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Drake Edward

EXPANDING THE WORLD OF SECTION 220: LENDING CREDENCE TO THE BENEFITS OF ALLOWING EMAILS, TEXT MESSAGES, AND SOCIAL MEDIA IN A SHAREHOLDER DEMAND

DRAKE EDWARD*

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I. INTRODUCTION

Within corporate America, it is becoming commonplace to see a news headline or Twitter trend every day regarding an internal scandal happening in a large company.[1] To illustrate, in 2016, the

*Drake Edward, Juris Doctor, UIC John Marshall Law School, 2021. Thank

Consumer Financial Protection Bureau (CFPB) imposed a $100 million fine on Wells Fargo Bank for opening millions of deposit and credit card accounts without the consent of the accountholders.[2] Due to competitive sales targets and cash incentives, Wells Fargo employees would boost sales figures by opening accounts and secretly transferring funds from customer accounts without their knowledge.[3] Because the scandal was so large and affected so many customers, Wells Fargo also had to pay fifty million dollars to the City of Los Angeles and thirty-five million dollars to the Office of Comptroller of the Currency.[4] Other corporate scandals have arisen from a failure to disclose certain information, inappropriate work relationships, or a violation of fiduciary duties.[5]

When the shareholders of a company become aware of improper conduct and it catches the attention of the media, the shareholders seek answers.[6] Often, the question is whether the Board of Directors was involved or knew of the wrongdoing.[7] Shareholders will seek said answers by launching a demand

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you to my mom for her continued support throughout law school and the writing process of this Comment. I hope this Comment will serve to spark thought-provoking conversations surrounding the nuances of corporate law.

1. Ariel Schwartz, *BP Greenwasehes Post-Deepwater Horizon CSR Report*, FASTCOMPANY (Mar. 25, 2011), www.fastcompany.com/1742432/bp-greenwashes-post-deepwater-horizon-csr-report [perma.cc/2ULP-7C6J] (highlighting that the most recent and most publicized corporate scandal involved the 2010 BP oil spill in the Gulf of Mexico).

2. *Consumer Financial Protection Bureau Fines Wells Fargo $ 100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CONSUMER FIN. PROT. BUREAU (Sept. 8, 2016), www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/ [perma.cc/R4ED-Y38T].

3. *Id.*

4. *Id.* CFPB Director Richard Cordray went on record to state that this is the largest CFPB penalty ever imposed because it wanted to put the entire banking industry on notice that if these financial incentive programs are not vigilantly monitored, the consequences will be enormous. *Id.*

5. *See*, *e.g.*, Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp., No. 2017-0910-MTZ, 2019 Del. Ch. LEXIS 47, at *12 (Del. Ch. Jan. 25, 2019) (stating that in response to various breaches of fiduciary duties by members of the Board, a Del. Code Ann. tit. 8, § 220 ("Section 220") demand was launched to determine whether to pursue litigation).

6. *Id.* at *12 (stating that the party launching the Section 220 demand will most likely not receive the answers as to why there was some type of corporate wrongdoing or mismanagement if the court only requires disclosure of traditional documents such as meeting minutes and written correspondence); *see also* Hutton v. McDaniel, 264 F. Supp. 3d 996, 1006 (D. Ariz. 2017) (seeking Board of Directors "books and records" pursuant to a Section 220 demand to determine whether there was a violation of fiduciary duties).

7. Adam Bryant, *The Five Most Common Mistakes of Board of Directors*, FORBES (June 21, 2018), www.forbes.com/sites/adambryant/2018/06/21/the-five-most-common-mistakes-of-board-directors/?sh=4f276169e250 [perma.cc/5VCJ-9CTV].

pursuant to Section 220 of Delaware General Corporation Law ("Section 220").[8] Often, directors will refuse to disclose information by arguing that the information sought is too broad.[9] This is problematic because it hinders transparency and does not allow shareholders access to vital information that they are entitled to.[10]

A shareholder's right to information is imperative because, as a stakeholder in the company, a shareholder has a fundamental right to be fully informed in the affairs of the corporation.[11] This access of information serves as a tool that the shareholders can use to ensure that directors of a corporation are acting in good faith when performing their duties.[12] Information rights, such as a Section 220 demand, prevent directors from intentionally withholding material information and making decisions that can hurt the shareholders.[13] In a situation where, for example, a director is involved in an inappropriate work relationship, the shareholders would be entitled to information related to this scandal because the relationship may cause an adverse impact on the corporation.[14] If the shareholders are privy to this information, it protects the shareholders, directors, and integrity of the corporation.[15]

This Comment will discuss various ways in which the courts can broaden the type of information required in a Section 220 demand in an effort to increase transparency and preserve the director-shareholder relationship.

First, Section II of this Comment will begin with a discussion of the fundamental rights of a shareholder – specifically access to

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8. DEL. CODE ANN. tit. 8, § 220 (2021). Once the shareholders of record have made a demand in writing stating the information sought and a proper purpose, if the directors do not comply with the demand, the shareholders have a right to file a Section 220 proceeding seeking to compel compliance with the demand. Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands-Reprise*, 28 CARDOZO L. REV. 1287, 1310 (2006).

9. Highland Select Equity Fund, Ltd. P'ship v. Motient Corp., 906 A.2d 156 (Del. Ch. 2006) (arguing that a demand for "books, records, and correspondence . . ." is unreasonably broad and burdensome).

10. 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, 177 (2012).

11. WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2213 (2012).

12. *Id.*

13. Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L. J. 698, 702 (1982).

14. See, e.g., Espinoza v. Hewlett-Packard Co., No. 6000-VCP, 2011 Del. Ch. LEXIS 45 (Del. Ch. Mar. 17, 2011) (holding that a contractor's claims of an inappropriate relationship between the contractor and the CEO was subject to disclosure pursuant to Section 220).

15. Pederson v. Arctic Slope Reg'l Corp., 331 P.3d 384, 393 (Alaska 2014).

Corporate law information rights balance the interests of the corporation, shareholders, and predation of anything that may harm the corporation. *Id.*

information. Section III of this Comment will discuss the use of emails, text messages, and social media in other areas of the law. Specifically, this section will focus on the use of social media, the benefits of requiring a director's social media usage in a Section 220 demand, and the detriments of barring social media from being disclosed in a Section 220 demand. Section IV of this Comment will propose how the courts should interpret "books and records" to include various types of electronically stored information, specifically social media in order to preserve the inherent purpose of a Section 220 demand.

II. BACKGROUND

First, this section will discuss what a Section 220 demand is, the history of Section 220 demands, and the small amount of information that courts have required directors to disclose. Next, this section will discuss corporations and the use of technology in transmitting electronically stored information ("ESI"). Finally, this section will discuss the ambiguity surrounding the words "books and records" within the language of Section 220 and how it is not an accurate representation of a company's internal documents.

In order to fully comprehend Section 220 demands, one must be cognizant of the fundamental rights of a corporate shareholder. In addition, it is imperative to know the elements of a Section 220 demand and how courts have interpreted this particular section of the Delaware General Corporation Law ("DGCL"). Next, it is vital to understand how "books and records" is defined in the section itself and how these words are outdated. Lastly, it is important to understand how corporations comply with Section 220 demands and the amount of ESI that companies transmit that is not subject to a shareholder demand.

A. The Rights of a Shareholder

Shareholders have a variety of legal rights when they invest in a corporation which can be categorized into four distinct groups: control rights, economic rights, litigation rights, and informational rights.[16] Control rights are unique because while a shareholder may "own" part of a corporation through stock ownership, that does not grant them the right to control the operations of the business.[17] Instead, a shareholder's control rights stem from their voting rights

16. Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U. Cal. Davis L. Rev. 407, 413 (2006).

17. Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289-90 (1980) (explaining that, in layman's terms, a shareholder is not an owner of a corporation, but an investor).

– the ability to vote to elect and remove directors – which indirectly manages and controls the company.[18]

Economic rights include a shareholder's economic gain via dividends or the ability to sell the shares they own in a particular company.[19] A shareholder's right to dividends is determined by either a portion of a company's earnings or profits, whichever distribution model is adopted at the discretion of the company.[20] While there is a general right to dividends, if issuing dividends will render a corporation insolvent or unable to pay its liabilities pursuant to the law, it is within the discretion of the directors to not issue dividends.[21] Dividends are paid to shareholders out of the regular, current earnings of a corporation according to a fixed scheme.[22] Whether a shareholder is a holder of common stock or preferred stock will dictate how much they will be given as dividends.[23]

Litigation rights allow a shareholder to seek judicial remedy if there is a breach of a shareholder agreement or the directors are violating fiduciary duties.[24] This is a unique right because when an issue arises for a corporation, it is the directors who typically have the power to decide whether to pursue litigation.[25] When directors are conflicted, however, shareholders have the authority to take legal action on behalf of the corporation.[26]

Lastly, in many states, shareholders do not have a general right to access information—only a right to access certain specific pieces of information.[27] An example of a specific informational right

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18. DEL. CODE ANN. tit. 8, § 211(b) (2021).

19. *Id*.

20. Mobile & O.R. Co. v. State of Tennessee, 153 U.S. 486 (1931). Essentially, so long as the corporation is solvent and can pay its bills, the shareholder is entitled to a proportionate part of profits. *Id*.

21. *See* EBS Litig. LLC v. Barclays Glob. Inv'rs, N.A., 304 F.3d 302 (3d Cir. 2002) (holding that the directors breached their fiduciary duty by issuing dividends when the company was insolvent).

22. Barbara J. Van Arsdale et al., *Ordinary And Extraordinary Dividends*, 15 N.Y. Jur. 2d § 993 (2020).

23. FLETCHER, *supra* note 11, at § 5446. "There are three types of dividends which directors may declare: cash dividends, property dividends, and share dividends." Chirag Joshi, *Types of Dividend*, SAMCO (Jan. 6, 2020), www.samco.in/knowledge-center/articles/types-of-dividend/ [perma.cc/CZG3-6CXK]. Cash is simply paid to represent residual ownership in the company. *Id*. A property dividend divides assets other than cash among the shareholders. *Id*. A share dividend distributes authorized but unissued shares that have been reacquired by a corporation. *Id*.

24. DEL. CODE ANN. tit. 8, § 211(b) (2021).

25. *See* Zapata Corp. v. Maldonado, 430 A.2d 779, 785-86 (Del. 1981) (explaining that a board has the power to choose not to pursue litigation). If the board believes that the suit will have a detrimental impact on the company, it is well within its right to not pursue a lawsuit. *Id*.

26. McKee v. Rogers, 156 A. 191, 193 (Del. Ch. 1931).

27. MODEL BUS. CORP. ACT § 16.20 (2004).

is the right to inspect the corporation's books and records.[28] This right is limited and only includes the disclosure of basic documentation, such as the charter, bylaws, board meeting minutes, and the list of all shareholders on record.[29] While a shareholder's information rights may be limited in scope, access to information is a vital and fundamental right because it allows shareholders to bring about efficient changes and block inefficient changes via unanimity of a shareholder vote.[30] Thus, the right to information benefits the company and the economy as a whole.[31]

B. Section 220 Demand

Section 220 permits a shareholder to inspect a corporation's books and records upon demand pursuant to their right to information.[32] This section is used as a tool to protect the information rights of the shareholder and to ensure that the directors are acting in the interest of the corporation.[33] In order for the stockholder to seek redress under the Delaware code, the stockholder "must: (1) be a stockholder of record; (2) comply with the form and manner requirements when making the demand; and (3) state a proper purpose for the requested information."[34]

While Section 220 is exclusive to Delaware corporations because it is under the Delaware General Corporate Law, Delaware is home to almost 1.5 million businesses and more than half of Fortune 500 companies are incorporated in Delaware.[35]

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28. DEL. CODE ANN. tit. 8, § 220 (2021).

29. MODEL BUS. CORP. ACT §§ 16.01, 16.02(a)-(b) (2021) (setting forth the meeting minutes and record of shareholders that are typically disclosed in a Section 220 demand).

30. Armstrong v. Marathon Oil Co., 513 N.E.2d 776 (1987). A unanimous vote is a common law requirement only if the shareholder wishes to effectuate a fundamental corporate change such as a merger, consolidation, or sale of a substantial amount of the corporation's assets. *Id.*

31. Kobi Kastiel & Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 DEL. J. CORP. L. 55, 91 (2016) (proposing that if the free flow of information is encouraged for both management and shareholders, it will enhance transparency in the company and improve the governance playing field).

32. In re Forest Laboratories, Inc. Derivative Litig., 450 F. Supp. 2d 379, 393 (S.D.N.Y. 2006). A "demand" must be written under oath and state the purpose for investigating the corporation's books and records. 3B Vernon's Okla. Forms 2d, Bus. Org § 12.06. "If a shareholder is not a shareholder of record, their demand must also be written under oath and must be accompanied by documentary evidence of beneficial ownership of the stock." *Id.*

33. FLETCHER, *supra*, note 11.

34. *In re Forest Laboratories, Inc.,* 450 F. Supp. 2d at 393.

35.Brett Melson, *Delaware's 2019 Corporate Annual Report Just Released,* DELAWAREINC.COM (Aug. 4, 2020), www.delawareinc.com/blog/delaware-releases-annual-report-companies-formed/ [perma.cc/9Y5M-TSK9]. *See also* IpVenture, Inc. v. Acer, Inc., 879 F. Supp. 2d 426, 436 (Del. 2012) (stating that

Corporations have an affinity towards Delaware because of the efficiency and consistency of the DGCL statute.[36] Additionally, the judges of the Delaware courts are known for being impartial and are experts in the field of corporate law.[37] Additionally, some courts outside of Delaware will apply Delaware law when dealing with a complex corporate issue.[38] Lastly, some states model and interpret their own corporate law using Delaware's law.[39]

A "stockholder of record" is an individual who holds preferred or common shares of a company registered in such holder's name.[40] If the stock in question is owned in an unorthodox capacity (such as by a guardian, trustee, custodian, or by more than one individual), the demand can be made in that capacity so long as it is in a joint tenancy or tenancy in common and it is made by all owners of record.[41] The form and manner requirement mandates the stockholder to provide some form of documentary evidence of ownership before he or she can demand inspection of books and records.[42] Lastly, a proper purpose under the DGCL means, "a purpose reasonably related to such person's interest as a stockholder."[43] To provide an example of purpose, a Delaware court

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in addition to housing over half of the Fortune 500 companies, over 50% of all United States publicly traded companies are incorporated in Delaware). Additionally, the court states that in addition to the court assets, the Delaware government is favorable to corporations and provides service akin to friendly customer service. *Id.*

36. Delaware Corporate Law, *Why Businesses Choose Delaware*, DELAWARE.GOV, corplaw.delaware.gov/delaware-court-chancery-supreme-court/ [perma.cc/F63R-8KLM] (last visited Feb. 15, 2021).

37. *Id.*

38. *See* In re Bear Stearns Litig., 870 N.Y.S.2d 709, 727 (N.Y. Sup. 2008) (applying Delaware law to an interpretation of the business judgment rule in New York).

39. Connolly v. Agostino's Ristorante, Inc., 775 So. 2d 387, 387 (Fla. Dist. Ct. App. 2000) (stating that Florida courts rely upon Delaware's corporate law to interpret Florida corporate law because the state's corporate statues are modeled after Delaware's corporate statutes).

40. Enstar Corp. v. Senouf, 535 A.2d 1351, 1352 (Del. 1987) (holding that the statutory history, language, and prior decisions of the court make it unequivocally clear that only a stockholder of record can make a demand).

41. *Id.* at 1353. This provision exists in the Delaware code because it is important to enumerate the rights of beneficial shareholders and know how those rights may be distinct from the rights of traditional shareholders. DEL. CODE ANN. tit. 8, § 262.

42. Barnes v. Telestone Techs. Corp., No. 8513-VCG, 2013 WL 3480270, at *2 (Del. Ch. July 10, 2013) (concluding that the stockholder failed to meet the form and manner requirements because all he did was attach a sworn affidavit to his Section 220 demand testifying that he was the actual owner of the stock). The amount of "documentary evidence" required is within the discretion of the court, but the court will often look to ensure that enough evidence was submitted by the stockholder regarding the rights of the corporation. *Id.*

43. Paul v. China MediaExpress Holdings, Inc., No. 6570-VCP, 2012 WL 28818, at *3 (Del. Ch. Jan. 5, 2012) (opining that whenever a shareholder is seeking an inspection of corporate books and records because of wrongdoing and

found the plaintiff's purpose to be proper in a Section 220 demand when the plaintiff demonstrated that the demand was to investigate wrongdoing in connection with a merger, to investigate director disinterestedness related to said merger, and to value the shares in connection with the merger.[44] The burden of proof is on the stockholder to show by a preponderance of the evidence that they have a proper purpose for an inspection.[45]

Once the shareholders believe that an investigation of mismanagement is necessary and have stated a proper purpose, they will make the demand for the types of "books and records" that they seek from the directors.[46] If the corporation fails to reply to the shareholder's demand within five business days, the shareholders have a right to ask the court for an order to compel such inspection.[47] Where parties seek the opinion of the court is where various disputes arise, such as whether there is a proper purpose and whether certain documents should be disclosed.[48]

C. The Traditional Meaning Of "Books and Records"

Today, "books and records" is a convoluted term of art and courts have failed to properly define it in the context of shareholder demands.[49] This term is ambiguous because each corporation may have a different meaning of what constitutes a book or record and shareholders are suffering because they are not receiving access to

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mismanagement by the Board of Directors, it will always be considered a proper purpose).

44. Kosinski v. GGP Inc., 214 A.3d 944, 952 (Del. Ch. 2019). The court narrowly focused on the rights of a shareholder and asserted: "[A] purpose is 'proper' where it reasonably relates to the stockholder's interest as a stockholder." *Id.*

45. *Id.* The seminal case on what constitutes a proper purpose pursuant to a Section 220 demand is State ex rel. Pillsbury v. Honeywell, Inc., 291 Minn. 322 (1971). In *Pillsbury*, the plaintiff became a shareholder in a company immediately before a merger for the sole purpose of soliciting proxies and removing directors. *Id.* at 324. The plaintiff did this because his political and social beliefs conflicted with the overall mission of the corporation. *Id.* The court in *Pillsbury* ruled that this did not constitute a proper purpose because the plaintiff had no interest in the affairs of the business and his only plan was to further his personal beliefs through the company. *Id.* at 332. Accordingly, the plaintiff did not have a right to inspect the corporation's books and records because having stock in the company does not guarantee an absolute right to inspection. *Id*. at 331.

46. Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 567 (Del. 1997).

47. DEL. CODE ANN. tit. 8, § 220(c) (2021).

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

49. *See* Pileggi, *supra* note 10, at 164 (arguing that if the courts do not amend the statute to resolve the mere language of "books and records," Section 220 will essentially become obsolete).

information.[50] While the term "book" is a place where information is stored, the definition does not adapt to the impact of technology.[51] "Books" are becoming a thing of the past because most information can be read, stored, and disseminated electronically.[52]

Additionally, the term "record" is equally as confusing in today's digital world.[53] In the context of record retention, "record" refers to "data or information that the company deems to be important enough (based on legal, regulatory, and business reasons) to be retained for a specific period of time."[54] This is an ambiguous term because each business will define "records" according to the specific needs, goals, and objectives of their individual business.[55] Historically, through a variety of cases, courts have considered a "record" in the context of Section 220 demands to include financial records and reports that consist of more detailed items that would not be found in a regular company balance sheet.[56]

Traditionally, at common law, most courts have considered "books" to include lists of stockholders, a bank's stock book, and the stock ledger of the corporation.[57] Board of Directors' meeting minutes are also subject to disclosure pursuant to a Section 220 demand.[58] In addition to minutes, shareholders often request the production of financial records containing information such as the amount of compensation paid to directors and data relating to the corporation's manufacturing, operating, product lines, and industry.[59] That information is typically disclosed in a Section 220 demand because it neatly fits under "books and records" within the language of the statute; however, the language does not account for

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50. *Id*.

51. *Id*. at 165.

52. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (recognizing the large amount of electronic information that corporations produce, but also the importance of preserving and disclosing that information when necessary).

53. Pileggi, *supra* note 10, at 165.

54. *Id*. at 166.

55. *Id*. The term "document" is also closely connected with the term "record." For example, the Federal Rules of Civil Procedure have historically used "document" to reflect data or information stored in a particular format while a "record" can be much broader and include electronically stored information such as system metadata. FED. R. CIV. P. 26(b)(2)(B), 34(b)(1) (2021).

56. Debra T. Landis, Annotation, *What Corporate Documents are Subject to Shareholder's Right to Inspection,* 88 A.L.R.3D 663 (1978).

57. *Id*.

58. Beam v. Stewart, 845 A.2d 1040, 1056 (Del. 2004).

59. *See, e.g.,* Marathon Partners, L.P. v. M & F Worldwide Corp., No. Civ.A. 018-N, 2004 WL 1728604, at *2–*3 (Del. Ch. July 30, 2004) (discussing a demand for a copy of books and records that pertain to the company's stock ledger); *and* Ostrow v. Bonney Forge Corp., Civ. A. No. 13270, 1994 WL 114807, at *5 n. 9 (Del. Ch. Apr. 6, 1994) (seeking production of all financial records and the valuation of all shares in order to determine whether there was mismanagement, breach of fiduciary duties, or a waste of corporate assets).

modern technology and the multitudes of electronic information that is transmitted within corporations.[60]

D. Corporations and The Use of Technology

Aligned with current technological trends, there have been a small number of cases where courts have required a corporation to produce emails and other ESI in response to a Section 220 demand pursuant to the "books and records" language.[61] For example, in a Supreme Court of Delaware opinion, Chief Justice Strine stated:

> Ultimately, if a company observes traditional formalities, such as documenting its actions through board minutes, resolutions, and official letters, it will likely be able to satisfy a section petitioner's needs solely by producing those books and records. But if a company instead decides to conduct formal corporate business largely through informal electronic communications, it cannot use its own choice of medium to keep shareholders in the dark about the substantive information to which Section 220 entitles them.[62]

The decision to include emails in a Section 220 demand was unprecedented and courts have since failed to adopt a bright-line rule as to whether emails and other ESI can be subject to a shareholder demand.[63] The simple fact of the matter is that the language "books and records" is grossly outdated – the vast majority of a corporation's information is no longer printed out and placed in binders, folders, and filing drawers.[64] Information is now typically stored in some type of electronic format and, as some courts agree, if the statute fails to recognize this continuing trend, Section 220 of the DGCL will no longer serve its intended purpose.[65]

Today, corporations store most of their information electronically in the form of emails, text messages, word processing

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60. Charles R. Ragan et al., *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records In The Electronic Age*, THE SEDONA CONFERENCE (2005), thesedonaconference.org/sites/default/files/publications/Guidelines%20for%20Managing%20Information%20and%20Records%20in%20the%20Electronic%20Age%202005.pdf [perma.cc/98US-VTTB].

61. *See* Tanyous v. Happy Child World, Inc., C.A. No. 2947-VCN, 2008 WL 2780357, at *7 & n.50 (Del. Ch. July 17, 2008) (requiring defendant company to produce e-mails in response to a proper and narrowly-tailored Section 220 demand, which sought, inter alia, defendant's "[c]orrespondence file[s] . . . including all e-mails, letters, reports, etc").

62. KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 742 (Del. 2019).

63. A fifty-state survey of shareholder inspection demand statutes revealed no informative case law on requiring the inclusion (or exclusion) of ESI in response to a shareholder inspection demand. Pileggi, *supra* note 10, at 177.

64. MARY MACK, A PROCESS OF ILLUMINATION: THE PRACTICAL GUIDE TO ELECTRONIC DISCOVERY 37 (2008); Ragan, *supra* note 60, at vi.

65 Ragan, *supra* note 60, at vi.

documents, and web pages.[66] Emails are arguably the most prevalent form of communication used by businesses, as the average employee sends and receives approximately 140 business-related emails each day.[67] Worldwide, that comes to approximately 140 billion business-related emails sent and received each year.[68] While text messages have not been prevalent in the corporate setting for as long as emails have, they are becoming more commonplace.[69] In addition to using text messaging for internal communication, corporations are also using text messages to chat with customers, send payment and billing reminders, relay order confirmations, manage referral programs, and other business matters.[70]

Electronic records can encompass many different things such as voicemail, email, deleted emails, data files, program files, back-up files, archival tapes, temporary files, system history files, web site information in textual, graphical, or audio format, cache files, and other electronically stored information.[71] According to a 1999 study, ninety-three percent of all information gathered by companies was generated in digital form on computers.[72] Only seven percent of information is originated in some other form, such

66. Pileggi, *supra* note 10, at 165 (stating that even before technology such as handheld tablets came to fruition, over ninety percent of businesses documents were transmitted electronically).

67. Rob Asghar, *The Art of The Effective Business Email*, FORBES (June 12, 2014), www.forbes.com/sites/robasghar/2014/06/12/the-art-of-the-effective-business-email/ [perma.cc/8JNS-W7BM] (arguing that email will not be obsolete in the near future because more and more executives and top professionals in corporations do not check voicemails anymore).

68. *Id.*

69. Valerie Bolden-Barrett, *How to Improve Business Communications Through Text Messages*, CHRON (Nov. 21, 2017), smallbusiness.chron.com/improve-business-communication-through-text-messages-74614.html [perma.cc/U4GM-CGQ3] (arguing that short message service (SMS) is an invaluable tool for a business because it can serve as an aid to customer interaction, internal messaging, and crisis management).

70. West Corporation, *5 Types of Sms Conversations For Businesses,* INTRADO (Dec. 20, 2018), www.west.com/blog/interactive-services/5-types-sms-conversations-business/ [perma.cc/T9F3-SNVT]. Text messages between corporations and their customers has been a recent topic of litigation, particularly as it relates to whether the sending of text message advertisement violates the Telephone Consumer Protection Act (TCPA) 47 U.S.C. § 227 (2012). 141 Am. Jur. *Trials* § 109 (2015); Kauffman v. CallFire, Inc., 141 F. Supp. 3d 1044 (S.D. Cal. 2015) (holding that an internet-based text message service provider sending text messages to a consumer's mobile phone was not subject to liability under the TCPA).

71. Kleiner v. Burns, No. 2150-JWL, 2000 WL 1909470 (D. Kan. 2000). The court granted a motion to compel various forms of electronic communication. *Id.* The court took a liberal approach and enumerated the type of computerized data and other electronically recorded information that must be disclosed. *Id.*

72. Matthew Cohen et. al., *E-Discovery and Electronic Evidence Update*, 42 THE ADVOCATE (St. B. Tex., Section of Litig.) 1 (2008).

as a hard copy.[73] This study was conducted over two decades ago; and since then, the percentage of information being generated in digital form has grown exponentially.[74]

A 2014 study unveiled that ninety percent of companies now use social media as some form of business strategy.[75] Subsequently, a 2015 study revealed that a corporation's main goal in using social media is for marketing purposes.[76] Other corporations reported communication and customer service as allocation of its their social media resources.[77] Social media is very much a commercial space.[78] Companies also monitor to see how often social media users see advertisements on a daily basis, and companies are increasing their budgets in this area.[79]

Before social media, if a company wished to publish investor-related information such as an earnings announcement, it would have to send a press release to intermediaries such as a newswire service.[80] With this option, the company would not know or receive notification if the information in the announcement actually got to the interested investors.[81] Today, because of corporate access to social media, a company can combat this issue by using a social media site to send one or more direct messages to followers with a link to the same type of announcement as described above.[82] This approach solves the problem as to whether or not the interested investors saw the announcement, due to how frequently most people check social media messages in addition to options such as read receipts.[83]

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73. *Id*.

74. *Zubulake,* 217 F.R.D at 311.

75. *How Social Media Is Now Used In Corporations,* INCITE GROUP (Aug. 6, 2014), usefulsocialmedia.com/brand-marketing/how-social-media-now-used-corporations [perma.cc/9SKT-AS5F].

76. *Id*.

77. *Id*. (stating that in 2015, customer service queries via Twitter have increased by approximately fifty percent in response to customer willingness to participate in surveys via their personal social media pages).

78. Aimee Khuong, *Complying with the Federal Trade Commission's Disclosure Requirements: What Companies Need to Know When Using Social-Media Platforms As Marketing and Advertising Spaces*, 13 HASTINGS BUS. L.J. 129, 131 (2016) (arguing that because social media platforms have become huge marketing and advertising spaces for companies, they should be subject to commercial advertising regulations).

79. *Id*. (asserting that fifty-eight percent of companies responded that they would increase their social media budgets in 2014).

80. Matteo Tonello, *Corporate Use of Social Media*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (May 17, 2016), corpgov.law.harvard.edu/2016/05/17/corporate-use-of-social-media-2/ [perma.cc/4EQ6-XB73].

81. *Id*.

82. *Id*. (arguing that this approach also increases the speed and flexibility of news disseminations which in turn reduces acquisition costs for investors).

83. *Id.*; *Read Receipt*, CAMBRIDGE DICTIONARY (4th ed. 2013) (defining "read

Social media has also influenced how corporations do business by making it harder for corporations to control their reputations and hinder misconduct.[84] Because of social media, companies are no longer in exclusive control of their reputations – a single social media post regarding a corporate scandal has the possibility of reaching millions of people; making it harder for a company to manipulate a message or cover up the engagement of misconduct.[85] In terms of transparency, "customers and communities no longer trust the voice of the authority, but demand proof of authenticity."[86] Because of this, select corporations have decided to be more open about company reports via social media.[87] While it is clear that corporations rely heavily on social media, it is not clear as to why Section 220 of the DGCL does not reflect the increasing need to include social media in a shareholder demand to increase transparency and preserve the information rights of a shareholder.[88]

III. ANALYSIS

Section III of this Comment will make a comparative analysis of the admissibility of emails, text messages, and social media between other areas of the law and Section 220. This section will then discuss the foreseeable public policy implications of expanding the scope of Section 220. Emails, text messages, and social media must be considered relevant and authenticated to be admitted in court. Because the threshold for relevancy is low, the discussion will focus primarily on authentication issues.[89]

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receipt" as a message showing that someone has received and opened an email you sent). Corporations can also ensure that interested investors saw its announcement by using read receipts via email as well. Kim Komando, *How to Check If Someone Has Read Your Email*, USA TODAY (Oct. 13, 2017), www.usatoday.com/story/tech/columnist/komando/2017/10/13/how-check-if-someone-has-read-your-email/761101001/ [perma.cc/JE7A-PPZ5].

84. ALEXIS CARRIO, EMERGING ETHICAL AND LEGAL ISSUES IN THE BRAVE NEW WORLD OF SOCIAL MEDIA AND CORPORATE TRANSPARENCY 56 (2010) (arguing that social media can be the fuel to influence transparency in the corporate setting).

85. *Id*.

86. ROGER BOLTON, THE AUTHENTIC ENTERPRISE RELATIONSHIPS, VALUES & THE EVOLUTION OF CORPORATE COMMUNICATIONS 40 (2007).

87. CARRIO, *supra* note 84 (explaining that RioTinto is an example of a company that has increased its transparency, particularly in the area of business reporting).

88. Érica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the "Genius of American Corporate Law"*, 63 EMORY L.J. 1383, 1461 (2014) (explaining that the increase in scholarly writings to include more electronic information in Section 220 demands is in response to a retreat from discovery in shareholder actions).

89. State v. Williams, No. 106563, 2018 WL 6004579 (Oh. App. Ct. Nov. 15, 2018); State v. Craycraft, No. CA2009-02-013, 2010 WL 610601 (Oh. App. Ct.

While authentication is often not discussed in a Section 220 demand, it is possible for a court to order that the books, documents, and records sought in a demand be properly authenticated.[90] In addition, "it has been customary for the plaintiff to establish the demand's authenticity by calling as a trial witness the person who executed the demand."[91] For example, in a case involving a defendant raising demand authentication issues, the Delaware court held that a demand was properly authenticated when an officer of the corporation testified that he was familiar and recognized the signature of another officer who signed the demand.[92] The court asserted that the demand was self-authenticating pursuant to Rules 901(b)(1) and 902(8) of the Delaware Uniform Rules of Evidence.[93]

A. Admissibility of Emails

1. Emails in Other Areas of the Law

In the era of electronic communication, emails have become increasingly prevalent, and courts have been willing to admit electronic mail into evidence.[94] However, while courts are amicable to the admissibly of emails into evidence, two problems remain – the relevancy and the authenticity of the email.[95] Pursuant to the Federal Rules of Evidence Rule 401, for an email to be relevant, the court must find that the email in question is capable of making "a fact more or less probable than it would otherwise be without the evidence."[96] Pursuant to the Federal Rules of Evidence Rule 901, for

Feb. 22, 2010); State v. Roseberry, No. 96166, 2011 WL 5588725 (Oh. App. Ct. Nov. 17, 2011); State v. Winfield, No. 1641, 1991 WL 28291 (Ohio App. Ct. Feb. 7, 1991). The Williams case involved several counts relating to prostitution, trafficking, and unlawful sexual conduct. *Williams*, 2018 WL 6004579, at *1. In regard to the admissibility of text messages, the defendant allegedly sent a victim a text message containing an implicit statement that he wanted to have sex with her for money. *Id.* at *3. The court found that the text messages in question passed the "low" threshold for admissibility because the victim testified that she often exchanged text messages with the defendant over the relevant time period and the phone number in the exhibit matched the phone number of the defendant. *Id.* at *5.

90. OKLA. STAT. tit. 18, § 1065 (2019).

91. BBC Acquisition Corp. v. Durr-Fillauer Med., Inc., 623 A.2d 85, 89 (Del. Ch. Ct. 1992) The court stated that while demand authentication is customary, it is not a legal mandate. *Id.*

92. *Id.*

93. *Id.*

94. U.S. v. Safavian, 435 F. Supp. 2d 36 (D.D.C. 2006) (referring to our "age of technology and computer use" in which emails are a "normal and frequent" mechanism for the majority of us, including "the professional world").

95. ROBERT E. LARSEN, NAVIGATING THE FEDERAL TRIAL § 9:19 (2019 ed.)

96. FED. R. EVID. 401(a) (2021).

a piece of evidence to be properly authenticated, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[97]

Once a party has passed the 401-relevancy test and has shown that the email has probative value, they must also pass the 403 relevancy test to show that admitting the email into evidence will not unfairly prejudice or confuse the jury.[98] In determining whether evidence will prejudice the jury, the court applies a balancing test to see if the probative value of the evidence outweighs the potential harm likely to result from it being admitted.[99]

If a party can properly authenticate an email they wish to introduce into evidence, it will most likely be admissible because the relevance standard merely requires a party to demonstrate that there is probative value in the email.[100] Typical examples of evidence that courts are willing to accept to authenticate an email are the testimony of a witness with personal knowledge of the content of the email, a comparison of evidence by an expert witness or trier of fact, or a general pattern to prove how a person usually constructs their emails.[101] The Federal Circuit Courts have varying requirements for establishing email authenticity.[102] A Seventh Circuit case addressed the issue of authentication when a civil rights action was brought against a prison guard for allegedly

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97. FED. R. EVID. 901 (2021).

98. FED. R. EVID. 403 (2021).

99. M.C. Slough, *Relevancy Unraveled*, 5 KAN. L. REV. 1, 12 (1956). If the court finds the that the probative value outweighs any potential harm to the jury, it will admit the evidence. *Id.*

100. Allison L. Pannozzo, *Uploading Guilt: Adding A Virtual Records Exception to the Federal Rules of Evidence*, 44 CONN. L. REV. 1695, 1702 (2012).

101. *Id.* To illustrate an example of testimony of a witness with personal knowledge of the content of an email: In a case involving a co-conspirator, a court allowed for the authentication of several emails because of the testimony of an FBI agent assigned to the case. United States v. Lundergan, No. 5:18-cr-00106-GFVT, 2019 WL 4125618, at *2 (E.D. Ky. Aug. 29, 2019). The agent testified that the FBI served a grand jury subpoena on the defendant for several emails and he thoroughly reviewed the emails in question. *Id.* In regard to comparison of evidence by an expert: In a criminal case involving sexual assault, the court found forwarded emails to be properly authenticated because an expert presented sufficient evidence of the accuracy of the emails, whether they had been altered, and whether the emails actually were sent by the defendant. Bobo v. State, 285 S.W.3d 270, 273 (Ark. App. Ct. 2008). An example of a general pattern of how a user typically constructs their emails: A criminal court in Alabama found an email to be properly authenticated when the victim testified that the defendant had sent emails from his personal account; the account contained his photograph and screen name; and many emails were signed with defendant's initials. Culp v. State, 178 So. 3d 378, 386 (Ala. Crim. App. 2014).

102. Peter M. Lauriat et al., *Electronic discovery—Social media—Discovery of Social Media*, 49A Mass. Prac., Discovery § 7:15 (2019) (noting that there is a clash between broad and narrow interpretations of what is required to authenticate an email and other electronic evidence).

destroying an inmate's legal documents.[103] The case turned on the issue of whether an email sent by the prison guard to another official at the prison, stating his intent to destroy the inmate's documents, was admissible.[104] The Seventh Circuit held that emails are admissible if the plaintiff properly authenticates them by providing a statement from the person who wrote the email or an individual who saw the email being composed.[105]

The Eleventh Circuit looked at four factors to determine whether emails were properly authenticated during its review of a fraud case.[106] The court found the emails to be properly authenticated because: (1) the emails contained the defendant's email address, which was corroborated with additional evidence of his use of the same address; (2) an individual who received the emails testified that when he replied to the sender, the computer automatically imputed the defendant's email address; (3) the context of the emails revealed that the sender was familiar with the facts of the case at bar; and (4) the content of the emails contained the defendant's nickname.[107]

2. Emails in the Context of Section 220

The seminal case regarding email disclosure in a Section 220 demand is *KT4 Partners LLC v. Palantir Technologies Inc.* in which the plaintiffs alleged that Palantir mismanaged and violated certain KT4 shareholder agreements.[108] In KT4's Section 220 demand, it sought access to the corporation's books and records, "including hardcopy and electronic documents and information" to get to the root of the mismanagement.[109] While the Court of Chancery concluded that the inspection of emails was not essential to fulfill KT4's proper purpose of investigating various forms of misconduct and breaches of fiduciary duty, the Supreme Court of Delaware allowed for the inspection of emails because Palantir failed to observe corporate formalities by documenting its actions through board minutes, resolutions, and official letters.[110] The court

103. Devbrow v. Gallegos, 735 F.3d 584 (7th Cir. 2013).

104. *Id.* at 586.

105. *Id.* at 587. The court noted that if a party provides information such as an email's context, the actual email address, or previous email chains between the parties, this is merely circumstantial evidence and will only *help* to authenticate an email. *Id.* Because Devrow did not show that he or anyone else saw the prison guard actually write the email, the court found that he did not have sufficient evidence to authenticate the alleged retaliatory email in question. *Id.*

106. U.S. v. Siddiqui, 235 F.3d 1318, 1322 (11th Cir. 2000).

107. *Id.* at 1322-23.

108. *KT4 Partners LLC*, 203 A.3d at 745.

109. *Id.* at 746.

110. *Id.* at 742-748.

ordered emails to be produced because it was the corporation's only form of communication.[111] The court noted that KT4 met its burden of showing that the emails were necessary to accomplish its purpose because it identified the categories of books and records that presented evidence that those documents were necessary to support the claim of fraud and mismanagement.[112] Further, the court asserted that the emails were directly relevant to the alleged mismanagement and violation of shareholder's rights.[113] Finally, the court stated that if a party in a Section 220 demand "conducts formal corporate business without documenting its actions in minutes and board resolutions or other formal means, but maintains its records of the key communications only in emails," then the party "has no one to blame but itself for making the production of those emails necessary."[114]

3. Comparative Analysis of Emails Inside and Outside the Context of Section 220

Outside the scope of Section 220, courts require an email to be relevant and properly authenticated for it to be admissible.[115] In a Section 220 proceeding, instead of focusing on authenticating the email, the court will ensure that disclosure of the email is necessary to accomplish the stated purpose of the demand.[116] The relevancy requirement for emails is common to Section 220 and other areas of the law—in a Section 220 demand, the court will determine whether the email is relevant to an alleged violation of a shareholder right, breach of fiduciary duty, fraud, etc., while in other areas of the law, the court will look to see whether the email passes the 401 and 403 relevancy test pursuant to the Federal Rules of Evidence.[117] A requirement that is specific to the scope of Section 220 is that if a corporation fails to observe corporate formalities to document its activities and chooses informal communication such as emails, the court will allow for emails to be included in the demand.[118]

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111. *Id.* at 742.

112. *Id.* at 755. In its demand, KT4 sought books and records for the proper purpose of investigating "fraud, mismanagement, abuse, [and] breach of fiduciary duty" which was also related to its demand for "hardcopy and electronic document and information." *Id.* at 746. In a Section 220 demand, the stockholder must demonstrate that the books and records sought are necessary to satisfy a proper purpose. Saito v. McKesson HBOC, Inc., 806 A.2d 113, 114-15 (Del. 2002).

113. *KT4 Partners LLC*, 203 A.3d at 756.

114. *Id.* at 758. If a corporation does not have any documents, including emails, then the shareholders can use that lack of documentation as evidence in a Section 220 demand to gain access to other forms of documentation. *Id.*

115. Cohen, *supra* note 72.

116. *Saito*, 806 A.2d at 114-15.

117. *KT4 Partners LLC*, 203 A.3d at 756; FED. R. EVID. 401, 403 (2021).

118. *KT4 Partners LLC*, 203 A.3d at 758.

The simple fact of the matter is that because emails have been admissible in other areas of the law long before shareholders were allowed access in a Section 220 demand, courts understand the probative value of an email.[119] Traditionally, documents such as board minutes were subject to disclosure in a Section 220 demand, although minutes do not give shareholders the information they typically seek.[120] Emails allow shareholders to see how and when decisions were made and give the shareholders the information they are entitled to so they can investigate whether or not corporate wrongdoing was present.[121] This belief is backed by the *KT4* decision where the court allowed for the production of emails because they contained information that was entirely necessary and essential to showing the alleged wrongdoing.[122]

B. Admissibility of Text Messages

1. Text Messages in Other Areas of the Law

Similar to emails, text messages must be authenticated with documentary evidence in order to be admissible.[123] The authentication of a text message has two components: (1) "a witness with personal knowledge must testify that printouts of text messages accurately reflect the contents of the messages" and (2) a witness with personal knowledge must also provide testimony that aids the court in identifying the sender of the text message.[124]

To identify the sender of the text message, courts will look to several factors, such as: (1) the phone number assigned to the sender; (2) the content of the text message being recognizable as coming from the sender; (3) the fact that the sender "responded to an exchange in such a way as to indicate circumstantially that he or she was in fact the author of communication;" or (4) any other type of corroborating evidence that will identify the sender.[125]

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119. Michael Blanchard, *When Must E-Mails Be Produced In DGCL Section 220 Books And Records Actions*?, ABA (Aug. 20, 2019), www.americanbar.org/groups/business_law/publications/blt/2019/09/dgcl-section-220/ [perma.cc/8HPP-56Y4].

120. *Id.* Because books and records demands have traditionally allowed for only a narrow inclusion on paper records, this does not leave room for "creative interpretation." *Id.* This under inclusiveness burdens the shareholder because it makes it difficult for them to prove their case of mismanagement. *Id.*

121. *Id.*

122. *KT4 Partners LLC*, 203 A.3d at 754.

123. *See generally* State v. Thompson, 2010 ND 10, ¶ 12, (2012) (holding that a text message was properly authenticated because the complainant gave testimony regarding the content of the text message and picture of the actual text message was introduced into evidence).

124. George L. Blum, Annotation, *Authentication of a Text Message*, 38 A.L.R.7th Art. 2 (2018).

125. Published in the American Law Report, these are factors that courts in

In a Mississippi case involving prosecution for possession of a controlled substance, the court found text messages to be admissible.[126] First, the court found the text messages were admissible because they passed the relevancy test as the messages were solicitations that indicated that the defendant possessed the drugs and intended to distribute them.[127] Second, the court found the messages to be authenticated because the phone had the same phone number as the defendant, contained a "selfie" of the defendant, and all the text messages in the phone were dated within ten days of the defendant's arrest.[128]

In contrast, the Superior Court of Pennsylvania took a strict approach to authenticity and stated that authentication is only a prerequisite to admissibility.[129] There, the defendant was charged with possession of a controlled substance and as an accomplice.[130] The court found text messages from the defendant's phone to be inadmissible and not properly authenticated.[131] According to the court, the detective's description of how the text messages were transcribed coupled with his statement that the transcription was an accurate representation of the text messages was insufficient.[132] The court went on to say that "authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person."[133] The court also took issue with the fact that the Commonwealth conceded that the defendant did not write every single text message on the phone.[134] The court noted that evidence tending to substantiate the defendant's text messages was "glaringly absent."[135] According to the court, there should have been

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every state will look to in considering the authentication of a text message. *Id.* In a West Virginia case involving the authentication of text messages, the court found the text messages in question to be properly authenticated because AT&T phone records established the dates and times of text messages that corresponded with a spreadsheet of phone numbers admitted into evidence. Hasan v. W. Virginia Bd. of Med., No. 18-0715, 2019 WL 5875193, at *10 (W. Va. Nov. 8, 2019). This is an example of a court establishing a link between the phone number, party, and content of a text message. *Id.*

126. Holloway v. State, 270 So. 3d 1113 (Miss. App. 2018).

127. *Id.* at 1116.

128. *Id.* The court also considered the fact that the offender fled after being discovered was an additional reason for authentication and held there was no error in admitting the text messages. *Id.*

129. Com. v. Koch, 39 A.3d 996, 1005 (Pa. Super. 2011). Since authentication is only a prerequisite to admissibility, in addition to confirmation that the phone number belongs to the author of the text messages, there should also be circumstantial, corroborating evidence that identifies the sender. *Id*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

testimony of the person sending or receiving the text messages as well as context clues that reveal the identity of the sender.[136]

2. Text Messages in The Context of Section 220

Recently, a Delaware court ruled on the production of text messages in a Section 220 demand.[137] The demand followed the Papa John's Board of Directors asking John Schnatter to resign as director of the company and terminating two agreements the company had with him.[138] In response, he launched a Section 220 demand.[139] Schnatter sought seventeen categories of Papa John's books and records for the purpose of discovering whether the board violated their fiduciary duties.[140] In certain categories, Schnatter requested access to text messages stored on the director's personal devices.[141] The court allowed for the production of text messages and reasoned that "if the company's other directors, CEO, and General Counsel used personal devices to communicate about changing the company's relationship with Schnatter, they should expect to provide that information to the company."[142] The court noted that like emails, text messages have the opportunity to provide probative information.[143]

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136. *Id.*

137. Schnatter v. Papa John's International, Inc, C.A. No. 2018-0542-AGB, 2019 WL 194634 (Del. Ch. Jan. 15, 2019). The *Schnatter* decision involves John Schnatter who was the founder, largest stockholder, and recent CEO and chair of Papa John's. *Id.* at *1. In November of 2017, Schnatter was under a great deal of scrutiny for making public comments about the way in which the National Football League handled players protesting during the national anthem and how it adversely affected the Papa John's business. *Id.* at *2. Subsequently, in May of 2018, Schnatter was again under criticism from the press for using the N-word during a conference call. *Id.* at *3. Because of Schnatter's scandals, the Papa John's Board of Directors decided to intervene. *Id.* at *1.

138. *Id.* at *1.

139. *Id.*

140. *Id.* at *5. Schnatter asserted, "[T]he purpose of my demand is to inform myself so that I may fulfill my fiduciary duties and ensure that the other members of the Board are fulfilling their fiduciary duties as well." *Id.* at *6.

141. *Id.* at *15.

142. *Id.* at *16. In holding that text messages were to be produced in a Section 220 demand, the court used reasoning from another Delaware opinion which held that a shareholder was allowed to inspect emails and other documents on the director's personal device because the director owes an obligation to the company "to share information with the company when the company needs it." Indiana Electrical Workers Pension Trust Fund IBEW v. Wal-Mart Stores, Inc., C.A. No. 7779-CS, 81, 97 (Del. Ch. May 20, 2013).

143. *Schnatter*, 2019 WL 194634 at *16. While this court did not adopt a bright-line rule for the admissibility of text messages in Section 220 demands, the court stated that in the future, courts should weigh the need for information contained in the text messages against the burdens of confidentiality and the availability of the information from other sources. *Id.* After the discussion of the

3. Comparative Analysis of Text Messages Inside and Outside the Context of Section 220

Unlike in other areas of the law regarding the admissibility of text messages, a court will not focus on properly authenticating a text message in a Section 220 demand.[144] While the discussion of authentication is absent from the only case discussing text messages and Section 220 demands, authentication is necessary to ensure that the director in question is the one that authored the text message.[145] This will be further discussed in Section IV of this Comment. Rather, the court is solely focused on the relevancy of the information contained in the text messages and whether the information contains probative value and relates to the demand.[146] The relevancy requirement of text messages is consistent with the language of Rule 401 that requires an email to contain probative value as well.[147]

Because it has been only recently that courts have begun to speak about allowing shareholders to demand emails in a Section 220 demand, it is not surprising that only a single case has addressed the issue of text messages.[148] Communication is ever-changing.[149] Employees, corporate directors, and shareholders will continue to communicate using whatever platform they wish.[150] Just because it may be difficult for the court to review these communications and may impose heavy expenses on companies to produce them, this does not make the information any less necessary.[151] Information is a fundamental right of a shareholder and if they cannot get access to information in more than one form,

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text messages, the court discussed the issue of privileged communications and stated that Schnatter is not entitled to the other director's privileged information. *Id.* at *17. This section of the opinion was later abrogated by the Supreme Court of Delaware when it held that there is no presumption of confidentiality in productions under the statute governing the production of a corporation's books and records. Tiger v. Boast Apparel, Inc., 214 A.3d 933 (Del. 2019).

144. *Thompson*, 2010 ND 10, ¶ 12 (2012).

145. Kirk C. Strange, *E-Mail & Text Message Evidence in Litigation*, STANGE LAW FIRM (2016), www.stangelawfirm.com/articles/e-mail-text-message-evidence-in-litigation/ [perma.cc/GMF5-TRN7]. Authentication should not be assumed—the proponent of such evidence must present some proof that the message[s] were actually authored by the person who allegedly sent them. *Id.*

146. *Schnatter*, 2019 WL 194634, at *16.

147. FED. R. EVID. 401 (2021).

148. *Schnatter*, 2019 WL 194634, at *15.

149. Blanchard, *supra*, note 119. Technological advances make various forms of communication convenient and more efficient to use. *Id.*

150. *Id.*

151. *Schnatter*, 2019 WL 194634, at *16.

corporate malfeasance will run rampant and directors will not be held accountable.[152]

C. Admissibility of Social Media

1. Social Media in Other Areas of the Law

Several jurisdictions have adopted a two-step approach to determine whether there is enough evidence to properly authenticate and admit evidence from a user's social media account and messages sent via the social media platform: (1) whether there is proof that the printout of the social media page is an accurate depiction of the proffered evidence; and (2) whether the social media page is attributable to and controlled by a certain person, often the defendant.[153] New York takes a strict approach to the admissibility of social media evidence and requires evidence regarding the defendant's known use of the social media site, evidence of anyone communicating with the defendant via the social media site, and evidence that the account can be traced to a device owned by the defendant.[154] Ultimately, for a social media page to be authenticated, courts will require more than just evidence that the defendant's picture and last name appear on their personal profile page.[155]

a. Authentication of a Social Media Page

While social media is a relatively new form of communication and courts have yet to discuss social media in the context of Section 220 demands, New York believes that the discovery contents of social media profiles should be widely admissible.[156] For example,

152. FLETCHER, *supra*, note 11.

153. *See* People v. Price, 29 N.Y.3d 472, 478 (2017) (requiring additional circumstantial evidence, such as identifying information and pictures, to ensure that the social media profile was actually set up by and belongs to the defendant).

154. *Id.* at 478. In addition to plaintiff's failure to provide sufficient evidence that the defendant had a connection with the social media site, the court also noted there was no evidence that the page was password protected. *Id.* The court was concerned with the possibility of other people accessing defendant's personal page and posting things without his knowledge or permission. *Id.* The court found there was insufficient proof that the defendant exercised dominion or control over his alleged social media page. *Id.* at 479.

155. *Id.*

156. Kevin W. Turbert, *Discoverability of Social Media Profiles in New York: How Defense Litigators Can Optimize on Disclosure*, 87 N.Y. ST. B.J. 10, 11 (Oct. 2015) nysba.org/app/uploads/2020/04/Journal_October15_APP.pdf [perma.cc/C995-CV8U]. Approximately two-thirds of Americans have a personal profile on one of the many social networking sites. *Id.* Because of this large number, it would be a judicial oversight to ignore this type of evidence and

New York statute CPLR 3101 states that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action."[157] When interpreting this statute, courts have been liberal in determining what constitutes "material and necessary" and routinely allow for social media discovery.[158] In regard to privacy concerns, courts have widely recognized that there is no reasonable expectation of privacy when a social media user disseminates information in public communication.[159] If a party to litigation chooses to have a public social media profile, he or she is consenting to have that profile accessible and, therefore, discoverable to all.[160]

If a social media account is set to private, New York courts will look to see if certain portions of the social media page in question contain evidence that may contradict a claim.[161] For example, if the court finds that the portions of a user's social media page are probative to the issue of what the plaintiff is alleging, and "it is reasonable to believe that other portions" of the user's profile "may contain further evidence relevant to the issue," then the court will allow for the disclosure of relevant evidence that is located within the private portions of the user's profile.[162] The standard requiring the social media content to be probative is consistent with the

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bar its admission in various types of cases. *Id.*

157. N.Y. C.P.L.R. 3101(a) (McKinney 2014).

158. *See* Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403, 406 (1968) (holding that the words "material and necessary" under CPLR 3101 should be broadly interpreted and courts have wide discretion to determine whether the information should be admissible). The disclosure should be permitted if social media evidence, for example, will assist in the preparation for trial, sharpen material issues, and reduce any delay in the court proceedings. *Id.*

159. Romano v. Steelcase Inc., 30 Misc. 3d 426, 433 (Sup. Ct., Suffolk Co. 2010). Under CPLR 3101, the information sought by the defendant regarding plaintiff's Facebook and MySpace pages were "material and necessary" to the defendant's case. *Id.* at 430. While certain portions of plaintiff's social media sites were set to private, the defendant should have full access to the pages, regardless of a privacy setting, because holding otherwise would stand in stark opposition to the liberal interpretation of CPRL 3101 set forth by precedent. *Id.*

160. Fawcett v. Altieri, 38 Misc. 3d 1022, 1027 (Sup. Ct., Richmond Co. 2013) "[A]s courts have previously determined[,] this privacy is not absolute. Information posted in the open on social media accounts is freely discoverable and does not require court orders to disclose it." *Id.*

161. Turbert, *supra* note 156.

162. Richards v. Hertz Corp., 100 A.D.3d 728 (2012). The *Richards* decision involved an action to recover damages for personal injuries and the admissibility of Facebook profiles. *Id.* at 729. While certain portions of the Facebook profiles in question were set to private, the court ordered the private portions of the Facebook pages to be subject to discovery because the pictures contained in the profiles were probative to the extent of the alleged injuries. *Id.* at 730. At the end of the opinion, the court explicitly stated that in the future when private portions of social media pages are subject to discovery, the court should conduct an in-camera inspection of the social media page to ensure that the information sought is material to the issue. *Id.*

relevancy standard for the admissibility of emails as well as text messages.[163]

b. Authentication of a Social Media Message

A problem that often presents itself in court is the admissibility of messages that are written within a social media site's messaging system.[164] A West Virginia court stated: "[S]ocial media text messages may be authenticated in numerous ways, for example, by a witness who was a party to sending or receiving the text messages, or through circumstantial evidence showing distinctive characteristics that link the sender to the text messages."[165] In that case, the West Virginia court found the social media text messages in question to be properly authenticated because the lower court conducted an in-camera review of the messages, the messages were subject to cross-examination by opposing counsel, there was expert testimony stating the possibility of a fabricated Facebook page, and a witness testified regarding a conversation with the defendant via Facebook messaging.[166]

In contrast, in a case involving the admissibility of Instagram messages, an Arkansas court found the messages to be improperly authenticated because the victim admitted that she did not have personal knowledge that the defendant was the one sending the messages.[167] Further, the victim admitted that in 2016, she opened a new Instagram account and she did not communicate with the defendant via the new account.[168] Because of those reasons, the court found that there was an insufficient amount of circumstantial evidence to corroborate that the defendant sent the Instagram messages in question.[169]

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163. FED. R. EVID. 401 (2021).

164. State v. Benny W., No. 18-0349, 2019 WL 5301942 (W. Va. Oct. 18, 2019). This sexual assault case involved the admissibility of Facebook text messages in which the petitioner solicited sexual intercourse from the victim. *Id*. at *2.

165. *Id*. at *5.

166. *Id*. at *6. In addition, there must be an "adequate foundational showing of the messages' relevance and authenticity." State v. Eleck, 130 Conn. App. 632, 638-89 (2011). This relevancy requirement is akin to the relevancy requirement for admissibility of emails and text messages. FED. R. EVID. 401, 403 (2021).

167. Brown v. State, No. CR-18-74, 2019 WL 1062384 (2019). This rape case involved the admissibility of photographs of social media messages in which the defendant allegedly confessed to raping the victim. *Id.* at *2.

168. *Id.* at *12. The court conceded that if the victim did not testify that she did not have knowledge of the defendant sending the messages, the evidence would have been sufficient to authenticate the Instagram message. *Id.*

169. *Id.*

2. Comparative Analysis of Social Media to Emails and Text Messages

The main similarity in the admissibility of social media that mirrors the admissibility requirements of emails and text messages is the evidence required to prove that the social media post or social media text message was actually sent by the defendant.[170] Just like emails and text messages, for social media to be admitted, there must be distinctive characteristics that link the defendant to the social media page or messages.[171] Evidence must also go beyond a mere showing that the name connected to the social media account and profile picture matches the defendant.[172]

Because text messages and emails cannot be set to private, the requirements for disclosure of a private account are exclusive to social media.[173] If a social media user does not take advantage of any privacy settings, there is no expectation of privacy and the social media page is therefore discoverable.[174] On the other hand, if the social media page is set to private, the only way in which the court will allow for the content to be discoverable is if it is reasonable to believe that the private portions of the page contain information directly relevant to the issue at bar.[175]

D. Foreseeable Detriments in Expanding the Scope of Section 220 To Allow for Emails, Text Messages, and Social Media

The biggest concern with expanding the scope of Section 220 demands is confidentiality.[176] If more and more information becomes permissible in a shareholder demand, some courts argue that because a corporation's books and records often contain sensitive information about the company, this could cause security concerns.[177] If courts allow shareholders to demand all forms of electronic communication, it could place an enormous burden on a corporation and expose them to the unnecessary risk of privileged

170. *Bansal*, 663 F.3d at 667.

171. *Benny W.*, 2019 WL 5301942 at *5.

172. *Price*, 29 N.Y.3d at 478.

173. Turbert, *supra* note 156.

174. *Fawcett,* 38 Misc. 3d at 1027.

175. *Richards*, 100 A.D.3d at 728.

176. S. Mark Hurd & Lisa Whittaker, *Books and Records Demands and Litigation: Recent Trends and Their Implications for Corporate Governance*, 9 DEL. L. REV. 1, 26 (2006) (concluding that with the recent trend in increasing the use of Section 220, it is important to balance issues regarding the confidentiality of corporate books and records with the important rights of a shareholder).

177. *Id.*

information becoming compromised.[178] In addition, there is an argument that if Section 220 is expanded to include various types of electronic information, it will cause corporate governance concerns.[179] For example, as stated in the *KT4* decision, if a board fails to observe corporate formalities and only documents its activity in an informal, electronic platform, it should be expected to disclose electronic information such as emails in a Section 220 demand.[180] There is concern that in order to strictly observe corporate formalities, companies will need to hire skilled professions to draft meeting minutes.[181] Companies would be concerned with the cost and burden associated with finding and hiring such an individual.[182] They could also be concerned with the amount of time the board will have to spend in ensuring that each major issue is discussed and dictated in the minutes at each meeting.[183]

Lastly, it is arguable that if stockholders want access to a greater deal of electronically stored information in a corporation's books and records, the directors will be reluctant to produce the information and the matter will go to court.[184] Some courts see this as a waste of judicial resources and a decision that can be solved absent court intervention.[185]

IV. PROPOSAL

There are several feasible ways to safeguard against shareholders failing to gain equal access to information. First, this section will propose that the language of Section 220 must be broadly interpreted to include electronic communication. Next, it

178. Amalgamated Bank v. UICI, No. Civ.A. 884-N, 2005 WL 1377432, at *1 (Del. Ch. June 2, 2005). The court stated that with these confidentiality concerns, there should be restrictions put in place to limit shareholders from seeking access to privileged information via a Section 220 demand so the corporation can function more efficiently. *Id.* at *4.

179. Hurd & Whittaker, *supra* note 176.

180. *KT4 Partners LLC*, 203 A.3d at 738.

181. Hurd & Whittaker, *supra* note 176.

182. *Id.*

183. *Id.* (acknowledging that while being diligent in the record keeping of corporate books and records is helpful if litigation arises, it takes away necessary time and resources from the directors).

184. *Id.* at 34.

185. Stone v. Ritter, No. Civ.A. 1570-N, 2006 WL 302558 (Del. Ch. Jan. 26, 2006). In this case, the plaintiffs launched a demand because they believed that the directors of the corporation breached their fiduciary duties. *Id.* at *1. The plaintiffs contended that they did not have to make a demand directly to the directors and could go straight to the courts because the demand was excused on account that the board violated the business judgment rule. *Id.* at *2. The defendants then filed a motion to dismiss which the court granted on the grounds that the plaintiffs did not provide enough reasons as to why the demand was excused. *Id.* The court also made note that a shareholder should use all "tools at hand" before filing suit. *Id.* at *1.

will propose the standard for admitting social media into a Section 220 demand. Lastly, this section will address authentication and its necessity in light of admitting electronic communication into shareholder demands. If various forms of electronic communication can be used in a Section 220 demand, this would ensure that shareholder information rights are not infringed upon. Further, this would allow the shareholders to be effective monitors of potential wrongdoing in the companies they are invested in. Because this proposal calls for a broad reading of Section 220, it is important to ensure that the electronic communication sought in a demand is entirely relevant and authenticated, just as is required in other areas of the law.

A. Broadening the "Books and Records" Language of Section 220

If the courts continue to adopt a narrow approach to Section 220 and exclusively allow for the disclosure of books and records that appear in the traditional paper form, directors of corporations will take advantage of this trend. With this knowledge, directors could choose to communicate with one another via email, text message, or social media regarding corporate wrongdoing because they know shareholders will not gain access to any type of electronic communication in a Section 220 demand. To remedy this issue, the "books and records" language of Section 220 must be broadened to include electronic communication such as emails, text messages, and both private and public social media accounts.

B. Preservation of Documentation

When a Section 220 demand is imminent, directors must have the duty to preserve all information imposed upon them, be it electronic or in the traditional paper form, that is relevant to the shareholder demand.[186] This will ensure that directors do not spoil or intentionally interfere with any evidence they believe may be requested in a demand.[187] Because of the ambiguity attached to the

186. *Zubulake*, 217 F.R.D. at 311.

187. "Spoliation of evidence is the destruction or alteration of evidence." *Spoliation*, BLACK'S LAW DICTIONARY (6th ed. 1990). If there is an allegation of intentional spoliation of evidence, the courts will typically consider: "(1) whether there was a duty to preserve evidence; (2) whether the alleged spoliator breached that duty; and (3) whether the spoliation prejudiced the non-spoliator's ability to present the case." 18 AM. JUR. 3D *Proof of Facts* § 515 (1992). If a shareholder believes that the directors have spoiled evidence in anticipated of a Section 220 demand, they should have the opportunity to seek redress from the court. *Zubulake,* 220 F.R.D at 218. The Court should apply the above standard to determine whether there was a spoliation of evidence and

word "imminent" and whether or not directors will know when a Section 220 demand may be forthcoming, the proposed standard should be akin to the reasonable expectation standard set forth in Zubulake v. UBS Warburg LLC.[188] Tailoring the Zubulake standard to the Section 220 context, if a director has reason to believe that one of the company's shareholders will launch a Section 220 demand in the near future, a duty develops to preserve all documentation relevant to his or her role as a director and the incoming demand.

C. Section 220 Relevancy Standard

Once the demand has been made and the shareholders have stated a proper purpose for the demand, the shareholders must have a right to director emails, text messages, private and public social media accounts, as well as all other "books and records" that have previously been included in Section 220 demands. This includes a great deal of electronic communication; therefore, it is imperative that the information sought in the demand is entirely relevant to the purpose and reason that the shareholders are commencing the demand. To determine if the information sought is relevant, courts should continue to use the traditional relevancy standard of whether the probative value of the information outweighs any potential harm.[189] If a shareholder is demanding electronic communication from a director, the relevancy standard should be heightened to ensure there is no violation of privacy rights.[190] Courts must determine whether the emails, text messages, social media posts, or direct messages are material and necessary to the demand and whether there is a reasonable belief that the content within whichever electronic communication will advance the rights of the shareholder.[191]

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impose sanctions if needed. *Id.*

188. "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of all relevant documents." *Zubulake,* 220 F.R.D at 218. In *Zubulake*, the court found that the corporation should have anticipated litigation because certain company emails were titled "attorney client privileged" and an officer of the corporation admitted in a deposition that he feared litigation months before the suit commenced. *Id.* at 217.

189. Pannozzo, *supra* note 100, at 1702.

190. While significant advances in technology may make an individual more vulnerable to invasions of privacy, this does not mean that United States citizens no longer have privacy interests. State v. Hinton, 179 Wash. 2d 862, 870 (2010).

191. Typically, trial courts have wide discretion in determining what constitutes "material and necessary." Andon v. 302-304 Mott St. Assoc., 94 N.Y.2d 740, 746 (N.Y. 2000). The standard for "material and necessary" requires a liberal interpretation and the test is one of usefulness and reason. *Romano,* 30 Misc. 3d at 427. If the information at issue is related to the controversy;

To illustrate an example of complying with this heightened relevancy standard: If a shareholder has decided to launch a Section 220 demand due to suspicion regarding executive-level compensation, the shareholders would not have a right to director text messages merely because they have a belief that the directors are speaking about the corporation over text message.[192] This would be overbroad because a director could text message another director and mention the corporation for a multitude of reasons that would have nothing to do with executive compensation. To gain access to director text messages in a situation as such, the shareholders would have to state a proper purpose and the grounds for reasonable certainty that the directors are sending text messages pertaining to executive compensation. Absent this requirement, this would infringe on the closely held privacy rights of the directors.[193]

D. Adopting the New York Approach to Social Media to Section 220

As social media has yet to be discussed in the context of Section 220, the jurisdiction of New York, particularly statute CPLR 3101, should be used as a model for including social media posts and messages in a Section 220 demand. In addition to meeting the heightened relevancy standard discussed above, courts must ensure that individual privacy rights are not being infringed upon in regard to the privacy settings of an individual's social media account.

If a director's social media page is set to public, there is no reasonable expectation of privacy.[194] Therefore, if the director makes a post regarding the corporation in question that is reasonably linked to the purpose of the Section 220 demand, the

assists in sharpening the issues; and will reduce delay and prolixity; the information is therefore "material and necessary" and shall be disclosed. *Id.*

192. This heightened relevancy standard is mirrored from the traditional relevancy standard outlined in FED. R. EVID. 401 (2021).

193. The Supreme Court has addressed text messages, privacy rights, and the employer-employee relationships. City of Ontario, Cal. v. Quon, 560 U.S. 746 (2010). When discussing an employer's reasonable expectation of privacy in regard to a search of text messages: "[W]here an employee has a legitimate privacy expectation, an employer's intrusion on that expectation 'for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.'" *Id.* This reasoning can clearly be applied to the director-shareholder relationship: As long as the demand for director text messages is reasonably related to the demand and pertains to the business, there should be no privacy concerns.

194. *Romano,* 30 Misc. 3d at 433. The court noted that because sites such as MySpace and Facebook do not guarantee absolute privacy, to think that a public post will be protected by privacy expectations is essentially "wishful thinking." *Id.* at 434.

contents of the social media page are subject to disclosure.[195]

However, if a director's social media page is set to private, the court must take a different approach. Courts should adopt a similar approach outlined in *Schnatter v. Papa John ' s International* and determine whether there is a reasonable belief that the content contained in the private portions of the social media account is entirely relevant to the Section 220 demand.[196] It is vital for the court to apply a balancing test of the probative value of the social media content and the privacy concerns of the individual director. If the benefits of disclosure will protect the rights of the shareholder, the disclosure is therefore relevant to the Section 220 demand and outweighs any potential harm, thus, disclosure should be permitted.

Lastly, if a director's social media page is set to public, that does not mean that shareholders should have unlimited access to the direct messages sent via the social media platform. When a user sets his or her profile to public, they are consenting to their posts to be viewed by all, but not their direct messages.[197] Social media direct messages should come with a reasonable expectation of privacy, no matter the privacy setting the social media user chooses to subscribe to. Thus, it is important that social media direct messages be subject to the same standard as private social media accounts proposed above.

E. The Admissibility Standard

The distinction between the admissibility of emails, text messages, and social media in other areas of the law and in Section 220 is convoluted. This is due to the fact that in a Section 220 demand, courts often use the words "discoverable" or disclosure" when allowing shareholders access to certain documents.[198] Discoverability is a lower standard than admissibility because judges will often look to whether or not a piece of information is

195. *Id.*

196. *Schnatter*, 2019 WL 194634.

197. See Lianne Caetano, Instagram Direct: Your Private Messages to Marketers, MCAFEE (Jan. 8, 2014), www.mcafee.com/blogs/consumer/mobile-and-iot-security/instagram-direct-marketing-data/ [perma.cc/FAL8-KHL8] (explaining that Instagram has several options for sharing images with other users.) *Id.* After choosing a photo, the user has the option to share the photo publicly to followers or privately through a direct message. *Id.* With the direct sharing option, the user can share a picture with a caption or message and, unlike sharing publicly, direct allows the user to send something to only certain followers that the user personally selects. *Id.* The only people that can see the video or picture are the people that it was explicitly directed to. *Id.*

198. Kaufman v. CA, Inc., 905 A.2d 749, 755 (Del. Ch. 2006) (the court held that with the proper standard of necessity under Section 220, the document in question would be "discoverable").

relevant for it to be discoverable.[199] On the other hand, for information to be admissible, it must be relevant and authenticated pursuant to the Federal Rules.[200] Aligned with the heightened relevancy standard aforementioned, electronic information sought in a Section 220 demand must be subject to these same admissibility standards.[201] Requiring this higher standard of admissibility will ensure that the information the shareholders are seeking is entirely relevant to the purpose of their demand. This standard shall not be required if the directors comply with the demand and do not seek the aid of the court.[202]

F. Authentication

Outside the scope of Section 220, authentication of emails, text messages, and social media is discussed in great deal. However, when emails and text messages have been discussed in the context of Section 220, the requirement of authentication has been noticeably absent.[203] This presents a problem because directors may not be the ones writing their own emails, text messages, and social media posts, especially when discussing the corporation. For example, if a director is also an active officer of the corporation and receives a salary, it is likely that they will have an executive assistant.[204] This assistant could send emails on the director's behalf and even ghostwrite their social media posts that pertain to the corporation.[205] Because of this, the court must require some

199. Bill Tolson, *Discoverable Versus Admissible; Aren't They The Same*?, EDISCOVERY 101 (Mar. 14, 2013), www.ediscovery101.com/2013/03/14/discoverable-verses-admissible-arent-they-the-same/ [perma.cc/6YDQ-ZDRX].

200. FED. R. EVID. 401, 403 (2021).

201. Tolson, *supra* note 199. The Federal Rules for admissibility previously mentioned include FED. R. EVID. 401, 403, and 901 (2021).

202. Radin, *supra* note 8 at 1288. As mentioned in the background section of this Comment, a Section 220 court proceeding is only needed if the directors of the corporation in question fail to comply with the initial demand made by the shareholders. *Id.*

203. State v. Thompson, 2010 ND 10, ¶ 12, (2012) (discussing how authentication is not a requirement for the admissibility of a text message in a Section 220 demand).

204. *Answered: 4 Considerations for Sending Emails on Behalf of Your Boss*, OFFICENINJAS (Apr. 6, 2019), officeninjas.com/sending-emails-behalf-boss/ [perma.cc/2UBK-5WX3]. This article speaks about an executive assistant's experience in sending emails from her boss's account for several years. *Id.* The assistant explained that in the beginning of her career, she would call her boss and get a "feel" for the correct tone and style by reading drafts of emails over the phone. *Id.* As time progressed, the assistant became so comfortable that she could dictate most responses without consulting her boss. *Id.*

205. Josh Fletcher, *How I Became a Ghostwriter for Famous CEOs* (Mar. 15, 2019), joshfechter.com/jobs-ghostwriting-ceos/ [perma.cc/QSG8-Q6P2] (explaining the different types of ghostwriting jobs available in the corporate

level of authentication to confirm that the text message, email, or social media post subject to a Section 220 demand was written or approved by a director. This calls into question the theory of agency.

Agency is defined as a "fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf, and subject to his control, and consent by others to act."[206] Agency allows for the agent to be liable for the loss caused by the principle in the case of a breach of duty.[207] Therefore, looking at agency theory through the lens of Section 220, if an agent engages in correspondence that was on behalf of a director of a corporation and that correspondence is sought in a Section 220 demand, so long as it is properly authenticated, it shall be subject to disclosure.[208]

The authentication standard for director emails, text messages, and social media should be akin to the authentication standard used in all other areas of the law. The shareholders should meet the normal authentication standard of providing evidence to support a finding that the item is what the proponent claims it is.[209] In addition, there should also be evidence of distinctive characteristics that identify the author of the email, text message, or social media post or message.[210] For example, in a situation regarding the admissibility of a director email in a Section 220 demand, if the email was sent from the director's computer and from his or her email address and it contains the same tone, jargon, and signature that is customarily used in their emails, this would be sufficient authentication.[211] Further, if there is testimony under oath from a person that saw the director write the email in question or oral or written testimony that the director gave express authority to someone to write the email, this would also constitute proper authentication.[212] If a director does not contest the fact that they wrote an email, text message, or social media post or message that is requested in a Section 220 demand, this authentication standard

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world and the author's personal experience ghostwriting social media posts for successful CEOs).

206. *Restatement (Second) Of Agency* § 1 (1957).

207. *Id.* at § 401.

208. The agent authentication should take place pursuant to FED. R. EVID. 901 (2021).

209. FED. R. EVID. 901 (2021).

210. FED. R. EVID. 401 (2021).

211. This proposal is consistent with the rationale set forth in *Culp v. State*, 178 So. 3d 378 (Ala. Crim. App. 2014). In this case, the court found an email to be authenticated because it aligned with the author's general pattern of previous emails, contained his username and profile picture, and each email was signed with his initials. *Id.*

212. This proposal is consistent with the assertion in *Brown*, a 2019 case from Arkansas. *Brown v. State*, No. CR-18-74, 2019 WL 1062384 (Ark. Ct. App. 2019). In this case, the court required personal knowledge testimony to authenticate a message. *Id.*

should not be required.

Lastly, if directors feel as if shareholders are demanding information that does not meet the heightened relevancy standard or is not properly authenticated, to preserve judicial efficiency, the directors and shareholders should make a good faith effort to resolve any dispute before seeking redress from the court. Judges should be the ultimate gatekeepers in deciding if the link between the demand and the information sought is close enough to allow for disclosure.[213] If a judge feels that a director's privacy concerns are being violated, the information sought is either not entirely relevant to the demand or is not properly authenticated. In this scenario, the court is within its discretion to bar whatever it feels necessary as justice so requires.

V. CONCLUSION

If shareholders continue to feel as if they are not receiving equal access to information, they will not invest, and current and growing corporations will be unable to receive capital from shareholders that they may desperately need. In turn, this could have a devastating impact on the United States economy because businesses create jobs and function as an engine that allows citizens and the government to acquire the goods and services they need to grow.[214] Allowing for emails, text messages, and social media to be disclosed in a Section 220 demand will combat this issue, increase transparency, and incentivize appropriate director conduct.

If the scope of Section 220 is expanded and shareholders can receive additional information from directors regarding the management of the company, it will allow the shareholders to become better monitors of corporate management and ensure that the corporation is acting in the best interest of the company. If the "book and records" language of Section 220 does not align itself with changing technology, the statute will essentially become obsolete and disrupt the culture of corporate law.

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213. The Supreme Court of the United States places a great deal of trust in judges in deciding evidentiary issues. Daubert v. Merrell Dow Pharm, Inc., 509 U.S. 579 (1993). Evidence can be both powerful and misleading and due to the risk and difficulty associated with evaluating evidence, a judge exercises a great deal of control. *Id.* at 595.

214. David M. Kirby, *Small Businesses Can Make A Big Impact On The Economy*, HUFFPOST (Nov. 21, 2016), www.huffpost.com/entry/small-businesses-can-make_b_13127000 [perma.cc/S7GE-8W8S]. There is a direct link between the stability of our nation and the strength of United States businesses. *Id.* If individuals do not invest in businesses, this will result in fewer jobs and less money being spread around communities. *Id.*