s proper purpose as determined by the court.”). For a good example of this problem, see Master’s Draft Report at 47, *Wimbledon Fin. Master Fund, Ltd. v. Shelter Island Opportunity Fund, LLC*, C.A. No. 12933–MZ (Del. Ch. June 29, 2018) (recommending the plaintiff be allowed to renew its request for “more peripheral documents that may become essential if core documents were lost”). The defendant’s exceptions to the master’s report assert that, in fact, many documents the court

often accompanied with voluminous filings, long opinions, and, indeed, sometimes full trials.<sup>148</sup> Books and records actions are said to be “summary proceedings,”<sup>149</sup> but, in practice, they can turn out to be much more.

Section 220 also provides that the Court of Chancery may impose “any limitations or conditions with reference to the inspection, or award such other or further relief as the [c]ourt may deem just and proper.”<sup>150</sup> The Delaware Supreme Court has interpreted this power broadly and charges the Court of Chancery to consider “case specific factors” and “exercise its traditional care in evaluating the factors relevant to the specific application before it.”<sup>151</sup>

## 2. Why Make a Section 220 Demand?

### *a. Litigation*

Stockholder derivative lawsuits are commonplace in the Delaware Court of Chancery, and Section 220 litigation can play an important role. In many such actions, stockholders first seek a temporary restraining order<sup>152</sup> and then a preliminary injunction<sup>153</sup> in order to maintain the status quo while a dispute on the merits is pending. However, plaintiffs generally must allege particular facts in order to survive a motion to dismiss or obtain a preliminary injunction.<sup>154</sup> And in derivative actions, plaintiffs face a similar burden to establish demand futility.<sup>155</sup> To gain access to this information, stockholders may use books and records demands as a first step.

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ordered it produce “do not exist.” Defendant Shelter Island Opportunity Fund, LLC’s Notice of Exceptions to Master’s Draft Report at 2, *Wimbledon*, C.A. No. 12933–MZ.

148. See *Highland*, 906 A.2d at 161–63 (describing an extensive discovery process and trial on the merits of a Section 220 demand); see also *infra* Section II.C.

149. *Grimes v. Donald*, 673 A.2d 1207, 1216 n.11 (Del. 1996); see also *United Techs. Corp. v. Treppel*, 109 A.3d 553, 561 (Del. 2014) (“[T]he Court of Chancery should also give weight to the importance of maintaining Section 220 actions as streamlined, summary proceedings that do not get bogged down in collateral issues.”).

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

151. *United Techs.*, 109 A.3d at 558, 562.

152. See DEL. CT. CH. R. 65(b); see also *Trilogy Portfolio Co. v. Brookfield Real Estate Fin. Partners, LLC*, C.A. No. 7161–VCP, 2012 WL 120201, at \*4 (Del. Ch. Jan. 13, 2012).

153. See DEL. CT. CH. R. 65(a); see also *In re Cogent, Inc. S’holder Litig.*, 7 A.3d 487, 513 (Del. Ch. 2010).

154. See, e.g., *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008). The (still ongoing) Tesla litigation (discussed above) is also illustrative of the importance of Section 220 documents at the motion to dismiss stage of subsequent derivative litigation. See *In re Tesla Motors, Inc. Stockholder Litig.*, C.A. No. 12711–VCS, 2018 WL 1560293, at \*10 n.183 (Del. Ch. Mar. 28, 2018).

155. DEL. CT. CH. R. 23.1(a).

At the height of derivative litigation in the 1990s, the Delaware Supreme Court decided *Rales v. Blasband*, which dealt with the pleading requirements for demand futility under Court of Chancery Rule 23.1.<sup>156</sup> In addressing the challenges faced by litigants, the court noted, “Although derivative plaintiffs may believe it is difficult to meet the particularization requirement of *Aronson* because they are not entitled to discovery to assist their compliance with Rule 23.1, they have many avenues available to obtain information bearing on the subject of their claims.”<sup>157</sup> In particular, the court encouraged litigants to use the “tools at hand,” with particular reference to inspection rights under Section 220.<sup>158</sup> Though the court lamented the fact that plaintiffs rarely used this tool,<sup>159</sup> it would not be long until that trend changed.<sup>160</sup> Section 220’s role as a threshold to derivative litigation is illustrative of its importance in the corporate law landscape.

### *b. Corporate Governance*

While it is easy to think of books and records demands as simply the first step in substantive litigation, it is important to note that Section 220 has many other potential applications. Perhaps most significantly, from a public policy standpoint, is the use of inspection to aid stockholder participation in corporate governance.<sup>161</sup> For example, plaintiffs investigating corporate wrongdoing can use the information from demanded documents to mount proxy contests and replace existing management.<sup>162</sup> The information is also useful in preparing shareholder proposals, which can have more direct influence on a particular corporate policy.<sup>163</sup> The Delaware Supreme Court has gone so far as to suggest that a stockholder could use Section 220 inspection

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156. See *Rales v. Blasband*, 634 A.2d 927, 929–31 (Del. 1993).

157. *Id.* at 934 n.10. The mention of “*Aronson*” refers to *Aronson v. Lewis*, which detailed the previous pleading standard for demand futility. See *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984). *Aronson* was overruled by *Brehm*, which requires even more particularity in the pleadings. *Brehm v. Eisner*, 746 A.2d 244, 254–55 (Del. 2000).

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

159. *Id.* (“Surprisingly, little use has been made of Section 220 as an information-gathering tool in the derivative context.”).

160. See *infra* Section II.C.

161. See *First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 571 (Del. 1997) (“Section 220 proceedings are an important part of the corporate governance landscape in Delaware.”).

162. See *Se. Pa. Transp. Auth. v. AbbVie, Inc.*, C.A. No. 10374–VCG, C.A. No. 10408–VCG, 2015 WL 1753033, at \*11 (Del. Ch. Apr. 15, 2015) (citing *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002)).

163. See 17 C.F.R. § 240.14a–8 (2019).

to determine “an individual’s suitability to serve as a director.”<sup>164</sup> Ultimately, inspection rights can be useful to stockholders in both gathering information for litigation and in furtherance of other corporate governance issues. In either case, Section 220 stands as an important promoter of corporate transparency.<sup>165</sup>

### *C. The State of Books and Records Litigation*

Today, inspection litigation is approaching a turning point. Emerging trends underscore the need to streamline the process.

#### 1. Current Trends

Books and records cases in Delaware have been on the rise for nearly two decades.<sup>166</sup> Commentators have referred to Section 220 as the “next big thing” in the Court of Chancery.<sup>167</sup> A closer look reveals three key trends: books and records cases are (1) being filed more often, (2) requiring substantial involvement by the court, and (3) taking too long to resolve.<sup>168</sup>

##### *a. Inspection Actions Are Being Filed More Often*

In 1993, the Delaware Supreme Court famously encouraged plaintiffs to make use of the “tools at hand” before filing derivative complaints.<sup>169</sup> A study of Section 220 actions filed leading up to that time period (1981 to 1994) showed that this particular “tool” was fairly unpopular: only fifty-three cases were filed during that period.<sup>170</sup> This

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164. *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 289–90 (Del. 2010) (citing *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 818 (Del. Ch. 2007)).

165. See Daniel R. Saeedi & Richard Y. Hu, *The Difference Between Illinois and Delaware: Shareholder Inspection Rights*, YOUNG LAW. J., Apr.–May 2015, at 40. Inspection rights hold an important place in Delaware law. Delaware’s LLC statute, known for its flexibility, includes mandatory inspection rights for LLC members. See DEL. CODE ANN. tit. 6, § 18-305(a) (2018).

166. See Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands*, 26 CARDOZO L. REV. 1595, 1595, 1599 (2005).

167. *The Long Form*, CHANCERY DAILY (The Chancery Daily LLC, Wilmington, Del.), Jan. 30, 2019.

168. See James D. Cox, Kenneth J. Martin & Randall S. Thomas, *The Paradox of Delaware’s “Tools at Hand” Doctrine: An Empirical Investigation* 29–32 (Vanderbilt Univ. Law Sch. Legal Studies Research Paper Series, Paper No. 19-10, 2019). This Author is grateful to Professor Thomas and his coauthors for their permission to cite this insightful paper before it is published. Readers interested in a deeper discussion of these trends are encouraged to read the paper in its entirety when it becomes available.

169. See *Rales v. Blasband*, 634 A.2d 927, 934 n.10 (Del. 1993).

170. See Randall S. Thomas & Kenneth J. Martin, *Using State Inspection Statutes for Discovery in Federal Securities Fraud Actions*, 77 B.U. L. REV. 69, 105 (1997).

has since changed dramatically. A new study by the same author reveals that from 2004 to 2018, stockholders filed a staggering 691 inspection actions, representing a *thirteenfold* increase.<sup>171</sup>

Why have stockholders opted to use the “tools at hand” so aggressively in recent years? One possible explanation is the end of so-called disclosure-only settlements.<sup>172</sup> When the Court of Chancery ended this practice in *In re Trulia*, plaintiffs (and their lawyers) stopped challenging mergers in Delaware courts and, instead, focused their energies in federal courts.<sup>173</sup> But this has not stopped stockholders from using the Court of Chancery as a launch point for “information litigation.”<sup>174</sup> To the contrary, the post-*Trulia* docket has seen a remarkable increase in Section 220 filings.<sup>175</sup> While inspection actions are not a substitute for required disclosures, the uptick in these cases has helped fill the vacuum caused by *Trulia*.<sup>176</sup>

*Trulia*, decided in 2016, is not the only recent Delaware decision that has created a hurdle for merger plaintiffs. In *Corwin v. KKR Financial Holdings LLC*, the Delaware Supreme Court extended ratification effect to fully informed, uncoerced shareholder votes.<sup>177</sup> If a company can prove that the requirements of *Corwin* have been met, the challenged transaction is presumptively subject to the lenient review of the business judgment rule.<sup>178</sup> Scholars have noted that the now-familiar “*Corwin* doctrine” makes it harder for plaintiffs to successfully challenge merger transactions in Delaware.<sup>179</sup> Because the *Corwin* inquiry focuses so heavily on whether stockholders were fully informed, the information found in a company’s books and records can be critical.<sup>180</sup> Inspection can uncover previously undisclosed facts,

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171. Cox, Martin & Thomas, *supra* note 168, at 7–8.

172. See *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 899 (Del. Ch. 2016). In a “disclosure-only” settlement, plaintiffs agree to broad releases of their claims in exchange for nominal supplemental disclosures and payment of plaintiffs’ attorneys’ fees. See Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 605 (2018).

173. See Cain et al., *supra* note 172, at 607–08.

174. George S. Geis, *Information Litigation in Corporate Law*, 71 ALA. L. REV. 407, 413 (2019).

175. Edward B. Micheletti et al., *Continuing Trends in M&A Disclosure Litigation*, SKADDEN (Nov. 21, 2017), <https://www.skadden.com/insights/publications/2017/11/insights-the-delaware-edition/continuing-trends-in-ma-disclosure-litigation> [<https://perma.cc/5Z9Y-4A7G>].

176. See *id.*

177. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 312 (Del. 2015).

178. *Id.* at 312–13.

179. See Cain et al., *supra* note 172, at 606.

180. Cox, Martin & Thomas, *supra* note 168, at 23 (“But for the emails obtained in the books and records request, the defendants most assuredly would have ultimately prevailed [in invoking *Corwin*].”).

which “would have been material to a voting shareholder.”<sup>181</sup> Section 220’s increased use as a sort of “pre-suit discovery”<sup>182</sup> can help explain the explosion of filings in recent years.

*b. Inspection Actions Require Substantial Involvement by the Court*

Inspection cases are also requiring significant involvement from the court in order to be resolved. The same study discussed above measured the number of pages filed in inspection cases by plaintiffs, defendants, and the court.<sup>183</sup> It revealed that, on average, the Court of Chancery files approximately forty-seven pages, reflecting a significant amount of involvement.<sup>184</sup> Moreover, as compared to the 1997 study, litigants are also filing substantially more pages during books and records cases.<sup>185</sup> It is unsurprising that in the last year alone, at least three inspection cases have required the court to hold full trials.<sup>186</sup>

One possible explanation for the increased need for court involvement in Section 220 litigation may be the increased complexity of the cases themselves.<sup>187</sup> Recent scholarship has criticized the newfound broadness with which plaintiffs make inspection demands.<sup>188</sup> Others have called Section 220 a “blunt instrument, more akin to a sledgehammer than a scalpel,”<sup>189</sup> underscoring the difficulties presented to judges tasked with adjudicating books and records cases. Because of these problems, scholars have long called for streamlining the inspection process to provide for quicker trials and increased access for stockholders.<sup>190</sup>

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181. Morrison v. Berry, 191 A.3d 268, 275 (Del. 2018).

182. Cox, Martin & Thomas, *supra* note 168, at 24.

183. *Id.* at 32.

184. *Id.*

185. Compare *id.*, with Thomas & Martin, *supra* note 170, at 104.

186. Matthew Solum, *Del. Courts Continue Limiting Books and Records Demands*, LAW360 (May 28, 2019, 2:28 PM), <https://www.law360.com/articles/1163477/> [<https://perma.cc/URR2-SV9R>].

187. Cox, Martin & Thomas, *supra* note 168, at 31.

188. S. Mark Hurd & Lisa Whittaker, *Books and Records Demands and Litigation: Recent Trends and Their Implications for Corporate Governance*, 9 DEL. L. REV. 1, 17 (2006) (noting that stockholders seem to believe that “the ‘rifle’ of Section 220 has been exchanged for a shotgun”).

189. Francis G.X. Pileggi, *Wal-Mart Saga Ends in Delaware; Plaintiff Loses Bid for More Section 220 Documents*, LEXISNEXIS: LEGAL NEWSROOM (May 11, 2015), <https://www.lexisnexis.com/legalnewsroom/corporate/b/blog/posts/wal-mart-saga-ends-in-delaware-plaintiff-loses-bid-for-more-section-220-documents> [<https://perma.cc/VZ2Y-STSG>].

190. See Thomas & Martin, *supra* note 170, at 101.



*c. Inspection Actions Are Taking Too Long to Resolve*

Books and records actions are said to be “summary proceedings.”<sup>191</sup> According to guidelines published by the court, this means they should be resolved, under normal circumstances, within 45 to 60 days.<sup>192</sup> However, recent data suggest that this is rarely the case. In the same 2019 study cited above, the authors calculated the number of days that elapsed between the initial demand and the final outcome of the books and records litigation.<sup>193</sup> It revealed that, on average, books and records cases take approximately 309.8 days to be resolved.<sup>194</sup> The median time lapse, 190 days,<sup>195</sup> is over three times longer than the recommended maximum of 60 days.

Delay in Section 220 proceedings is not without consequence. Aside from the obvious increases in costs, exceptionally long inspection cases can also hurt plaintiffs when filing substantive cases.<sup>196</sup> In 2012, the *New York Times* reported a bribery scheme and cover-up by Walmart executives; several sets of stockholders filed derivative complaints, both in Arkansas federal court and in the Court of Chancery.<sup>197</sup> At the urging of the chancellor, the Delaware plaintiffs stayed their suit to file a books and records action to improve their complaint.<sup>198</sup> The resulting Section 220 litigation lasted nearly three years and involved a full trial and appeal to the Delaware Supreme Court.<sup>199</sup> Meanwhile, the Arkansas suit, initially stayed in favor of the Delaware action, moved forward.<sup>200</sup> Ultimately, the federal case was dismissed with prejudice.<sup>201</sup> When the derivative suit finally went forward in Delaware, Walmart moved to dismiss the case based on issue preclusion.<sup>202</sup> After years of litigation, the Delaware Supreme Court ultimately agreed.<sup>203</sup> In sum, the delays in the books and records proceeding killed the Delaware plaintiffs’ case, allowing another,

191. Grimes v. Donald, 673 A.2d 1207, 1216 n.11 (Del. 1996).

192. GUIDELINES TO HELP LAWYERS PRACTICING IN THE COURT OF CHANCERY § II(4)(f)(i) (DEL. COURT OF CHANCERY 2014), <https://courts.delaware.gov/forms/download.aspx?id=99468> [<https://perma.cc/4AJH-UUFB>].

193. Cox, Martin & Thomas, *supra* note 168, at 32.

194. *Id.*

195. *Id.*

196. Geis, *supra* note 174, at 435; Cox, Martin & Thomas, *supra* note 168, at 32.

197. Cal. State Teachers’ Ret. Sys. v. Alvarez, 179 A.3d 824, 830 (Del. 2018).

198. *Id.* at 831.

199. *Id.*

200. *Id.* at 830–31.

201. *Id.* at 832–33.

202. *Id.* at 833.

203. *See id.* at 855.

weaker claim in federal court to move forward, fail, and end litigation on the matter. Because delays in the Section 220 proceeding were so detrimental to the stockholders' derivative claims, scholars have urged the Delaware legislature to update the inspection process.<sup>204</sup>

## 2. The Response: Expanding Delaware Courts

As the docket of the Court of Chancery continues to grow, Delaware has made efforts to expand its judiciary. The court now includes two masters in chancery, similar to magistrates.<sup>205</sup> Originally, the role was dedicated to address the court's noncorporate docket,<sup>206</sup> allowing the chancellor and vice chancellors to focus more of their attention on those matters. Today, the role has expanded, and masters in chancery frequently adjudicate books and records disputes.<sup>207</sup> While this development, in theory, would help alleviate the burdens of increased Section 220 filings, it creates problems of its own. Under court rules, masters in chancery cannot issue a final disposition in a case; rather, masters first issue a "draft report,"<sup>208</sup> give parties time to take and brief "exceptions,"<sup>209</sup> and then consider and incorporate those exceptions into a "final report."<sup>210</sup> Once this time-consuming process is complete, the final report is subject to de novo review by the chancellor or one of the vice chancellors.<sup>211</sup> Masters in chancery, much like federal magistrates, play an indispensable role in the court's functioning. However, these structural hurdles arguably slow down the "summary proceedings"<sup>212</sup> of Section 220 litigation.

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204. See Cox, Martin & Thomas, *supra* note 168, at 8, 15.

205. Parsons & Slight, *supra* note 98.

206. See *id.*; see also Press Release, Delaware Court of Chancery, The Court of Chancery Announces a New Master in Chancery (Mar. 2, 2016), <https://courts.delaware.gov/forms/download.aspx?id=85108> [<https://perma.cc/QFA3-SMEU>] ("The Masters adjudicate cases assigned to them by the [c]ourt and play an important administrative role in ensuring that the [c]ourt handles its case load in a timely manner, particularly in the sensitive areas of trusts and estates and guardianships.").

207. See, e.g., Barnes v. Sprouts Farmers Mkt., Inc., C.A. No. 2017-0735-MTZ, 2018 WL 3471351, at \*1 (Del. Ch. July 18, 2018) (then master Zurn); Quantum Tech. Partners IV, L.P. v. Ploom, Inc., C.A. No. 9054-ML, 2014 WL 2156622, at \*1 (Del. Ch. May 14, 2014) (then master LeGrow).

208. See DEL. CT. CH. R. 144(b). A "master's draft report" is a preliminary opinion issued by the master after the parties have argued their positions (and sometimes after a trial or hearing).

209. See *id.* 144(c). After a draft report has been issued, the parties may take "exception" to it and petition the master to reconsider.

210. See *id.* 144(b). A "master's final report" incorporates any exceptions the parties have taken and is the opinion that is ultimately reviewed by the chancellor or a vice chancellor.

211. See *id.* 144(a).

212. Grimes v. Donald, 673 A.2d 1207, 1216 n.11 (Del. 1996).

Beyond the creation of the masters in chancery, the Delaware legislature has also acted in other ways to address the court's expanding docket. First was the creation of the Complex Commercial Litigation Division (CCLD) of the Delaware Superior Court, the state trial court of general jurisdiction, in 2010.<sup>213</sup> This expansion, however useful, does little to address the groundswell in Section 220 litigation, as the Court of Chancery maintains exclusive jurisdiction over those matters.<sup>214</sup> Perhaps more helpful have been the expansions of the Court of Chancery itself. In 1984, a third vice chancellorship was created, and a fourth was added shortly thereafter in 1989.<sup>215</sup> The court's membership remained at five until 2018, when two new vice chancellorships were created.<sup>216</sup> The growing role of masters in chancery seems to have been recognized in these appointments: Vice Chancellor Glasscock (appointed in 2011) and Vice Chancellor Zurn (appointed in 2018) both formerly held the position.<sup>217</sup>

#### *D. Inspection of Electronic Records*

##### 1. Trends in Corporate Record Keeping

It is certainly no secret that the world—Delaware corporations included—is increasingly moving away from printed documents and into electronic storage and communication.<sup>218</sup> Regulatory requirements,<sup>219</sup> increased use of data,<sup>220</sup> and even the proliferation of

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213. *Complex Commercial Litigation Division (CCLD)*, DEL. CTS., <https://courts.delaware.gov/superior/complex.aspx> [<https://perma.cc/D23Q-LSZS>] (last visited Feb. 18, 2020).

214. DEL. CODE ANN. tit. 8, § 220(c) (2019). Most other state courts read the exclusive jurisdiction provision to mean that only the Delaware Court of Chancery has subject matter jurisdiction over Section 220 actions. See Matthew D. Stachel, *Understanding and Mitigating the Risks Involved When Stockholder Books and Records Actions Are Asserted Outside of Delaware*, A.B.A.: BUS. L. TODAY (July 22, 2014), [https://www.americanbar.org/groups/business\\_law/publications/blt/2014/07/03\\_stachel/](https://www.americanbar.org/groups/business_law/publications/blt/2014/07/03_stachel/) [<https://perma.cc/AG2T-YLWC>].

215. Quillen & Hanrahan, *supra* note 107.

216. See *Governor Carney Announces Two Nominations to Court of Chancery*, DELAWARE.GOV (Sept. 20, 2018), <https://news.delaware.gov/2018/09/20/governor-carney-announces-two-nominations-court-chancery/> [<https://perma.cc/2TFH-3KPB>].

217. *Judicial Officers*, *supra* note 112. Vice Chancellor Zurn's service as a master in chancery was cited by Governor Carney as a motivating factor behind her appointment. See Tom McParland, *Del. Gov. Names 2 Women for New Chancery Seats as Business Court Expands*, DEL. L. WKLY. (Sept. 21, 2018, 4:39 PM), <https://www.law.com/delawarelawweekly/2018/09/21/del-gov-names-2-women-named-for-new-chancery-seats-as-business-court-expands/> [<https://perma.cc/HZ2H-3Y56>].

218. See Pileggi I, *supra* note 81, at 165.

219. See 17 C.F.R. § 240.17a-1(a) (2019).

220. See Muhammad Obeidat et al., *Business Intelligence Technology, Applications, and Trends*, 11 INT'L MGMT. REV., Sept. 2015, at 47, 47–48.

email<sup>221</sup> mean that corporations now have more ESI than ever. According to some scholars, over 90 percent of corporate books and records are now electronically stored.<sup>222</sup> As a result, inspecting a company's "records" rarely involves any paper—and a company's "books" can no longer be found simply by looking on the shelf. This presents new challenges for stockholders looking to get ahold of these documents.

## 2. Can Electronic Records Be Inspected?

Delaware courts have acknowledged that this shift has a tremendous impact on Section 220 litigation, most directly in *Amalgamated Bank v. Yahoo!*.<sup>223</sup> In this (surprisingly recent) case, the defendant corporation argued that electronic documents were "beyond the scope of Section 220 because the statute does not mention 'electronically stored information.'"<sup>224</sup> Though this contention seems absurd, given the aforementioned realities of corporate record keeping, it was the subject of considerable discussion among scholars prior to the case.<sup>225</sup> Vice Chancellor Laster was quick to strike down Yahoo!'s argument, making it clear that the form of a record, electronic or otherwise, has no impact on whether a stockholder is entitled to inspect it under Section 220.<sup>226</sup> Of course, as the court acknowledged, this was not the first case when a stockholder plaintiff sought (and was granted) access to ESI in a Section 220 action.<sup>227</sup> But *Yahoo!* is significant in its acknowledgement that Delaware corporate law must evolve to meet the current realities of corporate behavior.<sup>228</sup>

As others have previously observed,<sup>229</sup> the Court of Chancery has been reluctant to allow shareholders to inspect emails as part of a Section 220 proceeding. Indeed, Vice Chancellor Lamb told parties in a 2006 case<sup>230</sup> that "[it is v]ery unlikely that—unless some other court

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221. See *The Sedona Principles*, *supra* note 47, at 207.

222. Pileggi I, *supra* note 81, at 165.

223. *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 791 (Del. Ch. 2016).

224. *Id.* Note that while the text of Section 220 does not specifically mention electronic records, other portions of the Delaware General Corporation Law have been amended to acknowledge this trend and include ESI in the definition of "records." See DEL. CODE ANN. tit. 8, § 224 (2017).

225. *E.g.*, Pileggi I, *supra* note 81, at 165.

226. *Yahoo!*, 132 A.3d at 792.

227. *Id.* at 792–93.

228. See *id.* at 792.

229. See Pileggi I, *supra* note 81, at 173.

230. *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156 (Del. Ch. 2006), *aff'd sub nom.* *Highland Equity Fund, L.P. v. Motient Corp.*, 922 A.2d 415 (Del. 2007).

tells me I have to—that I’m going to make Delaware corporations start searching their e-mail systems in response to 220 requests.”<sup>231</sup> In 2012, practitioners noted that while the Court of Chancery had ordered production of emails in books and records actions, this area of the law was still somewhat ambiguous.<sup>232</sup>

This changed in 2019 when, in *KT4 Partners LLC v. Palantir Technologies Inc.*,<sup>233</sup> the Delaware Supreme Court finally addressed the issue head-on. It held that the Court of Chancery “abused its discretion by denying wholesale [plaintiff]’s request to inspect emails” as part of its Section 220 inquiry.<sup>234</sup> Though the court noted that traditional corporate records (such as “board minutes, resolutions, and official letters”) may satisfy many inspection requests, “informal electronic communications” are available if a company conducts its formal business through these media.<sup>235</sup> This holding has the potential to significantly alter the scope of documents subject to stockholder inspection. In a situation where a corporation has chosen to use email to conduct its formal business, an extensive search may be necessary to find the responsive documents. This would likely contribute to the trends discussed above: increased time and court involvement becoming necessary to resolve an otherwise “summary” proceeding.<sup>236</sup>

The Court of Chancery continues to acknowledge the expanding role of ESI in books and records litigation, ordering collection and production of emails, text messages, and other electronic communication.<sup>237</sup> Electronic documents, once thought to be inaccessible via books and records demands, are now the norm. There must now be a new question going forward: How will the court manage those productions? Section 220 cases are increasingly common, time-consuming, and complex;<sup>238</sup> without change, they will not be the “streamlined, summary proceedings”<sup>239</sup> promised by Delaware law.

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231. Pileggi I, *supra* note 81, at 173.

232. *See id.* at 164.

233. *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 765 (Del. 2019).

234. *Id.* at 742.

235. *Id.*

236. *See supra* Section II.C.

237. *See, e.g., Schnatter v. Papa John’s Int’l, Inc.*, C.A. No. 2018-0542-AGB, 2019 WL 194634, at \*16 (Del. Ch. Jan. 15, 2019).

238. *See supra* Section II.C.

239. *United Techs. Corp. v. Treppel*, 109 A.3d 553, 561 (Del. 2014).

## III. POSSIBLE E-DISCOVERY APPLICATIONS TO SECTION 220 LITIGATION

Modern books and records litigation has become burdensome to all parties. This Part proposes that Delaware courts leverage the ever-increasing capacities of AI technology to streamline the inspection process. It begins with a basic framework for using predictive coding to manage document production, as well as potential use cases for this technology. This is followed by commentary on a 2012 case, wherein the Court of Chancery applied the same technology to manage complex document production in the discovery context.

*A. Using E-discovery and Predictive Coding to Aid Litigation*

As books and records litigation becomes increasingly common and complex, the Delaware legislature has responded by adding more judges to help lighten the load.<sup>240</sup> However, artificial intelligence can also be employed to aid judges and litigants. The inherent tension between the requirement of “rifled precision”<sup>241</sup> and the promise of a “summary proceeding”<sup>242</sup> invites the assistance of technology-aided document review. To this end, the Court of Chancery should use its broad equitable powers to require the use of e-discovery technology to help manage document production and even potentially to assess which documents may be responsive to a stockholder plaintiff’s books and records demand in the first instance.

## 1. Mechanics

“While the old judicial paradigm was that of judge-as-umpire, judges are now largely conceived of as being managers of the judicial process, and it appears that judges have largely embraced such a role.”<sup>243</sup> Rather than spending time and resources evaluating whether certain documents are responsive to a plaintiff’s demand, artificial intelligence can quickly sort documents, using techniques like “clustering.”<sup>244</sup> This could help the court preserve the “summary”<sup>245</sup> nature of Section 220 proceedings and instead focus judicial resources

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240. See Jacqueline Karli, *Delaware House Approves Expanding Chancery Court*, WBOC (June 29, 2018, 10:32 AM), <http://www.wboc.com/story/38541105/delaware-house-approves-expanding-chancery-court> [https://perma.cc/H7VP-JRXJ].

241. See *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000).

242. See *Grimes v. Donald*, 673 A.2d 1207, 1216 n.11 (Del. 1996).

243. See *Yablon & Landsman-Roos*, *supra* note 32, at 673.

244. See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259 n.9 (D. Md. 2008).

245. See *Grimes*, 673 A.2d at 1216 n.11.

on the increasingly complex substantive issues that come along with them.

The mechanics of such a process would be fairly straightforward. The court would, using its normal discretion, adjudicate the merits of a plaintiff's "proper purpose," determining whether she is entitled to inspection at all. At this point in the litigation, the court would make a preliminary finding as to what sorts of documents might be responsive to the demand. But rather than bogging itself down in the details, the court could order the parties to use predictive coding to manage the minutia of the document production. Just like in the discovery context, this reduces judicial involvement while still allowing the parties to return to the court if there are problems along the way.

## 2. Potential Use Cases

The Delaware Supreme Court's nascent decision in *KT4*<sup>246</sup> has the potential to alter the scope of books and records productions for years to come. When a company "decides to conduct formal corporate business largely through informal electronic communications," stockholders have the right to inspect those communications to satisfy their Section 220 demand.<sup>247</sup> In such a situation, the court may need to order the production of emails and possibly even text messages. This means that the potential universe of documents could be much larger than in a typical statutory inspection, "present[ing] greater challenges for collection and review."<sup>248</sup> This problem presents a perfect use for predictive coding and e-discovery. Technology-assisted review, which is superior to human-only review, is well equipped to handle ESI.<sup>249</sup> The increased volume of documents in such a case only magnifies these benefits.

Outside of this context, there are also other cases where the use of e-discovery technology could better facilitate "an order circumscribed with rifled precision."<sup>250</sup> This include cases like *Highland*, where the plaintiff demanded forty-seven broad categories of documents,<sup>251</sup> and *Wimbledon*, where the master in chancery ordered production of

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246. *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 765 (Del. 2019).

247. *Id.* at 742.

248. *Schnatter v. Papa John's Int'l, Inc.*, C.A. No. 2018-0542-AGB, 2019 WL 194634, at \*16 (Del. Ch. Jan. 15, 2019).

249. *See* Grossman & Cormack, *supra* note 69, at 48.

250. *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000).

251. *See* *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 160 (Del. Ch. 2006), *aff'd sub nom.* *Highland Equity Fund, L.P. v. Motient Corp.*, 922 A.2d 415 (Del. 2007).

documents that the defendant later asserted did not exist.<sup>252</sup> As demonstrated below, the Court of Chancery has the discretion to distinguish between those cases where enhanced technology would be helpful and those where it would be burdensome.

*B. Case Study: EORHB, Inc. v. HOA Holdings LLC*

In 2012, the Court of Chancery considered a motion to dismiss in *EORHB, Inc. v. HOA Holdings LLC*,<sup>253</sup> a corporate dispute relating to the 2011 sale of the Hooters restaurant chain. The court denied the motion, which meant the parties would proceed into discovery.<sup>254</sup> To help manage the scope of document production, Vice Chancellor Laster proposed a novel solution, ordering the parties to use predictive coding software.<sup>255</sup> This decision underscores not only the Court of Chancery's creativity in crafting remedies but also as its familiarity with e-discovery and predictive coding. It also shows that Delaware is on the cutting edge: scholars have noted that this was the first time a court ordered the use of predictive coding *sua sponte*.<sup>256</sup>

As discussed above, similar technology could be used to streamline document production in the books and records context. However, two factors distinguish this case and such a proposal. First, and most notably, Section 220 litigation is *not* discovery.<sup>257</sup> As the Court of Chancery has noted, plaintiff-stockholders are entitled to a narrower scope of documents in a books and records demand than they are during discovery.<sup>258</sup> Thus, the volume of the documents produced may not justify the costs of the process in all cases. But, as noted above, recent years have seen increased complexity in Section 220 demands<sup>259</sup> and decreasing costs of e-discovery technology.<sup>260</sup> These trends suggest that a similar model could be reasonably applied in the books and records context.

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252. See *supra* note 147 and accompanying text.

253. Transcript of Motion for Partial Summary Judgment, Motion to Dismiss Counterclaim, and Ruling of the Court at 4, *EORHB, Inc. v. HOA Holdings LLC*, C.A. No. 7409-VCL, 2012 WL 4896670 (Del. Ch. Oct. 15, 2012) [hereinafter *HOA Holdings Transcript*].

254. *Id.* at 65.

255. *Id.* at 66.

256. Yablon & Landsman-Roos, *supra* note 32, at 662.

257. See *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 789 (Del. Ch. 2016).

258. *Id.*

259. See *supra* Section II.C.

260. See *supra* Section I.B.



Second, Vice Chancellor Laster noted that the litigation in *HOA Holdings* was nonexpedited,<sup>261</sup> suggesting that court-ordered predictive coding-based discovery would be unnecessarily time-consuming. Perhaps this was true in 2012,<sup>262</sup> but it certainly is not today. In fact, computer-driven document review, particularly when aided by predictive coding, is significantly faster and more accurate than manual review by humans.<sup>263</sup> This suggests that even expedited litigation—like the summary proceedings<sup>264</sup> of Section 220—could benefit from this type of document review.

### C. Challenges

The implementation of e-discovery technology creates some difficulties. As a primary matter, developing an AI model requires large amounts of data.<sup>265</sup> This is expensive,<sup>266</sup> making such models initially burdensome to adopt. There are, of course, potential legal and policy hurdles to this innovation as well.<sup>267</sup> These issues may go away, or at least become less concerning, as technology advances and e-discovery technology becomes more widely available. Delaware courts are already on the cutting edge of these developments.<sup>268</sup>

The biggest weakness of this proposal is no doubt that it does not solve all the problems plaguing books and records litigation. Corporate defendants still have strong incentives to delay<sup>269</sup> and appeal court decisions; no doubt they would continue to do so. This Note does not purport to solve this issue. However, the “scope” inquiry, which this

261. HOA Holdings Transcript, *supra* note 253, at 66.

262. It may not have even been true in 2012. See Yablon & Landsman-Roos, *supra* note 32, at 634 (suggesting, in a 2013 article, that predictive coding was able to “review [documents] faster and without many of the dangers of human error”).

263. See generally Barry, *supra* note 26.

264. Grimes v. Donald, 673 A.2d 1207, 1216 n.11 (Del. 1996).

265. See Barry, *supra* note 26, at 356–57.

266. Bernard Marr, *5 Key Artificial Intelligence Predictions for 2018: How Machine Learning Will Change Everything*, FORBES (Dec. 18, 2017, 12:28 AM), <https://www.forbes.com/sites/bernardmarr/2017/12/18/5-key-artificial-intelligence-predictions-for-2018-how-machine-learning-will-change-everything/#55ff654f6545> [https://perma.cc/PDU7-6FDM].

267. This Note does not purport to examine the due process implications of using e-discovery technology to help judges adjudicate cases. Constitutional law scholars have yet to reach a consensus on this issue. See Caroline Spiezio, *Due Process and Efficiency: AI Has Complicated Legal Systems in US, China*, AM. LAW. (July 2, 2018), <https://www.law.com/international/2018/07/02/due-process-and-efficiency-ai-has-complicated-legal-systems-in-u-s-china-396-4525/> [https://perma.cc/3MJQ-4JPE].

268. See *supra* Section II.A.

269. See Cox, Martin & Thomas, *supra* note 168, at 7 n.14.

Note does address, is still an important fight—just ask our old friend Elon Musk. In a recent case involving “Musk’s company”<sup>270</sup>—Tesla—a difficult issue involving the scope of inspection arose.<sup>271</sup> Because of the complexities of the scope problem, the court decided to consider that issue before hearing argument as to whether the plaintiff had a proper purpose.<sup>272</sup> If AI technology can be leveraged to improve the scope inquiry, these battles can be streamlined.

This Note is not meant to suggest that an AI aide for books and records adjudication is near on the horizon. It is not. The public appetite for “robots” in the courtroom is low,<sup>273</sup> and the technology that would be necessary is not here yet. The law, like so many things, is slow to change, and the above-described proposal is no exception. However, the unique set of factors herein described—a cutting-edge court,<sup>274</sup> an ever-growing Section 220 docket,<sup>275</sup> and the promise of growing technological capabilities<sup>276</sup>—demonstrate both the need for such change and the capacity of Delaware courts to embrace it. As hockey great Wayne Gretzky famously quipped, “[S]kate where the puck’s going, not where it’s been.”<sup>277</sup> AI is the future, and lawyers would be wise to get there as fast as our skates can take us.

#### IV. CONCLUSION

Elon Musk is good for lawyers. His recent litigation in the Delaware Court of Chancery underscores the importance of Section 220 as a tool for stockholder plaintiffs. And while his fear of the AI “overlord” is likely premature, it is no secret that machine learning is the future. This technology can be usefully applied in books and

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270. See *In re Tesla Motors, Inc. Stockholder Litig.*, C.A. No. 12711-VCS, 2018 WL 1560293, at \*10 (Del. Ch. Mar. 28, 2018).

271. See Transcript of Teleconference Re Plaintiff’s Motion to Expedite and Defendant’s Motion to Stay and the Court’s Rulings at 31, *Gharrity v. Tesla, Inc.*, C.A. No. 2019-0217-JRS (Del. Ch. July 19, 2019) (“To use Section 220 parlance, I have questions whether or not additional documents are necessary, essential, and sufficient for the plaintiff’s stated purpose. So we’ve got a legitimate issue here regarding scope. And that’s an issue that’s going to have to be resolved at some point or another, and I’d just as soon resolve it now. So under Chancery Rule 42 and the [c]ourt’s inherent authority to manage the presentation of issues for decision, I’m going to take up the scope issue first, and I’m going to take it up now.”).

272. See *id.*

273. See Kopp, *supra* note 82.

274. See *supra* Section II.B.

275. See *supra* Section II.C.

276. See *supra* Section I.B.

277. David Staples, *The Great Quote from the Great One, Wayne Gretzky.*, EDMONTON J. (Apr. 28, 2009), <https://edmontonjournal.com/sports/hockey/nhl/cult-of-hockey/the-great-quote-from-the-great-one-wayne-gretzky> [<https://perma.cc/ZYH5-EGB7>].

records cases. The “next big thing” in chancery litigation has become time-consuming for both parties and the court; AI presents an opportunity to solve that problem. As technology improves, innovative approaches to document management, such as Vice Chancellor Laster’s in *HOA Holdings*, should be embraced. The framework developed in this Note hopefully provides a starting point as Delaware moves into the future.

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\* JD Candidate, Vanderbilt University Law School, 2020; BS, Monmouth University, 2017. I must begin ditching the third person; this Author detests it. I am eternally grateful to my family—Kirk, Susan, Jacob, and Benjamin Manning—for their boundless love and support in all matters, big and small. Neither this Note nor any other accomplishment would be possible without their sacrifices. There are countless others whose valuable advice and support deserve recognition. A few that will fit in this space: Professor J.B. Ruhl, Professor Randall Thomas, Marc Jenkins, and my brothers at Vanderbilt Law School. Many thanks to the editorial board and staff of the *Vanderbilt Journal of Entertainment and Technology Law* for lending their time and talents to this publication.

I will be serving as a law clerk in the Delaware Court of Chancery from 2020 to 2022. The views expressed here are mine alone and do not reflect those of that court or any of its members.