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Corporations

Inspection Rights

While shareholder inspection rights are important to shareholders and corporations, they are limited in deference to the basic principle that a corporation's board is responsible for managing corporate affairs. Looking at New York law, the authors outline the procedures for shareholders to exercise and enforce their inspection rights. They also discuss the prerequisites for enforcing those rights, including shareholder status and proper purpose.

Shareholder Inspection Rights Under New York Law



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The right of shareholders to inspect corporate books and records occupies an important—though sometimes overlooked—place in corporate democracy and in shareholder litigation.

The basic premise underlying inspection rights is that shareholders—as owners of the corporate enterprise—have a legally cognizable interest in accessing certain information relevant to their financial investment in the corporation.¹ Nonetheless, the separation of share ownership from management control is one of the foundational principles of corporate law and, thus, a shareholder's inspection rights necessarily must be limited in deference to the basic principle that a corporation's board of directors, not its shareholders, is charged with managing the affairs of the corporation.²

Shareholder inspection rights have come to the forefront in several recent Delaware derivative lawsuits, in which the Delaware Court of Chancery has strongly encouraged shareholders of Delaware companies to avail themselves of shareholder inspection rights before

¹ *Crane Co. v. Anaconda Co.*, 39 N.Y.2d 14, 17-18 (1976) (“The conceptual basis for [the shareholder inspection] right is derived from the shareholder's beneficial ownership of corporate assets and the concomitant right to protect his investment.”).

² See New York Business Corporation Law (“BCL”) § 701 (providing that “the business of a corporation shall be managed under the direction of its board of directors”).

bringing derivative actions, including so-called *Caremark*³ claims for failure to adequately oversee and monitor alleged corporate wrongdoing.⁴

Although the Delaware Supreme Court recently rejected the most far-reaching implications of these Chancery Court decisions, holding that there is no “irrebuttable presumption” that shareholders who bring *Caremark* claims without first exercising their inspection rights will provide inadequate representation to shareholders generally, the court also acknowledged the “fast filer” problem, directed that remedies for that problem be aimed at counsel, and cited cases in which it had previously emphasized the importance of issuing pre-suit inspection demands.⁵

Delaware courts encourage shareholder plaintiffs to exercise their inspection rights before filing plenary suits in order to (a) dissuade the filing of derivative actions that cannot satisfy applicable demand futility or wrongful refusal of demand standards or fail to state a claim, and (b) improve the quality of any plenary litigation that is brought (including by enabling the plaintiff to plead demand futility or wrongful refusal with the required particularity and to plead the necessary factual link between any corporate “trauma” that is the basis of the claim and the fiduciaries who are the subject of the suit).⁶

Reinforcing these objectives, Delaware courts generally preclude the filing of books and records actions after a derivative complainant has filed a plenary action, requiring the complainant to defend his pleading based

upon the allegations contained therein, without further enhancement through a post-suit inspection demand.⁷

New York law, too, grants inspection rights to shareholders under the common law and by statute.⁸ New York courts have grappled with inspection rights in the past and likely will continue to confront them in future litigation, especially if the trend in Delaware to encourage shareholders to employ their inspection rights carries over to New York, as it should.

Given the important position that shareholder inspection rights occupy in safeguarding shareholders’ financial interests and informing shareholder legal action, and the at least equally important policy that gives primacy to the board of directors in deciding whether a corporation should pursue causes of action (and if so, how), shareholders and corporate management alike should be aware of these rights.

Accordingly, this article seeks to shed light on the scope of New York shareholder inspection rights, as well as the procedures for exercising and enforcing them.

I. Procedure for Exercising, Enforcing Inspection Rights

In order to exercise the common-law or statutory right of inspection, a shareholder of a New York corporation must make a demand upon the board of directors seeking specific books and records.⁹

³ *In re Caremark Int’l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (recognizing that directorial liability may be predicated upon “a sustained or systematic failure of the board to exercise oversight . . . such as an utter failure to attempt to assure a reasonable information and reporting system exists”).

⁴ *See, e.g., South v. Baker*, 62 A.3d 1, 23 (Del. Ch. 2012) (noting presumption that derivative plaintiffs who purport to bring *Caremark* claims but fail to make use of their inspection rights before initiating suit will provide inadequate representation to the corporation, and therefore, cannot sue on its behalf).

⁵ *Pyott v. La. Mun. Police Emps’ Ret. Sys.*, No. 380/2012, 2013 BL 94920, at *5 (Del. April 4, 2013), *overruling La. Mun. Police Emps’ Ret. Sys. v. Pyott*, 46 A.3d 313 (Del. Ch. 2012) (“But, there is no record support for the trial court’s premise that stockholders who file quickly, without bringing a § 220 books and records action, are *a priori* acting on behalf of their law firms instead of the corporation. This Court understands the trial court’s concerns about fast filers. But remedies for the problems they create should be directed at the lawyers, not the stockholder plaintiffs or their complaints.” (footnotes omitted)).

⁶ *See, e.g., Beam ex rel. Martha Stewart Living Omnimedia Inc. v. Stewart*, 845 A.2d 1040, 1056 (Del. 2004) (“Both this Court and the Court of Chancery have continually advised plaintiffs who seek to plead facts establishing demand futility that the plaintiffs might successfully have used a Section 220 books and records inspection to uncover such facts.”); *White v. Panic*, 783 A.2d 543, 556–57 (Del. 2001) (opining that “this case demonstrates the salutary effects of a rule encouraging plaintiffs to conduct a thorough investigation, using the ‘tools at hand’ including the use of actions under 8 Del. C. § 220 for books and records, before filing a complaint. . . . [F]urther pre-suit investigation in this case may have yielded the particularized facts required to show that demand is excused or it may have revealed that the board acted in the best interests of the corporation” (footnote omitted)).

⁷ *See, e.g., Central Laborers Pension Fund v. News Corp.*, C.A. No. 6287-VCN, 2011 BL 301680, at *6 (Del. Ch. Nov. 30, 2011) (“[O]nce the derivative action is filed, and until the judicial processing of the dismissal motion reaches the point where a recasting of the allegations has been authorized, the stockholder may not, as a general matter, demonstrate a proper purpose for invoking Section 220.”); *Baca v. Insight Enters. Inc.*, C.A. No. 5105-VCL, 2010 BL 139317, at *5 (Del. Ch. June 3, 2010) (“[A] stockholder does not act with a proper purpose when the stockholder attempts to use Section 220 to investigate matters that the same stockholder already put at issue in a plenary derivative action. . . . [T]he stockholder who serves a post-plenary-action Section 220 demand contradicts his own certification that he already possessed sufficient information to file a complaint.”); *Beiser v. PMC-Sierra, Inc.*, C.A. No. 3893-VCL, 2009 BL 56405, at *1 (Del. Ch. Feb. 26, 2009) (dismissing Section 220 action to enforce inspection rights while plenary derivative action was pending and leave to amend had not been granted).

⁸ *See Crane Co.*, 39 N.Y.2d at 17-18 (tracing evolution of New York common-law and statutory shareholder inspection rights from 19th century forward); *In re Steinway*, 159 N.Y. 250, 263 (1899) (addressing New York common-law and statutory shareholder rights); *Dwyer v. DiNardo & Metschl PC*, 41 A.D.3d 1177, 1177 (4th Dep’t 2007) (collecting cases for proposition that the statutory inspection right embodied by BCL § 624 supplements, rather than supplants, the common-law right of inspection).

⁹ *See Levine v. Pat-Plaza Amusements*, 67 Misc. 2d 485, 488 (Nassau Cnty 1971) (“Under both section 624 (subd. [b]) of the Business Corporation Law and at common law demand is a prerequisite.” (internal citations omitted)); *see also BCL § 624(b)* (providing that inspection may be had “upon at least five days’ written demand”); *BCL § 624(e)* (providing that financial statements may be obtained “[u]pon the written request of any shareholder”); *In re Steinway*, 159 N.Y. at 263 (holding that, “if [inspection] right is refused by the officers in charge, a writ of mandamus may issue, in the sound discretion of the court” (emphasis supplied)).

Neither the common law nor the BCL specifies the necessary content of such an inspection demand. Nonetheless, a corporation may condition a shareholder's exercise of his statutory right of inspection upon the submission of an affidavit attesting that "inspection is not desired for a purpose which is in the interest of a business or object other than the business of the corporation and that he has not within five years sold or offered for sale any list of shareholders of any corporation of any type or kind."¹⁰

Although the case law does not expressly hold that the common-law right may be conditioned upon the submission of such an affidavit, a New York court might so rule, as the common-law and statutory rights often are analyzed a piece.¹¹

Once an inspection demand has been made upon a corporation, the corporation generally must endeavor to respond to that demand within a reasonable period of time.¹² Further, in the event that the corporation denies a shareholder's inspection demand, the shareholder may seek judicial relief, usually in the form of a petition for a writ of mandamus pursuant to Article 78 of the Civil Practice Law and Rules.¹³

New York courts have not explicitly confronted arguments regarding whether shareholder inspection rights may be enforced contemporaneously with the filing of derivative claims.¹⁴ The Delaware courts, however, have explicitly held that inspection rights may not be enforced at the same time that a shareholder is prosecuting a derivative claim.

Substantial policy and practical concerns support this result. First, a derivative complainant affirms that he has sufficient information to bring a lawsuit by filing

that suit, and a request to inspect corporate books and records contradicts that affirmation.¹⁵

Second, shareholders elect the board to manage the corporation's affairs, including whether to bring litigation, and that responsibility should not be displaced unless a shareholder complainant has in hand a factual basis for seeking to do so.¹⁶ The corporation (and all of its shareholders) should not be put to the expense of addressing derivative action litigation if the complainant requires access to books and records in order to determine whether it can satisfy the threshold requirements with respect to demand futility or wrongful refusal.¹⁷

Third, once a shareholder complainant commences a derivative action, any discovery available in that action should be governed by the applicable rules of civil procedure, such as the CPLR, rather than the BCL.¹⁸

Further, requiring potential complainants to seek access to books and records before commencing plenary actions may both weed out cases that should not be filed, and improve those that should be.¹⁹

Finally, an obligation to proceed first with a books and records inspection and only thereafter, if at all, with a plenary action also would diminish the burdens of litigation on the judicial system.²⁰

¹⁵ See *Central Laborers Pension Fund*, 2011 BL 301680, at *3; *Baca*, 2010 BL 139317, at *6; *Beiser*, 2009 BL 56405, at *3.

¹⁶ See BCL § 626(c) (requiring plaintiff who seeks to bring derivative suit to "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort" (emphasis added)); *Marx v. Akers*, 88 N.Y.2d 189, 200-01 (1996) (holding that demand is excused only if shareholder pleads with particularity that "(1) . . . a majority of the board of directors is interested in the challenged transaction[;] (2) . . . the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances[;] (3) . . . the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors" (internal quotation marks, citations, and footnotes omitted)); *Auerbach v. Bennett*, 47 N.Y.2d 619, 630 (1979) ("Derivative claims against corporate directors belong to the corporation itself. As with other questions of corporate policy and management, the decision whether and to what extent to explore and prosecute such claims lies within the judgment and control of the corporation's board of directors.").

¹⁷ See, e.g., *Beam ex rel. Martha Stewart Living Omnimedia Inc. v. Stewart*, 833 A.2d 961, 982 (Del. Ch. 2003), *aff'd* 845 A.2d 1040 (Del. 2004) (criticizing "appalling results" from failure to make pre-suit inspection demand, including that, "[i]f there is no reasonable doubt that the board could respond to demand in the proper fashion, failure to make demand and filing the derivative action results in a waste of the resources of the litigants, including the corporation in question, as well as those of this Court").

¹⁸ See *Condren v. Slater*, 85 A.D.2d 507, 507 (1st Dep't 1981) ("Although, ordinarily, the disclosure provisions of CPLR § 3101 are liberally construed and applied, the rule in shareholder derivative actions is that an individual defendant should not be examined before trial, absent an evidentiary showing of special circumstances."); see also *Beiser*, 2009 BL 56405, at *3 (denying books and records inspection request for failure to state a proper purpose where plaintiff had filed a derivative complaint regarding related subject matter and discovery in the derivative action had been stayed, because permitting the requested inspection to go forward would circumvent the discovery stay in the plenary action).

¹⁹ See sources cited *supra*, in note 6.

²⁰ *Beam*, 833 A.2d at 982.

¹⁰ BCL § 624(c). This rule applies to materials sought under BCL § 624(b), but not to financial statements requested under § 624(e).

¹¹ See, e.g., *Dwyer*, 41 A.D.3d at 1178.

¹² See *Martin v. Martin Found. Inc.*, 32 Misc. 2d 873, 874-75 (NY Cnty 1962) (providing that inspection must be permitted "at reasonable times and without undue inconvenience to the [corporation]"); see also BCL § 624(b) (allowing inspection "during usual business hours"); BCL § 624(e) (allotting the corporation "a reasonable time to prepare [an] annual balance sheet and profit and loss statement").

¹³ See, e.g., BCL § 624(d) (permitting shareholder who has been denied inspection to "apply to the supreme court in the judicial district where the office of the corporation is located, upon such notice as the court may direct, for an order directing the corporation, its officer or agent to show cause why an order should not be granted permitting such inspection by the applicant"); *Liaros v. Ted's Jumbo Red Hots, Inc.*, 96 A.D.3d 1464, 1464 (4th Dep't 2012) (Article 78 petition for order directing corporation to permit inspection of books and records under common law and statute).

¹⁴ Some cases have permitted claims to enforce shareholder inspection rights to survive alongside related derivative claims, but they have done so without addressing whether this is wise or good policy. See *Gimpel v. Bolstein*, 125 Misc. 2d 45, 57-58 (NY Cnty 1984) (granting plaintiff-shareholder's request to inspect corporate books and records in action involving, among other things, a derivative claim for excessive compensation); see also *Guenzel v. Am. Culture Inc.*, No. 837-11 (Suffolk Cnty Feb. 17, 2012) (Trial Order) (granting plaintiff-shareholders' request to inspect books and records under the BCL, but denying request under the common law, in action involving direct and derivative claims for alleged waste, misuse and misappropriation of corporate assets, fraud, and breaches of fiduciary duty).

II. Threshold Requirements for Enforcing Inspection Rights

There are two principal substantive prerequisites to the enforcement of common-law and statutory shareholder inspection rights in New York: (1) shareholder status at the time of the inspection request; and (2) good faith and a proper purpose in making the inspection request.

Shareholder Status. An individual is entitled to exercise common-law and statutory inspection rights only if he is a shareholder at the time of his inspection request. Accordingly, although there is no express requirement that shareholder status be proved through any particular means, a corporation nevertheless may require reasonable proof of shareholder status before granting access to corporate books and records.²¹

Good Faith and Proper Purpose. Under the common law of New York and by statute, a shareholder is entitled to exercise his inspection rights only if he acts in good faith and with a proper purpose.²² Thus, a corporation may deny a shareholder's inspection demand if it determines that the shareholder is not acting in good faith or otherwise does not have a proper purpose. Further, if a shareholder subsequently brings suit to enforce his common-law or statutory inspection rights, a court may order that inspection be granted only if it determines that the shareholder is acting in good faith and has a proper purpose.²³

Significantly, when a shareholder brings suit to enforce the common-law right of access, he has the burden of "plead[ing] and prov[ing] that inspection is desired for a proper purpose,"²⁴ whereas when the shareholder asserts the statutory right of access, the corporation bears the burden of "showing an improper

purpose or bad faith."²⁵ In either event, if there is a question of fact as to whether the shareholder seeks to exercise his inspection rights in good faith and has a proper purpose, the court must hold a hearing to adjudicate that issue.²⁶

There is scant case law on the meaning of good faith in the context of shareholder inspection rights,²⁷ as most of the jurisprudence focuses upon the "proper purpose" requirement. In this respect, common-law and statutory inspection rights exist principally to permit shareholders reasonably to "protect their financial interests in a corporation by inspecting its books and records."²⁸ Thus, whether an individual shareholder has a "proper purpose" in seeking inspection turns on a fact-specific inquiry into whether he is reasonably seeking to safeguard his investment.

Although the "proper purpose" inquiry necessarily is fact intensive, the case law provides some guidance on shareholder purposes that may be deemed sufficiently connected to safeguarding shareholder financial interests as to ground an inspection demand.

Generally, proper shareholder purposes may "include, among others, efforts to ascertain the financial condition of the corporation, to learn the propriety of dividend distribution, to calculate the value of stock, to investigate management's conduct, and to obtain information in aid of legitimate litigation."²⁹

Whether an individual shareholder has a "proper purpose" in seeking inspection turns on a fact-specific inquiry into whether he is reasonably seeking to safeguard his financial stake in the corporate entity.

On the other hand, improper purposes embrace "those which are inimical to the corporation, for example, to discover business secrets to aid a competitor of the corporation, to secure prospects for personal business, to find technical defects in corporate transactions to institute 'strike suits,' and to locate information to pursue one's own social or political goals."³⁰

²⁵ *Id.* at 20; see *Matter of Marcato*, 102 A.D.2d 826, 826 (2d Dep't 1984) (distinguishing between statutory right of access, which throws upon a corporation the burden of showing an improper purpose, and common-law right, which places upon the shareholder the burden of showing a proper purpose).

²⁶ See, e.g., *Liaros*, 96 A.D.3d at 1465; *Niggli*, 257 A.D.2d at 623.

²⁷ A leading treatise has offered: "'Good faith' with reference to an inspection of books and records is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest intent, the absence of malice, and the absence of a design to defraud or to seek an unconscionable advantage." 14 N.Y. Jur. 2d *Business Relationships* § 397 n. 52.

²⁸ 14 N.Y. Jur. 2d *Business Relationships* § 407; see *Crane Co.*, 39 N.Y.2d at 18 (similar).

²⁹ *Tatko v. Tatko Bros. Slate Co.*, 173 A.D.2d 917, 917 (3d Dep't 1991).

³⁰ *Id.* at 917-18.

²¹ See *Theile v. Merlis*, 85 Misc. 351, 352 (1st Dep't 1914) (holding that "the officers and agents of a corporation are not required to exhibit the books to persons who demand to see them, where such persons are unknown to them, without first exacting reasonable proof of the identity of the said demandants that they are in fact the persons who are the stockholders of the company"); accord *Northeast Litho Co. v. Stearns & Beale*, 90 A.D.2d 713, 714 (1st Dep't 1982) (remanding inspection demand petition for hearing to determine, *inter alia*, "whether petitioner is truly the beneficial owner of the share of stock it holds and whether that share was validly issued"); *Rudolfer v. Hudson Shipping Co.*, 158 N.Y.S.2d 948, 950 (NY Cnty 1956) (remanding for determination of whether title to stock had passed to petitioner, as she would be entitled to inspection only if title had passed and she owned stock); see also BCL § 624(b) (granting inspection rights to "[a]ny person who shall have been a shareholder of record" and to "[h]olders of voting trust certificates of the corporation"); BCL § 624(e) (allowing "any shareholder" to request certain company financial statements).

²² See, e.g., *Liaros*, 96 A.D.3d at 1465; *Niggli v. Richlin Mach. Inc.*, 257 A.D.2d 623, 623 (2d Dep't 1999).

²³ See *Liaros*, 96 A.D.3d at 1465 ("Respondents raised an issue of fact whether petitioner was acting for the improper purpose of obtaining personal business or a competitive advantage by stating their belief that petitioner intended to open competing restaurants, the basis for their belief, and the ways in which the documents requested were overbroad for petitioner's stated purposes and would grant petitioner a competitive advantage. Thus, a hearing is required to determine whether petitioner is acting in good faith and with a proper purpose.")

²⁴ *Crane Co.*, 39 N.Y.2d at 18.

In line with this general guidance, New York courts regularly permit inspection for purposes of valuing shareholdings, especially in the context of closely held corporations.³¹ There also is support for the use of shareholder inspection rights to obtain a shareholder list for purposes of preparing a tender offer or proxy filing.³²

The investigation of possible corporate mismanagement and the preparation of shareholder litigation also may constitute proper inspection purposes under certain circumstances, although the case law is more limited and more nuanced on this point.

New York courts do not require conclusive proof of wrongdoing before allowing a shareholder to inspect books and records in order to investigate management conduct or prepare for litigation.³³ Nonetheless, New York courts have made clear that they will not permit shareholder inspection rights to be used as fishing expeditions.³⁴

Further, conclusory allegations of corporate mismanagement or wrongdoing fail to provide a sufficient foundation for the exercise of shareholder inspection rights.³⁵ Therefore, it seems reasonable to conclude that New York courts, like their Delaware counterparts, generally will require a showing of some concrete reasonable basis to infer that wrongdoing has occurred before allowing a shareholder inspection predicated solely on allegations of mismanagement or wrongdoing.³⁶

³¹ See, e.g., *Dwyer*, 41 A.D.3d at 1178; *Dyer v. Indium Corp. of Am.*, 2 A.D.3d 1195, 1196 (3d Dep't 2003); *Tatko*, 173 A.D.2d at 917.

³² *Tatko*, 173 A.D.2d at 917.

³³ See, e.g., *Malone v. Dimco Corp.*, 68 Misc. 2d 610, 612 (NY Cnty 1969) ("The petitioners as stockholders have a right to examine the corporate books to determine whether the officers are properly managing its affairs, even though upon an examination of the books it should appear that in fact there was no mismanagement." (quoting *Matter of Durr v. Paragon Trading Corp.*, 270 N.Y. 464, 471 (1936))); *Martin v. Columbia Pictures Co.*, 133 N.Y.2d 469, 474 (NY Cnty 1953), *aff'd*, 283 A.D. 926 (1st Dep't 1954) ("A bona fide claim that a corporation is being mismanaged will support an order for an inspection of corporate books and records even though such inspection ultimately establishes that in fact there was no mismanagement.").

³⁴ *Wells v. League of Am. Theatres & Producers Inc.*, 183 Misc. 2d 915, 921 (1st Dep't 2000) ("The right to inspection would be . . . unduly burdensome if members were permitted to engage in a fishing expedition.").

³⁵ See *Lapsley v. Sorfin Int'l Ltd.*, 43 A.D.3d 1113, 1114 (2d Dep't 2007) (refusing to enter order requiring corporation to permit inspection where shareholder made only "unsupported" and "conclusory claims" of corporate waste); *Matter of Camhe-Marcille v. Sally Lou Fashions Corp.*, 289 A.D.2d 162, 162 (1st Dep't 2001) ("Petitioners' claim that respondents may have wasted and manipulated assets is unsupported. Relief such as petitioner seeks is granted cautiously, and never for speculative purposes." (internal quotation marks, alterations and citation omitted)); *Guenzel*, No. 837-11 (rejecting common-law inspection demand predicated on claims of corporate waste and breaches of fiduciary duty after indicating that such claims "may be a basis for a limited review of the books and records, [but] such requests are granted with great circumspection and only in those cases wherein such claims [are] duly supported").

³⁶ Cf. *La. Mun. Police Emps. Ret. Sys. v. Lennar Corp.*, C.A. No. 7314-VCG, 2012 BL 262366, at *3 (Del. Ch. Oct. 5, 2012) (setting forth and applying Delaware law requiring that shareholder seeking to inspect books and records based on alleged

In addition, a shareholder possesses a proper purpose for conducting an inspection only if the inspection is reasonably calculated to advance that proper purpose.³⁷ In other words, a shareholder is not entitled to inspect books and records merely because he states a purpose that, in the abstract, may be proper where, for example, that purpose cannot be advanced through inspection.³⁸

III. Scope of Inspection Rights

The statutory and common-law rights of inspection provide access to distinct, though partly overlapping, corporate books and records.

Beginning with the statutory right, BCL § 624 narrowly delineates the books and records available to shareholders. In particular, subsection (b) permits a shareholder to examine the "minutes of the proceedings of [the corporation's] shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder."³⁹ Subsection (e) allows a shareholder to obtain "an annual balance sheet and profit and loss statement for the [corporation's] preceding fiscal year, and, if any interim balance sheet or profit and loss statement has been distributed to its shareholders or otherwise made available to the public, the most recent such interim balance sheet or profit and loss statement."⁴⁰

Other records may be obtained (if at all) only through reliance on the common-law right of access.

Delimiting the scope of the common-law right of inspection, courts generally hold that a shareholder is entitled to access only those books and records that are "relevant and necessary" to his "proper purpose."⁴¹ Accordingly, the shareholder's purpose in seeking ac-

wrongdoing provide some credible basis to infer that wrongdoing had occurred).

³⁷ Cf. *Dwyer*, 41 A.D.3d at 1179 (holding that inspection may be had only of records reasonably related to advancement of shareholder's proper purpose); *Dyer*, 2 A.D.3d at 1197 (same); *Tatko*, 173 A.D.2d at 919 (same); cf. also *Graulich v. Dell Inc.*, C.A. No. 5846-CC, 2011 BL 141744, at *7 (Del. Ch. May 16, 2011) (rejecting Section 220 demand because, among other reasons, it was made for the purpose of investigating and initiating a derivative suit that would have been time-barred).

³⁸ See 14 N.Y. Jur. 2d *Business Relationships* § 407 ("Inspection orders will not issue perfunctorily upon the mere statement of a purpose that appears to be proper.") For instance, a shareholder may not obtain access to corporate books and records regarding a board's consideration of a course of conduct where the supporting allegations regarding that conduct fail to show the involvement of the board, but show only management or employee involvement. Cf. *Wandel v. Eisenberg*, 60 A.D.3d 77, 81 (1st Dep't 2009) (holding that shareholder demand was not excused where shareholder alleged that board members had received backdated options, but "the amended complaint fails to plead with the requisite particularity that the directors had specific information or reason to inform themselves about the details of the issuance of stock options, and failed to do so"); *South*, 62 A.3d at 14 (holding that mere averment that a corporate trauma occurred, without specific allegations connecting that trauma to board action, creates "no reason to doubt the board's ability to address the corporate trauma and evaluate a related demand").

³⁹ BCL § 624(b).

⁴⁰ BCL § 624(e).

⁴¹ *Dwyer*, 41 A.D.3d at 1179; *Dyer*, 2 A.D.3d at 1197; *Tatko*, 173 A.D.2d at 919.

cess is the primary guidepost in determining the books and records that the shareholder is entitled to review. Therefore, the scope of materials available through the exercise of common-law inspection rights generally is much narrower than the scope of materials available through disclosure in the context of litigation.⁴²

Finally, a corporation is entitled to withhold documents based on the attorney-client and work-product privileges.⁴³ Moreover, where the documents to be in-

⁴² See *Wells*, 183 Misc. 2d at 921 (distinguishing right to inspect books and records under Not-For-Profit Corporation Law § 621 from broader disclosure available in litigation); cf. *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997) (stating that inspection demands pursuant to Section 220 and document requests pursuant to Rule 34 “are not the same and should not be confused,” as Section 220 requires “rifled precision” and Rule 34 production orders “may often be broader in keeping with the discovery under Court of Chancery Rule 26(b)”).

⁴³ See *Barasch v. Williams Real Estate Co.*, 104 A.D.3d 490, 492-94 (1st Dep’t 2013) (overturning lower court’s ruling that director had absolute right to inspect books and records of corporation and holding that corporation may assert attorney-client privilege against director who sued corporation in her capacity as shareholder and, thus, was adverse to corporation); *Khanna v. Covad Comm’cns Grp. Inc.*, No. 20481-NC, 2004 BL 3053, at *7 (Del. Ch. Jan. 23, 2004) (recognizing that attorney-client and work-product privileges are generally ap-

spected include potentially sensitive materials, a corporation may be entitled to a protective order restricting the dissemination or use of such materials.⁴⁴

IV. Conclusion

Shareholder inspection rights provide an important tool for shareholders to obtain information regarding their financial stake in the corporation and to exercise their share ownership rights on a more informed basis. Given the separation of ownership and management embodied by the New York corporate form, such inspection rights are of course not without their reasonable limitations.

It behooves shareholders and corporations alike to be fully aware of the scope and content of shareholder inspection rights. Such awareness may permit shareholders to enhance their ability to make reasonably informed investment decisions, while also allowing corporations to process inspection demands efficiently.

plicable to shareholder inspection demands, although carving out exceptions where there is showing of “substantial need” for non-opinion work product or “good cause” as to why attorney-client privilege should not apply).

⁴⁴ See, e.g., *Dyer*, 2 A.D.3d at 1197; *Tatko*, 173 A.D.2d at 918.