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RECENT DEVELOPMENTS REGARDING BOOKS AND RECORDS DEMANDS TO MUTUAL FUNDS

Shareholders of mutual funds have with increasing frequency made demands to inspect their fund's books and records, demands that typically are opposed by fund directors and management. In this article, the authors address such conflicts. After an introduction, they discuss, in detail, shareholders' inspection rights to fund records under the laws of Delaware and Massachusetts, and the cases decided under each. After each discussion, they give key takeaways and observations. They close with a comparison of inspection rights under the laws of the two states.

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Over the last several years, shareholders considering potential claims against mutual fund directors or fund service providers have been making demands to inspect the funds' books and records with much greater frequency. Plaintiffs' lawyers have used these inspection rights to determine whether a meritorious claim exists, and also to bolster the allegations that they make in initial pleadings in an effort to increase their chances of surviving an initial motion to dismiss. Many of these so-called books and records demands have ended in a compromise over the scope of records to be turned over to the demanding shareholders. Some of these books and records requests have been litigated and inevitably more of these inspection demands will find their way into the courts. This article explores many of the issues that may guide the decision of defense counsel in deciding the proper scope of a records demand, and what defenses may be asserted in court to avoid an overly broad and burdensome request.

I. GOVERNANCE, STRUCTURE, ORGANIZATION, AND GENERAL OBLIGATIONS OF MUTUAL FUNDS

In the United States, investment companies can be open-end mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts.¹ Mutual funds are a nearly \$30 trillion industry, a fact not lost on the plaintiffs' bar.² Certain federal laws and regulations govern mutual funds, including federal securities laws.³

¹ Investment Company Institute, *2021 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry* (61st ed.) at 40, 283.

² *Id.* at 40.

³ *Id.* at 282 (listing four principal federal laws governing investment companies — namely, (1) Investment Company Act of 1940; (2) Investment Advisers Act of 1940; (3) Securities Exchange Act of 1934; and (4) Securities Act of 1933).

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FORTHCOMING

• RECENT UNITED STATES SANCTIONS ON RUSSIA

The primary federal statute, the Investment Company Act of 1940 (“ICA”), provides a private right of action under Section 36(b) for fund shareholders to assert claims for breach of fiduciary duty.⁴ Section 15(c) of the ICA sets forth the role of independent directors of mutual funds in reviewing and approving investment advisory contracts, and other contracts that establish the fees charged to fund shareholders.⁵ Both Sections 15(c) and 36(b) were enacted as part of the 1970 amendments to the ICA. Even before 1970, the mutual fund industry has faced litigation, including shareholder derivative actions.⁶

Often times, litigation involves mutual funds organized as Massachusetts business trusts or Delaware statutory trusts.⁷ Mutual funds are typically created as corporations or business trusts under state laws.⁸ Mutual funds are governed by the state laws pursuant to which the funds are organized. Massachusetts business trusts are governed by Chapter 182 of the Massachusetts

General Law, and Delaware statutory trusts are governed by the Delaware Statutory Trust Act.⁹

Mutual funds are also subject to extensive laws and regulations addressing disclosure obligations, some of which apply to investment advisors of the funds.¹⁰ Under the Investment Advisers Act of 1940, investment advisors must pay attention to certain recordkeeping, custodial, reporting, and other regulatory responsibilities.¹¹ Generally, shareholders receive published information regarding the fund’s finances, operations, and governance, including financial statements.¹² Such information is available from brokers and other sources, including the fund’s website and the Securities and Exchange Commission’s EDGAR database.¹³ To obtain additional information, some shareholders may seek to inspect the records of mutual funds organized as trusts pursuant to rights that may exist under state law.¹⁴

⁴ 15 U.S.C. § 80a-35(b).

⁵ See, e.g., 15 U.S.C. § 80a-15(c).

⁶ See, e.g., Sean M. Murphy, Esq., et al., *Judicial Deference to Mutual Fund Boards: Lessons from Post-Jones Excessive Fee Litigation*, Review of Securities & Commodities Regulation (vol. 53, no. 22, Dec. 30, 2020); Sean M. Murphy, Esq., et al., *Mutual Funds and Securities Class Actions: A Square Peg in a Round Hole*, Review of Securities & Commodities Regulation (vol. 51, no. 12, June 20, 2018).

⁷ See, e.g., *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1057 (9th Cir. 2015), *as amended on denial of reh’g and reh’g en banc* (Apr. 28, 2015) (holding that, under Massachusetts law, a shareholder of a mutual fund organized as a Massachusetts business trust could sue the trustees directly for breach of fiduciary duty to shareholders); *Redus-Tarchis v. New York Life Inv. Mgmt. LLC*, No. CV 14-7991, 2015 WL 6525894, at *1 (D.N.J. Oct. 28, 2015) (denying motion to dismiss against investment adviser and manager of two mutual funds organized as a series within a Massachusetts business trust and mutual funds organized as a series within a Delaware statutory trust).

⁸ Investment Company Institute, *supra* note 1, at 284.

⁹ See, e.g., Mass. Gen. Laws ch. 182, § 1 (defining a Massachusetts business trust); 12 Del. C. § 3801(i) (defining a Delaware statutory trust).

¹⁰ See, e.g., Investment Company Institute, *supra* note 1, at 96; *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984) (explaining that “an investment company is typically created and managed by a pre-existing external organization known as an investment adviser” and “the adviser generally supervises the daily operation of the fund and often selects affiliated persons to serve on the company’s board of directors”).

¹¹ Investment Company Institute, *supra* note 1, at 282.

¹² U.S. Securities & Exchange Commission, Office of Investor Educ. & Advocacy, *Mutual Funds and ETFs: A Guide for Investors* at 30, 37-40, available at <https://www.sec.gov/investor/pubs/sec-guide-to-mutual-funds.pdf>.

¹³ *Id.* at 40.

¹⁴ For purposes of this article, the term “shareholder” shall include beneficial owners or investors of trusts and investment companies. The term “shareholder” is used as a generic term, but it may not apply to all trusts.

II. RIGHTS TO INSPECT A MUTUAL FUND'S BOOKS AND RECORDS

Recently, the plaintiffs' bar has been active in utilizing a fund shareholder's right to inspect the records of funds in an effort to determine if there is a basis to sue the fund's directors or service providers, or to better articulate the basis for a potential cause of action in an initial complaint. These demands typically implicate a shareholder's right under the laws of Delaware and Massachusetts,¹⁵ including Chapter 156D of the Massachusetts General Law, the Delaware General Corporation Law, or the Delaware Statutory Trust Act.¹⁶ A shareholder also may look to specific provisions in the trust's bylaws, declaration of trust, or governing written instrument that can grant inspection rights. For example, the Massachusetts Superior Court interpreted the master trust agreement of a Massachusetts business trust, and found that the agreement granted shareholder inspection rights to the same extent as is permitted stockholders of a Massachusetts business corporation because the declaration incorporated by reference the corporate inspection provision.¹⁷ Reaching the same conclusion, the Delaware Court of Chancery held that a trust's beneficial owner had a contractual right to inspect the books and records of the trust because the trust agreement expressly stated that the beneficial owners were entitled to inspect, examine, and copy the trust's books and records.¹⁸ Finally, in addition to statutory and contractual inspection rights, Massachusetts courts have recognized the common law right to inspection

traditionally afforded to shareholders of corporations.¹⁹ Similarly, the Delaware Supreme Court has acknowledged that the common law right of inspection is preserved.²⁰

III. SHAREHOLDERS' RIGHTS TO INSPECT BOOKS AND RECORDS UNDER DELAWARE LAW

Shareholders of Delaware statutory trusts may seek to enforce their inspection rights under Section 3819 of the Delaware Statutory Trust Act.²¹ Because the case law for Section 220 of the Delaware General Corporation Law is well-developed, Delaware courts have cited to Section 220 cases in other alternative entity contexts.²² And litigants have relied on Section 220 in construing the parameters of inspection under Section 3819.²³ As such, the language of Section 220 and the jurisprudence in the Section 220 context may offer guidance in Section 3819 enforcement actions.

A. Corporate Books and Records Under Section 220

The right of shareholders to seek corporate books and records is well-established in Delaware corporate law.

¹⁵ See, e.g., Compl. at ¶¶ 33-35, *Friess Associates LLC 401(k) v. AMG Funds I*, No. 21-0951, 2021 WL 1795061 (Mass. Super. Ct. Apr. 23, 2021) (shareholder of investment company organized as a Massachusetts business trust requested, among other things, various categories of books and records, including shareholders' lists and board materials to investigate possible wrongdoing or mismanagement by the board under Massachusetts law); Compl. at 1, *Rowan v. Infinity Q Capital Mgmt. LLC, et al.*, No. 2022-0176-MTZ (Del. Ch. Feb. 28, 2022) (asserting plaintiff obtained records through multiple inspection demands under § 3819 of the Delaware Statutory Trust Act).

¹⁶ See, e.g., Mass. Gen. Laws ch. 156D, § 16.02; 8 Del. C. § 220; 12 Del. C. § 3819.

¹⁷ Mem. & Order at 6-7, *Gallant v. SSgA Funds*, No. 12-03192-BLS1 (Mass. Super. Ct. Mar. 21, 2013).

¹⁸ *Grand Acquisition, LLC v. Passco Indian Springs DST*, 145 A.3d 990, 996, 999 (Del. Ch. 2016), as revised (Sept. 7, 2016), *aff'd*, 158 A.3d 449 (Del. 2017).

¹⁹ See, e.g., *Gallant* at 10-11; Richard W. Southgate, et al., *Shareholder's Common Law Right of Inspection*, Mass. Corp. L. & Prac. § 16.3 (collecting cases).

²⁰ *State v. Penn-Beaver Oil Co.*, 143 A. 257, 260 (Del. 1926) (en banc) ("Because the Legislature saw fit to expressly give stockholders the right to examine certain records of the company, it cannot be inferred that the stockholders' common-law right to examine any other records, under proper conditions and for a proper purpose, was thereby taken away.").

²¹ 12 Del. C. § 3819.

²² *Sanders v. Ohmite Holdings, LLC*, 17 A.3d 1186, 1194 (Del. Ch.) (explaining that "the concepts [of the necessary-and-essential standards under § 18-305 for LLCs and § 220 for corporations] as functionally synonymous for purposes of [§] 220"), judgment entered *sub nom. Sanders v. Ohmite Holding, LLC* (Del. Ch. 2011).

²³ See, e.g., Def.'s Opening Brief in Supp. of Mot. for Summ. J. at 21 n.3, *Grand Acquisition, LLC v. Passco Indian Springs DST*, 2016 WL 3232847 (Del. Ch. June 8, 2016) (arguing that § 3819's purpose requirement should be construed consistent with Delaware decisions interpreting § 220's "proper purpose" requirement); Opening Brief in Supp. of Def.'s Mot. to Dismiss, at 8 n.5, *Krasner v. Third Ave. Trust*, 2016 WL 1608735 (Del. Ch. Apr. 15, 2016) (noting that "analogous cases and this Court's jurisprudence under 8 [Del. C.] § 220 should control the narrow issue" of whether there was a proper purpose under § 3819).

In general, Section 220 gives a shareholder the right to inspect and copy corporate records during the usual business hours. Section 220(b) provides, in relevant part, that a shareholder “shall, upon written demand under oath stating the purpose thereof, have the right . . . to inspect for any proper purpose, and to make copies and extracts from . . . [t]he corporation’s stock ledger, a list of its stockholders, and its other books and records.”²⁴ It further states that “[a] proper purpose shall mean a purpose reasonably related to such person’s interest as a stockholder.”²⁵ Some of the basic requirements for a Section 220 demand seem straightforward: (1) it must be made in writing and under oath and (2) it must state a “proper purpose.” But a shareholder will not always succeed in a Section 220 proceeding because there are significant hurdles in accessing corporate books and records.²⁶

Plaintiffs must first establish that they were shareholders at the time the Section 220 action was filed. Failure to do so will result in dismissal for lack of standing.²⁷ Next, the Section 220 demand must state a “proper purpose.” Delaware courts will only allow inspection of documents where the demand is narrowly tailored to a proper purpose. Section 220 is limited to books and records that are “necessary and essential” to achieve the stated purpose.²⁸ Where the demand’s true purpose is a sham, there is an improper purpose.²⁹

²⁴ 8 Del. C. § 220(b).

²⁵ *Id.*

²⁶ A shareholder may file an action in the Delaware Court of Chancery to compel inspection if a corporation refuses to permit compliance with the demand within five (5) business days. 8 Del. C. § 220(c).

²⁷ See, e.g., *Weingarten v. Monster Worldwide, Inc.*, No. CV 12931-VCG, 2017 WL 752179, at *1 (Del. Ch. Feb. 27, 2017) (dismissing a § 220 action where a former stockholder was squeezed out in a merger, and the merger cancelled the plaintiff’s stock and converted it into a right to receive cash resulting in him no longer being a stockholder after merger, thereby lacking standing to bring an action); *Walker v. Cabo Verde Cap., Inc.*, No. CV 11696-MZ, 2017 WL 2491516, at *3 (Del. Ch. June 8, 2017) (granting motion to dismiss where plaintiff did not establish he was a stockholder at the time the action was filed).

²⁸ *Norfolk Cty. Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, No. CIV.A. 3443-VCP, 2009 WL 353746, at *9 (Del. Ch.), *aff’d*, 977 A.2d 899 (Del. 2009).

²⁹ *Carpenter v. Texas Air Corp.*, No. 7976, 1985 WL 11548, at *3 (Del. Ch. Apr. 18, 1985) (denying demand for inspection as

Delaware courts have recognized that a proper purpose can be investigating potential wrongdoing, fraud, mismanagement, abuse, and breach of fiduciary duty committed by the company’s board or management.³⁰ The shareholder bears the burden of demonstrating a “credible basis” for suspecting wrongdoing or mismanagement.³¹ Nonetheless, the “credible basis” threshold has been found to be “met where wrongdoing is merely *possible* — it need not be proven.”³²

Despite the seemingly low credible basis threshold, other hurdles can present issues for shareholders in a Section 220 proceeding. Section 220 does not “open the door to the wide ranging discovery that would be available in support of litigation.”³³ Because fishing expeditions are impermissible, a court may limit the scope of a demand if the stated purpose is an attempt to obtain documents for a fishing expedition.³⁴ A

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“merely a sham” and improper where the plaintiffs’ true intent was to exert economic pressure on the company).

³⁰ See, e.g., *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 742 (Del. 2019) (“Section 220 entitles a stockholder to inspect all books and records that are necessary to accomplish that stockholder’s proper purpose, and on our review of the record below, KT4 made a sufficient showing that e-mails were necessary to investigate potential wrongdoing related to the Investors’ Rights Agreement amendments.”); *Seinfeld v. Verizon Commc’ns, Inc.*, 909 A.2d 117, 121 (Del. 2006) (“It is well established that a stockholder’s desire to investigate wrongdoing or mismanagement is a ‘proper purpose.’”); *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 115 (Del. 2002) (“[W]here a [section] 220 claim is based on alleged corporate wrongdoing, and assuming the allegation is meritorious, the stockholder should be given enough information to effectively address the problem, either through derivative litigation or through direct contact with the corporation’s directors and/or stockholders.”).

³¹ *Thomas & Betts Corp. v. Leviton Mfg. Co. Inc.*, 681 A.2d 1026, 1031 (Del. 1996) (“[A] stockholder must present some credible basis from which the Court can infer that mismanagement, waste, or wrongdoing may have occurred.”).

³² *Jacob v. Bloom Energy Corp.*, No. CV 2020-0023-JRS, 2021 WL 733438, at *7 (Del. Ch. Feb. 25, 2021) (granting demand for inspection but narrowing scope of requested documents).

³³ *Saito*, 806 A.2d at 114.

³⁴ *Seinfeld*, 909 A.2d at 118, 122 (affirming denial of § 220 demand where stockholder did not meet his evidentiary burden to demonstrate a proper purpose; explaining that investigations that are “indiscriminate fishing expeditions” are not allowed).

shareholder's demand must be specific, discrete, "with rifled precision, of the documents sought."³⁵ Given these limitations, a Delaware corporation can narrow the scope of a demand or refuse to produce certain documents.

If a shareholder satisfies Section 220's requirements and asserts a proper purpose, the scope of the demand becomes the central issue. Trial courts have considerable discretion on the scope of a Section 220 demand.³⁶ As recognized by the Delaware Supreme Court, Section 220 confers "broad discretion to the Court of Chancery to condition a books and records inspection: 'The [c]ourt may, in its discretion, prescribe 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.'"³⁷ As a result, "Delaware courts have viewed the determination of whether to impose a condition or limitation on an inspection as inherently case-by-case and 'fact specific.'"³⁸

B. Records Under Section 3819 of the Delaware Statutory Trust Act

Subject to the statutory trust's governing instrument, Section 3819 grants shareholders the right to inspect specified records.³⁹ Section 3819(a) provides that a shareholder has a "right . . . to obtain from the statutory trust from time to time upon reasonable demand for any purpose reasonably related to the beneficial owner's interest as a beneficial owner of the statutory trust" the following four specific categories of documents:

- A copy of the governing instrument and certificate of trust and all amendments thereto, together with copies of any written powers of attorney pursuant to which the governing instrument and any certificate and any amendments thereto have been executed;

- A current list of the name and last known business, residence, or mailing address of each beneficial owner and trustee;
- Information regarding the business and financial condition of the statutory trust; and
- Other information regarding the affairs of the statutory trust as is *just and reasonable*.⁴⁰

The inspection right is "subject to such *reasonable standards* (including standards governing what information and documents are to be furnished at what time and location and at whose expense) as may be established by the trustees or other persons who have authority to manage the business and affairs of the statutory trust."⁴¹ The right is qualified by the terms of Section 3819(c), which expressly states:

The trustees or other persons who have authority to manage the business and affairs of the statutory trust *shall* have the *right to keep confidential* from the beneficial owners, for such period of time as such persons deem reasonable, *any information that such persons reasonably believe to be in the nature of trade secrets or other information the disclosure of which such persons in good faith believe is not in the best interest of the statutory trust or could damage the statutory trust or its business or which the statutory trust is required by law or by agreement with a third party to keep confidential*.⁴²

Section 3819(e) also requires the shareholder's written demand to state the purpose of such demand.⁴³

The few Section 3819 enforcement actions reveal that some difficult questions for Delaware statutory trusts remain unresolved. Delaware courts have not reached the merits of certain issues concerning the scope of Section 3819 demands, and the Delaware Supreme Court has not weighed in on Section 3819.⁴⁴ While

³⁵ *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000) (emphasis added).

³⁶ 8 Del. C. § 220(c).

³⁷ *United Techs. Corp. v. Treppel*, 109 A.3d 553, 557 (Del. 2014) (quoting 8 Del. C. § 220(c)).

³⁸ *Id.* (quoting *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 372 (Del. 2011)).

³⁹ 12 Del. C. § 3819(a)-(c) ("Except to the extent otherwise provided in the governing instrument of a statutory trust . . ."). Section 3819(d) provides that a statutory trust may maintain its records in forms other than paper. *Id.* § 3819(e).

⁴⁰ 12 Del. C. § 3819(a) (emphases added).

⁴¹ *Id.* (emphasis added).

⁴² *Id.* § 3819(c) (emphases added).

⁴³ See, e.g., 12 Del. C. § 3819(e); *Krasner v. Third Ave. Trust*, No. 12113-VCL, 2016 WL 4079454, at *1 (Del. Ch. July 28, 2016).

⁴⁴ Without issuing an opinion or addressing the merits in a Section 3819 case, the Delaware Supreme Court affirmed the judgment of the Delaware Court of Chancery based on the reasons

shareholders have made Section 3819 demands and pursued litigation, parties often resolve the matters without judicial intervention, or reach agreements on the categories of requested documents.⁴⁵ Thus, there is little published case law in the Section 3819 context.

One of the early Section 3819 cases was *Grand Acquisition, LLC v. Passco Indian Springs DST*.⁴⁶ The case — which did not involve a mutual fund — was brought by a beneficial owner of a Delaware statutory trust seeking to enforce its inspection rights under Section 3819 and the trust’s governing instrument. The plaintiff argued that its purpose for inspection of the books and records was to communicate with other owners, discuss the operations, and other matters related to the owner’s investment.⁴⁷ The defendant contended, among other things, that the stated purpose was improper, the information was subject to third-party confidentiality agreements, and the trust’s manager had a good-faith belief that revealing the requested information was not in the trust’s best interests.⁴⁸ In granting the plaintiff’s motion for summary judgment, the Delaware Court of Chancery applied principles from the Delaware Limited Liability Company Act and Delaware Revised Uniform Limited Partnership Act cases treating contractual books and records rights in governing instruments as independent from the relevant default statutory right in the Delaware Statutory Trust Act.⁴⁹

In finding that the same rule should apply in the case of a Delaware statutory trust, the court held that the trust agreement at issue did not include any preconditions or defenses of Section 3819; thus, the beneficial owners had an unconditional right to inspect the books and records.⁵⁰ The trust agreement “provide[d] the Owners

with an unqualified contractual right to the [t]rust’s books and records, which is contrary to Section 3819’s qualified statutory right.”⁵¹ The court found that the owners could inspect the books and records of the trust without complying with Section 3819’s “procedural and proper purpose requirements.”⁵² The court also found that the contractual right to inspect books and records included the ownership records that the owners had identified.⁵³ The court then found that the trust failed to support its improper purpose defense.⁵⁴

Months before the decision in *Grand Acquisition*, the Delaware Court of Chancery issued a short order granting summary judgment in favor of a plaintiff-investor.⁵⁵ In *Krasner v. Third Avenue Trust*, the plaintiff was an investor in the Third Avenue Focused Credit Fund, seeking to inspect the books and records from the trust pursuant to Section 3819.⁵⁶ The Fund was an open-ended mutual fund, which was organized as a series of the Third Avenue Trust — a Delaware statutory trust.⁵⁷ The court found that the trust failed to identify any “meaningful objections” to the investor’s ability to meet Section 3819’s requirements that (1) he was a beneficial owner, (2) the demand was in writing, and (3) the investor stated the purpose of the demand.⁵⁸

The court also found that the plaintiff-investor established as a matter of law that he was entitled to certain categories of documents, including: (1) minutes of the risk committee and the liquidity working group, as well as any reports made to or considered by the risk committee and the liquidity working group regarding the fund’s liquidity issues; (2) documents relating to the departure of individuals, including documents below the level of the board of trustees; (3) an offer to purchase the fund’s illiquid investments; (4) D&O insurance questionnaires, board questionnaires, or similar materials; and (5) materials relating to liquidity and valuation issues that were reviewed by the board of trustees at its meetings relating to liquidity and valuation

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articulated in the trial court’s opinion. *Passco Indian Springs DST v. Grand Acquisition, LLC*, 158 A.3d 449 (Del. 2017).

⁴⁵ See, e.g., Stipulation of Dismissal, *Zuber v. Third Ave. Trust*, No. 12959 (Del. Ch. Jan. 25, 2018); Letter to Court at 1, *Zuber v. Third Ave. Trust*, No. 12959 (Del. Ch. May 5, 2017) (stating that the parties reached an agreement on the scope of the production); Compl., *Zuber v. Third Ave. Trust*, No. 12959, 2017 WL 228282 (Del. Ch. Jan. 17, 2017).

⁴⁶ 145 A.3d 990, 993-94 (Del. Ch. 2016).

⁴⁷ *Id.* at 992.

⁴⁸ *Id.* at 993.

⁴⁹ *Id.* at 994-96.

⁵⁰ *Id.* at 999.

⁵¹ *Id.* at 998.

⁵² *Id.* at 999.

⁵³ *Id.* at 1001.

⁵⁴ *Id.* at 1004.

⁵⁵ *Krasner*, 2016 WL 4079454, at *1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

issues, such as reports on daily trading prices and the reports on fair value pricing.⁵⁹

Following *Krasner*, another plaintiff-shareholder filed a similar complaint against the same statutory trust, Third Avenue Trust.⁶⁰ In *Zuber v. Third Avenue Trust*, the plaintiff sought certain books and records pursuant to Section 3819 in connection with the alleged mismanagement of the fund and other conduct.⁶¹ The plaintiff requested information related to the valuation of the fund, and specifically related to the calculation of the fund's net asset value ("NAV"), including its constituent assets, in order for the plaintiff to evaluate the fund's NAV's reliability and the possibility of wrongdoing by officers, directors, or employees of the trust and/or the fund.⁶² The plaintiff asserted that Third Avenue breached Section 3819 for failing to comply with its obligation to permit the inspection of books and records.⁶³ According to the plaintiff, the documents requested related directly to the valuation and "the business and financial condition of the statutory trust" and were "just and reasonable" given the unique circumstances of the Fund.⁶⁴ In the end, the parties reached an agreement on the scope of production in response to the Section 3819 demand, and the matter was voluntarily dismissed.⁶⁵

Outside of Delaware, a federal district court in California opined on Section 3819's inspection rights in a Section 36(b) case.⁶⁶ In *Kennis v. Metropolitan West Asset Management, LLC*, the court denied the plaintiff's motion to compel discovery concerning privileged documents. The plaintiff owned shares in the Fund, an open-ended mutual fund organized as part of a series of mutual funds owned by a Delaware statutory trust.⁶⁷ By way of procedural background, the court denied the

motion to dismiss the breach of fiduciary duty claim under Section 36(b), and the court denied the plaintiff's motion for summary judgment on an issue.⁶⁸

With respect to the motion to compel, the plaintiff sought documents from disinterested trustees who were described in part to include board members who were not interested persons of the fund as defined in the ICA.⁶⁹ The court addressed the core issue of whether the fiduciary exception applied to otherwise privileged communications between mutual fund trustees and their attorneys.⁷⁰ In doing so, the court's analysis focused, in part, on the disclosure of information rationale for applying the fiduciary exception.⁷¹ Relying on Section 3819, the court found that the disclosure of information rationale did not support an extension of the fiduciary exception for the following reasons:

[T]he legal obligations of business trusts under Delaware law do not include full disclosure of all information related to the trusts. Business trusts under Delaware Code tit. 12 § 3819(a) have a right subject to reasonable standards to obtain certain information and documents. That section does not mandate a general right to access all information regarding the trust. Section 3819(c) provides "trustees or other persons who have the authority to manage the business and affairs of the statutory trust . . . the right to keep confidential from the beneficial owners . . . information the disclosure of which such persons in good faith believe is not in the best interest of the statutory trust or could damage the statutory trust or its business or which the statutory trust is required by law or by agreement with a third party to keep confidential." Delaware Code tit. 12 § 3819(c).⁷²

C. Key Takeaways and Observations

There are a number of key takeaways and observations based on the inspection rights under Sections 220 and 3819.

⁵⁹ *Id.*

⁶⁰ Compl. ¶ 1, *Zuber v. Third Ave. Trust*, No. 12959, 2017 WL 228282 (Del. Ch. Jan. 17, 2017).

⁶¹ *Id.*

⁶² *Id.* ¶ 3.

⁶³ *Id.* ¶ 70.

⁶⁴ *Id.* (quoting 12 Del. C. § 3819(a)(3)).

⁶⁵ Stipulation of Dismissal, *Zuber v. Third Ave. Trust*, No. 12959 (Del. Ch. Jan. 25, 2018).

⁶⁶ *Kennis v. Metro. W. Asset Mgmt., LLC*, No. CV 15-8162-GW(FFMX), 2018 WL 5274586, at *7 (C.D. Cal. May 17, 2018).

⁶⁷ *Id.* at *1.

⁶⁸ *Id.* at *2.

⁶⁹ *Id.*

⁷⁰ *Id.* at *3.

⁷¹ *Id.* at *6.

⁷² *Id.*

First, the scope of a Section 3819 demand is limited by the categories of documents permitted for inspection. By its terms, Section 3819 permits shareholders of a Delaware statutory trust to (1) make a “reasonable demand” for (2) “any purpose reasonably related to” the shareholder’s interest as a beneficial owner of the trust, and (3) obtain specific categories of documents (*e.g.*, governing instrument, list of shareholders, information regarding the trust’s business and financial condition, other information regarding the trust’s affairs “as is just and reasonable”).

Second, Section 3819 also gives trustees (or other persons with authority to manage the trust’s business and affairs) the *right* to keep *confidential* from shareholders, for a reasonable period of time, any information that the trustees reasonably believe to be in the nature of trade secrets or other information the disclosure of which such persons in good faith believe is not in the best interest of the statutory trust or could damage the statutory trust or its business or which the statutory trust is required by law or by agreement with a third party to keep confidential.

Third, Section 220 cases may assist courts and litigants in construing Section 3819’s requirements. As discussed above, a proper purpose in the Section 220 context includes investigating potential wrongdoing. The same established purpose could apply in the Section 3819 context.

Fourth, there are notable differences in the statutory language between Section 220 and Section 3819(a). Crucially, information available under Section 3819(a) is narrower than the information under Section 220. Section 3819(a) provides four categories of documents (copy of instrument, list of beneficial owners, information regarding business and financial condition, and “other information” regarding the trust’s affairs “as is just and reasonable”). Section 220, however, allows for the inspection of “[t]he corporation’s stock ledger, a list of its stockholders, and its *other books and records*.”⁷³

As previously noted, the inspection right under Section 3819 is subject to reasonable standards.⁷⁴ Indeed, Section 3819(a) contains the phrases “reasonable standards,” “reasonable demand,” and “just and reasonable.” Section 220, on the other hand, does not contain the same language. And Section 3819(a)’s right to keep confidential cannot be found in Section 220.

⁷³ 8 Del. C. § 220(b)(1).

⁷⁴ *Kennis*, 2018 WL 5274586, at *7.

Fifth, the potential defenses against a Section 3819 demand include, among others: (1) failure to comply with the procedural requirements (*e.g.*, demand not in writing, demand lacks a stated purpose); (2) improper purpose; (3) third-party confidentiality agreement prevents disclosure; (4) trustee or manager has a good-faith belief that disclosing the requested information is not in the trust’s best interests or could damage the trust; and (5) demand is not reasonable.

IV. SHAREHOLDERS’ RIGHTS TO INSPECT BOOKS AND RECORDS UNDER MASSACHUSETTS LAW

Unlike the analogous Delaware statute, the Massachusetts statute governing a Massachusetts business trust is silent on a shareholder’s right to inspect the books and records of the business trust.⁷⁵ Chapter 182 of the Massachusetts General Law does not explicitly grant statutory inspection rights to shareholders.⁷⁶ Litigants disagree on the issue of whether a shareholder of a mutual fund organized as a Massachusetts business trust has inspection rights under Massachusetts corporate law. Defendants have argued that Chapter 156D, Section 16.02 of the Massachusetts General Law, which provides that a shareholder is entitled to inspect and copy corporate records, does not apply to non-corporate entities like Massachusetts business trusts.⁷⁷

Undeterred, shareholders of trusts have invoked Massachusetts common law and the trust’s governing instrument to assert their inspection rights. With respect to common law, a Massachusetts court has recognized that a shareholder has a common law right to inspect the books and records of a Massachusetts business trust.⁷⁸ Because a statutory trust is a creature of contract, a shareholder of a Massachusetts business trust may have contractual rights to inspect the books and records if

⁷⁵ *See, e.g.*, Mass. Gen. Laws ch. 182; Mem. & Order at 6, *Gallant*.

⁷⁶ Provisions applicable to associations and trusts owning or holding stock in certain public utilities only (1) allow the department of public utilities or the department of telecommunications and cable to examine the books and records and (2) require the trustee to provide certain information and reports. *See, e.g.*, Mass. Gen. Laws ch. 182, §§ 7, 8, 9, 10. Those provisions do not appear to give any inspection rights to shareholders.

⁷⁷ Mass. Gen. Laws ch. 156D, § 16.02.

⁷⁸ Mem. & Order at 10-11, *Gallant* (recognizing common law right to inspection traditionally afforded to stockholders of corporations).

such rights are expressly provided in the trust's declaration or written instrument.⁷⁹

A. Inspection Under Massachusetts Common Law

Although the Massachusetts Supreme Judicial Court — the highest court in Massachusetts — did not address the common law right regarding books and records,⁸⁰ older decisions that pre-date Section 16.02's enactment have recognized the common law right of inspection of corporate books and records.⁸¹ Modern cases rely on the older cases recognizing the common law right of inspection of a corporation's records, while noting that the common law right was qualified.⁸²

One such modern case, *Rule v. Massachusetts Mutual Life Insurance Company*, is illustrative of the qualified common law inspection right. There, a policyholder of a mutual insurance company sought to inspect documents concerning the board's deliberations and approval of proposed changes to the company's bylaws.⁸³ The Appeals Court of Massachusetts affirmed the dismissal by the trial court, which found that no Massachusetts court had held that policyholders have rights to inspect the books and records under Massachusetts common law.⁸⁴ While not reaching the issue of whether a common law right of inspection existed for policy holders of mutual insurance companies, the appellate

court explained that “[a] common-law right of inspection does not grant stockholders an all-access permit to the corporation's records.”⁸⁵ The court went on to explain that “[t]he common-law right is a qualified right to inspect the books of a corporation that are material to the stockholder's interest in the assets and business of the corporation.”⁸⁶ In dicta, the court stated that the plaintiff did not plead a proper purpose because the company's vote to adopt the proposed amendments had ended and the plaintiff had already voted.⁸⁷ The court opined that “[s]uch a [common law] right would not entitle [the plaintiff] to inspect ‘all documents’ that pertain to the board's deliberations on the proposed amendments.”⁸⁸ The court concluded that “a common-law right of inspection cannot be exercised ‘for mere curiosity, or for merely speculative purposes, or vexatiously.’”⁸⁹

B. Inspection Under Massachusetts Corporate Law

As previously discussed, the shareholder of a corporation has a right of inspection under Section 16.02 of Chapter 156D. Before turning to the argument by shareholders that Section 16.02 applies to Massachusetts business trusts, a close look at the language of the applicable sections of Chapter 156D is required.

Section 16.02(a) gives a shareholder the right to inspect and copy corporate records during regular business hours at the office where said records are maintained if she provides the corporation with written notice of her demand at least five business days prior to the date on which she wishes to inspect and copy said records.⁹⁰ Subject to certain conditions, Section 16.02(b) provides that a shareholder, upon at least five business days' written notice, has the right to inspect and copy, during regular business hours at a reasonable location specified by the corporation, the following three categories of documents:

- excerpts from minutes reflecting action taken at any meeting of the board of directors, records of any action of a committee of the board of directors while

⁷⁹ *Id.* at 6-7 (interpreting the master trust agreement's plain language to dictate plaintiff's inspection rights were the same as those allowed for shareholders of Massachusetts business corporations under Chapter 156D).

⁸⁰ *Chitwood v. Vertex Pharm., Inc.*, 476 Mass. 667, 678 n.10 (Mass. 2017) (noting the shareholder did not assert a common law right of inspection; thus “we do not address whether the common law right of inspection survives after the enactment of G. L. c. 156D §§ 16.01 and 16.02 . . .”).

⁸¹ *See, e.g., Gavin v. Purdy*, 139 N.E.2d 397 (Mass. 1957) (recognizing the “common law right of examination of corporate records”); *Albee v. Lamson & Hubbard Corp.*, 69 N.E.2d 811, 813 (Mass. 1946) (“The burden of proof was upon the petitioner to allege and prove his good faith and a proper purpose. His right being a qualified one, he fails if his petition and proof are insufficient to bring his case within the limitations of this common law right.”).

⁸² *See, e.g., Rule v. Mass. Mut. Life Ins. Co.*, No. 15-P-1235, 2016 WL 2585756, at *3-4 (Mass. App. Ct. 2016) (citing cases); Mem. & Order at 10-11, *Gallant* (citing *Varney v. Baker*, 194 Mass. 239, 240-41 (Mass. 1907)); *Albee*, 320 Mass. at 424).

⁸³ *Rule*, 2016 WL 2585756, at *3 n.3.

⁸⁴ *Id.* at *3-4.

⁸⁵ *Id.* at *3.

⁸⁶ *Id.*

⁸⁷ *Id.* at *4.

⁸⁸ *Id.* at *3.

⁸⁹ *Id.* at *4 (quoting *Varney*, 194 Mass. at 241).

⁹⁰ Mass. Gen. Laws ch. 156D, § 16.02(a). Section 16.02 provides that the term “‘shareholder’ includes a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf.” *Id.* § 16.02(f).

acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under subsection (a) of section 16.02;

- accounting records of the corporation, but if the financial statements of the corporation are audited by a certified public accountant, inspection shall be limited to the financial statements and the supporting schedules reasonably necessary to verify any line item on those statements; and
- the record of shareholders described in section 16.01(c).⁹¹

Notably, the drafters' comments provide guidance on the documents available under Section 16.02(b). In essence, the drafters noted that shareholders do not have a "statutory right to examine the remainder of the minutes of a board or committee meeting" because such examination "could inhibit frank discussion or the disclosure of sensitive matters to the directors to enable them to exercise their fiduciary responsibilities."⁹² The drafters also noted that "[t]he intention [of Section 16.02(b)(1)] is to permit inspection of votes or action taken on relevant matters, not of reports, discussion or decisions not to act on a matter."⁹³

This inspection right under Section 16.02(b) is subject to the conditions set forth in Section 16.02(c). A shareholder may inspect and copy the aforementioned categories of documents *only if* the demand meets the following conditions:

- it is made in *good faith* and for a *proper purpose*;
- it describes with *reasonable particularity* the purpose and the records that the shareholder desires to inspect;

- the records are *directly connected* with the purpose; and
- the corporation *shall not* have determined in good faith that disclosure of the records sought would *adversely affect the corporation in the conduct of its business* or, in the case of a public corporation, constitute *material non-public information* at the time when the shareholder's notice of demand to inspect and copy is received by the corporation.⁹⁴

Section 16.02(d) provides that "[t]he right of inspection granted by this section may not be abolished or limited by a corporation's articles of organization or bylaws."⁹⁵ And Section 16.02(e) reserves certain shareholder's rights, and does not limit "the power of a court, independently of this chapter, to compel the production of corporate records for examination, provided that, in the case of production of records described in subsection (b) at the request of a shareholder, the shareholder has met the requirements of subsection (c)."⁹⁶

Section 16.03 outlines the scope of the inspection right under Section 16.02, which includes allowing the corporation to impose (1) "a *reasonable charge*, covering the costs of labor, material, transmission and delivery, for copies of any documents provided to the shareholder" and (2) "*reasonable restrictions on the use or distribution of records by the demanding shareholder*."⁹⁷

Section 16.04 provides that an enforcement action can be brought in the "superior court of the county where the corporation's principal office or, if none in the commonwealth, its registered office is located."⁹⁸ An enforcement action can be brought in the following two circumstances: (1) "[i]f a corporation does not allow a shareholder who complies with section 16.02(a) to inspect and copy any records required by that subsection to be available for inspection[;]" and (2) "[i]f a corporation does not within a reasonable time allow a

⁹¹ *Id.* § 16.02(b). As to the shareholder list, Section 16.01(c) provides only for a "list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each." *Id.* § 16.01(c). Similarly, corporations are required to maintain for review only "a complete list of all stockholders, their residences, and the amount of stock held by each." Mass. Gen. Laws ch. 155 § 22.

⁹² Mass. Gen. Laws ch. 156D, § 16.02 at cmt. (b)(2).

⁹³ *Id.* at cmt. (b)(1).

⁹⁴ *Id.* § 16.02(c) (emphases added).

⁹⁵ *Id.* § 16.02(d).

⁹⁶ *Id.* § 16.02(e). Section 16.02(e) cross-references Section 7.20, which provides the requirements for a corporation to prepare and make available a list of shareholders who are entitled to notice of a shareholders' meeting. Shareholders may submit a written demand to inspect the list. *Id.* § 7.20.

⁹⁷ *Id.* § 16.03.

⁹⁸ *Id.* § 16.04(a), (b).

shareholder to inspect and copy any other record”⁹⁹ If an enforcement action is brought and the court orders inspection of the requested records under Section 16.02, “the court shall also order the corporation to pay the shareholder’s costs, including reasonable counsel fees, incurred to obtain the order unless the corporation proves that it refused inspection in *good faith* because it had a *reasonable basis for doubt* about the right of the shareholder to inspect the records demanded”; and “the court may order the corporation to pay the shareholder’s costs if it orders inspection and copying of records other than under section 16.02.”¹⁰⁰

Section 16.20 outlines the requirements for a corporation to furnish annual financial statements to shareholders upon request.¹⁰¹ But a corporation need not provide such statements if it can demonstrate a proper corporate purpose for withholding information in the statements.

C. Key Decisions Regarding Inspection Rights Under Massachusetts Law

A seminal Massachusetts decision, *Chitwood v. Vertex Pharmaceuticals, Inc.*, addressed the parameters under Section 16.02.¹⁰² Although the decision does not involve a mutual fund or trust, litigants have cited *Chitwood* in a mutual fund case.¹⁰³

In *Chitwood*, the plaintiff-shareholder sought inspection of records for the stated purpose of investigating his allegation that the board of directors had committed a breach of its fiduciary duty of oversight with regard to the corporation’s financial reporting and insider stock sales after an inaccurate public

announcement about drug test results.¹⁰⁴ The corporation rejected the demand, arguing that it was invalid under state law and it was improper because the board had rejected the shareholder’s earlier demand to commence derivative litigation based on the same allegations (following a reasonable inquiry by a special committee of independent directors).¹⁰⁵ The plaintiff did not agree that the board adequately responded to his concerns.¹⁰⁶ The demand sought several categories of records, including: (1) minutes of all meetings of the board and special committee regarding potential wrongdoing, mismanagement, and other issues; (2) all documents distributed at any meeting of the board or the special committee; (3) the special committee’s final report and drafts of said report; (4) all documents concerning the results of an internal review of a study; (5) copies of all policy and procedure manuals, and internal control practices; and (6) calendars showing the number and duration of meetings of the board and special committee.¹⁰⁷

The board rejected the demand for four reasons: (1) it lacked a proper purpose because the plaintiff did not present any credible basis to infer that there were legitimate issues that warranted further investigation; (2) it lacked a proper purpose because it sought discovery in support of a shareholder’s derivative demand allegations that plaintiff would have been barred from getting had he brought a shareholder derivative action; (3) it was overbroad and exceeded the narrow scope under Section 16.02; and (4) the board made a good-faith determination that disclosure of the records would adversely affect the corporation in conducting its business and that it called for disclosure of nonpublic material information.¹⁰⁸ The trial court principally agreed with the corporation, finding that the plaintiff failed to meet his burden of showing a proper purpose because he presented no evidence of wrongdoing and no evidence calling into question the independence of the special committee.¹⁰⁹ The trial court dismissed the action.¹¹⁰

⁹⁹ *Id.* § 16.04(b). This provision requires the court to resolve the action on an “expedited basis.”

¹⁰⁰ *Id.* § 16.04(c) (emphases added).

¹⁰¹ *Id.* § 16.20. “A corporation shall furnish to its shareholders upon request annual financial statements” *Id.* § 16.20(a); but see *id.* § 16.20(d) (“A corporation shall not be required to furnish its annual financial statements to a shareholder if it can demonstrate a proper corporate purpose for withholding information contained in those statements from that shareholder.”).

¹⁰² 71 N.E.3d 492, 494 (Mass. 2017).

¹⁰³ Def.’s Opp. to Pl.’s Emergency Mot. to Enforce Shareholder Inspection Rights at 13, 17, 19, *Friess Associates LLC 401(k) Retirement Plan v. AMG Funds I*, No. 21-0951-BLS2 (Mass. Super. Ct. May 3, 2021).

¹⁰⁴ *Chitwood*, 71 N.E.3d at 494.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 498.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 498.

¹⁰⁹ *Id.* at 499.

¹¹⁰ *Id.* at 494.

On appeal, the Massachusetts Supreme Judicial Court vacated the dismissal, remanded the case to the trial court, and held that the trial court erred in applying the Delaware “proper purpose” standard for inspection under Section 16.02.¹¹¹ The Court explained that the plaintiff was not required to prove evidence of wrongdoing beyond the allegations of insider trading after the inaccurate public announcement of the results of drug testing that suggested an apparent scientific breakthrough.¹¹² Given the plaintiff’s allegations and public announcement, the Court determined that “a shareholder has a proper purpose in asking to inspect the excerpts of the original minutes of the meetings of the board of directors and the special committee that reflect the actions taken at those meetings regarding the requested derivative action.”¹¹³ The Court declined to adopt Delaware law that requires a shareholder to show, by a preponderance of the evidence, a credible basis from which the court can infer there was possible mismanagement that would warrant further investigation.¹¹⁴

As discussed in detail below, the Court’s analysis highlights several issues concerning Section 16.02 demands.

Proper Purpose. A shareholder must have a proper purpose. The *Chitwood* court articulated the “proper purpose” standard. “A ‘proper purpose’ means a purpose that is reasonably relevant to the demanding shareholder’s interest as a shareholder.”¹¹⁵ “A proper purpose is one that protects the shareholder’s rights as an owner in the corporation and that advances the interests of the corporation itself.”¹¹⁶ “A shareholder’s purpose is improper where it is driven by ‘mere curiosity,’ speculation, or vexatious motives.”¹¹⁷ “‘Good faith,’ paired as it is with ‘proper purpose,’ means that the stated proper purpose also must be the shareholder’s true purpose.”¹¹⁸ “Where the specific records sought have no relevant connection to the shareholder’s stated purpose, a fact finder may infer that the stated purpose for inspection is not the true purpose, and that inspection of

those records is sought for another purpose that the shareholder chose not to articulate because it would likely be found improper.”¹¹⁹

Applying the “proper purpose” standard articulated in *Chitwood*, the Massachusetts Superior Court in *Knox v. Stalk & Beans, Inc.* granted a shareholder’s request for preliminary injunctive relief, finding that the shareholder’s Section 16.02 demand was made in good faith and for the proper purpose of determining whether the defendant and co-founder of the company was violating his duties to the company because if it was true, such a violation would have been directly contrary to the shareholder’s interest and the company’s interests.¹²⁰ The court found that the shareholder’s demand was “reasonably particular” and “directly connected to his purpose” where the shareholder demonstrated the co-founder was preparing to engage in the cannabis delivery and e-commerce businesses with a non-viable company.¹²¹ The court ordered that the defendants produce certain categories of documents, including minutes of all shareholders’ meetings, written communications to shareholders, excerpts from minutes reflecting action taken at any meeting of the board of directors, and accounting records.¹²²

Shareholder’s Burden. A shareholder bears the burden of proof to allege and prove her “good faith” and “proper purpose” for a books and records demand.¹²³

The Purpose Cannot Be Purely Personal. A purpose that is purely personal is an improper one. A Massachusetts court held that it was a proper purpose for a shareholder to seek a shareholder list to solicit proxies to unseat incumbent directors.¹²⁴ However, a shareholder who is motivated by personal investment

¹¹¹ *Id.* at 500-02.

¹¹² *Id.* at 500-01.

¹¹³ *Id.* at 500.

¹¹⁴ *Id.* at 500.

¹¹⁵ *Id.* at 496.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ No. 2184CV02197, 2021 WL 5626439, at *2 (Mass. Super. Ct. Oct. 4, 2021).

¹²¹ *Id.*

¹²² *Id.* at 3.

¹²³ *Rule*, 2016 WL 2585756, at *4 (holding that the shareholder had no proper purpose for further inspection based on the shareholder’s speculation that proposed amendments to bylaws constituted bad corporate governance).

¹²⁴ *Donaldson v. Boston Herald-Traveler Corp.*, 197 N.E.2d 671, 676 (Mass. 1964) (holding that the “solicitation of proxies in order to try to change management is a proper purpose” where the shareholder of the corporation sought inspection of shareholders list to solicit proxies “in order to obtain a measure of control” of the corporation).

concerns has no right to inspect a shareholder list.¹²⁵ Massachusetts courts distinguish “purely personal purposes for seeking inspection” like a desire to ascertain whether any shares are for sale,¹²⁶ from purposes related to the corporation’s affairs, including a desire “to control corporate policy or governance.”¹²⁷ With that being said, “if a stockholder does have a proper purpose in making a request to inspect a stockholders list, the fact that he may have personal, or indeed even selfish, motives in making the request does not render his purpose improper.”¹²⁸

No Showing of a Credible Basis. Before *Chitwood*, some Massachusetts courts cited with approval Delaware case law and required a shareholder to present some evidence to suggest a credible basis from which a court can infer that mismanagement, waste, or wrongdoing may have occurred.¹²⁹ The *Chitwood* court, however, made clear that Massachusetts law, unlike Delaware law, does not require a shareholder to make a credible basis if the purpose is to investigate alleged corporate wrongdoing or mismanagement.¹³⁰

D. Contractual Rights to Inspect a Massachusetts Business Trust’s Records

To recap, a shareholder of a Massachusetts business trust has a contractual inspection right so long as the trust’s governing instrument provides that right. *Gallant*

¹²⁵ *Shabshelowitz v. Fall River Gas Co.*, 588 N.E.2d 630, 633-34 (Mass. 1992) (holding that the stockholder lacked a proper purpose because his motivation for obtaining a stockholder list was purely personal).

¹²⁶ *Id.* at 633.

¹²⁷ *Id.* at 634.

¹²⁸ *Shabshelowitz v. Fall River Gas Co.*, 573 N.E.2d 1010, 1014 (Mass. App. Ct. 1991), *aff’d*, 588 N.E.2d 630 (Mass. 1992).

¹²⁹ See, e.g., *Gent v. Teradyne, Inc.*, No. CIV.A. 07-04676-BLS2, 2010 WL 5071862, at *13 (Mass. Super. Ct. Oct. 8, 2010) (granting defendant’s motion for summary judgment because the shareholder failed to meet his burden of showing that some evidence existed to establish a credible basis from which a court could infer the existence of legitimate issues of possible waste, mismanagement, or wrongdoing warranting further investigation); *Gent v. Teradyne, Inc.*, No. CIV.A. 07-04676-BLS2, 2008 WL 2120824, at *5 (Mass. Super. Ct. May 8, 2008) (denying motion to dismiss although “information provided in the complaint to indicate possible wrongdoing [was] not much”).

¹³⁰ *Chitwood*, 71 N.E.3d at 501.

v. SSgA Funds is illustrative on this point.¹³¹ There, the shareholder of a Massachusetts business trust asserted his inspection rights under Chapter 156D and common law.¹³² The trust argued that the shareholder only had a right under the master trust agreement, and the demands were overly broad and lacked a proper purpose.¹³³ The court found that the plain language of the master trust agreement dictated that the plaintiff’s inspection rights were “the same as those currently allowed shareholders of Massachusetts business corporations under the Act.”¹³⁴ In doing so, the court evaluated the provisions of the master trust agreement, including one that was deemed ambiguous because it referred to a statute that granted shareholders limited access to certain documents.¹³⁵ The court, however, found that the master trust agreement read as a whole was not ambiguous because a provision stated that any ambiguity must be resolved as if the trust was a business corporation; thus, Section 16.02 governed the plaintiff’s right to inspect the records.¹³⁶

V. COMPARISONS OF INSPECTION RIGHTS UNDER THE LAWS OF MASSACHUSETTS AND DELAWARE

Given the legal frameworks and common issues in Delaware and Massachusetts concerning shareholders’ inspection rights, this final discussion focuses on the practical and discernible similarities and differences in these jurisdictions. Set forth below is a brief, generalized, and non-exhaustive outline of some of the distinctions.

- **Scope of Demands** — The scope of a demand under Section 16.02 is limited in a similar fashion as the scope under Section 3819(a) of the Delaware Statutory Trust Act. In Delaware, a shareholder of a statutory trust has a right to inspect four specified categories of documents. Assuming that Chapter 156D, Section 16.02 of the Massachusetts General Law applies to business trusts, a shareholder of a business trust would be entitled to inspect three specified categories under Section 16.02(b). While a Massachusetts business trust has a number of defenses (e.g., improper purpose and non-disclosure of material non-public information), Section 3819

¹³¹ No. 12-03192-BLS1 (Mass. Super. Ct. Mar. 21, 2013).

¹³² *Id.* at 1.

¹³³ *Id.*

¹³⁴ *Id.* at 7.

¹³⁵ *Id.* at 5-7.

¹³⁶ *Id.* at 6-7.

expressly provides that Delaware statutory trusts can produce books and records subject to reasonable standards as may be established by trustees and other persons who have authority to manage the business affairs of the statutory trust. This language cannot be found in Section 16.02. Delaware's Section 3819 goes further than Section 16.02 in requiring "reasonable demands" to Delaware statutory trusts that are reasonably related to the shareholder's interest, and granting a trustee a right to keep confidential from shareholders any information that the trustee reasonably believes, in good faith, is not in the best interest of the trust, could damage the trust, or violates a third-party confidentiality agreement.

- **Trial Court's Discretion** — Delaware gives trial courts broad discretion over the scope of corporate records under Section 220, whereas Massachusetts courts do not have the same discretion because the scope of a demand is limited by statute.¹³⁷ Recognizing the differences between Delaware's Section 220 and its Massachusetts counterpart, the Massachusetts Supreme Judicial Court in *Chitwood* stated that "[u]nder Delaware law, a shareholder may identify the category of corporate records he or she seeks to inspect, and the scope of inspection is left to the sound discretion of the judge."¹³⁸ The *Chitwood* court did not analyze Section 3819, which differs from Section 220 in a material way. Under Section 3819, a shareholder of a Delaware statutory trust is limited to the inspection of specific categories. The arguably broadest category in Section 3819 — "[o]ther information regarding the affairs of the statutory trust" — is qualified by the phrase "as is just and reasonable."¹³⁹ That qualification is markedly different from Section 220's "other books and records" language allowing a corporate shareholder to identify categories of corporate records for inspection.¹⁴⁰

- **Narrow Inspection Rights for Board Materials** — Setting aside Delaware's Section 220 category of "other books and records," both Delaware's Section 3819(a) and Massachusetts' Section 16.02(b) afford shareholders with rights to inspect certain specified categories. One particular category in Section 16.02(b)(1) has substantially narrower inspection than Delaware's Section 3819(a) because it is limited to "excerpts from minutes reflecting action taken at any meeting of the board of directors . . ." ¹⁴¹ Section 16.02's usage of the word "excerpts" would prevent a defendant from producing a complete set of minutes. The word "excerpts" cannot be found in Section 3819(a).
- **Proper Purpose** — Courts in Delaware and Massachusetts recognize a proper purpose when a demand seeks certain documents to investigate potential wrongdoing and mismanagement.¹⁴² Where the stated purpose in the Section 220 context is to investigate alleged corporate wrongdoing and mismanagement, Delaware requires a shareholder to show, "by a preponderance of the evidence, a credible basis from which the [court] can infer there is possible mismanagement that would warrant further investigation."¹⁴³ Massachusetts courts cannot apply this credible basis threshold because the Massachusetts Supreme Judicial Court in *Chitwood* ruled that Delaware's requirement for Section 220 demands "is more demanding than is appropriate for the more limited scope of books and records subject to inspection under § 16.02."¹⁴⁴ As explained by the Appeals Court of Massachusetts, the "more exacting standards drawn from Delaware law [where a defendant challenges a shareholder's proper purpose] do not survive *Chitwood*."¹⁴⁵

footnote continued from previous column...

reasonable standards . . . as may be established by the trustees . . . to obtain . . . upon reasonable demand . . . [o]ther information regarding the affairs of the statutory trust as is just and reasonable.").

¹³⁷ Compare 8 Del. C. § 220(c) ("The Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other or further relief as the Court may deem just and proper."), with Mass. Gen. Laws ch. 156D, § 16.02.

¹³⁸ *Chitwood*, 71 N.E.3d at 501.

¹³⁹ 12 Del. C. § 3819(a)(4).

¹⁴⁰ Compare 8 Del. C. § 220(b) ("Any stockholder . . . shall . . . have the right . . . to make copies and extracts from . . . its other books and records."), with 12 Del. C. § 3819(a)(4) ("[E]ach beneficial owner . . . has the right, subject to such

¹⁴¹ Mass. Gen. Laws ch. 156D, § 16.02(b)(1).

¹⁴² See, e.g., *Chitwood*, 71 N.E.3d at 500-01 ("In Delaware, as in Massachusetts, a shareholder's desire to investigate corporate wrongdoing or mismanagement is a proper purpose."); *Seinfeld*, 909 A.2d at 121.

¹⁴³ *Seinfeld*, 909 A.2d at 121.

¹⁴⁴ *Chitwood*, 71 N.E.3d at 501.

¹⁴⁵ *Chanowski v. Forman Indus., Inc.*, 94 N.E.3d 436 (Mass. App. Ct. 2017).

- **Timing** — Under Massachusetts law, a Section 16.02 demand can be made before or after the filing or dismissal of a shareholder derivative action.¹⁴⁶ The timing of a Section 16.02 demand does not alter the definition of “proper purpose” in Massachusetts.¹⁴⁷ By contrast, the timing makes a difference for a Section 220 demand. In Delaware, “it is a proper purpose under Section 220 to inspect books and records that would aid the plaintiff in pleading demand futility in a to-be-amended complaint in a plenary derivative action, where the earlier-filed plenary complaint was dismissed on demand futility-related grounds without prejudice and *with leave to amend*.”¹⁴⁸ This means that “when a plaintiff has been *granted leave to amend* its complaint a plaintiff may have a proper purpose for

demanding such records.”¹⁴⁹ If, however, “that leave to amend no longer exists, a plaintiff’s proper purpose is extinguished.”¹⁵⁰

VI. CONCLUSION

Plaintiffs have successfully used books and records demands to obtain at least some fund records, and those demands will inevitably lead to more requests to mutual funds. Additionally, these books and records demands will lead to more guidance as to how the courts will construe these requests, and whether the courts may construe the records more narrowly as mutual funds have unique characteristics that make them different from traditional corporations, business trusts, or statutory trusts. ■

¹⁴⁶ *Chitwood*, 71 N.E.3d at 502 (“Section 16.02 . . . provides ‘an independent right of inspection,’ and its drafters made clear in their comments that the right of inspection under § 16.02 is available ‘at any time.’”).

¹⁴⁷ *Id.*

¹⁴⁸ *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1150 (Del. 2011) (emphasis added).

¹⁴⁹ *Amalgamated Bank v. NetApp, Inc.*, No. CIV.A. 6772-VCG, 2012 WL 379908, at *7 (Del. Ch. Feb. 6, 2012) (emphasis added).

¹⁵⁰ *Id.*

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