A Proposal to Eliminate Director Standards From the Model Business Corporations Act

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"PROPER PURPOSE," FIDUCIARY DUTIES, AND SHAREHOLDER-RAIDER ACCESS TO CORPORATE INFORMATION

Fred S. McChesney*

Keep a-knockin' but you can't come in.
Come back tomorrow night and try it again.
—Little Richard

I. INTRODUCTION

Suppose that Ms. Shareholder seeks access to corporate information. Management refuses to provide that information, justifying its refusal under the statutory provisions requiring that Ms. Shareholder have a "proper purpose" to obtain the information sought. Shareholder files a suit, pointing out that she is a part owner of the firm, and that management works for the firm she owns. Of course, both points are correct. But do they justify a court's ordering the firm to turn over to Ms. Shareholder the requested information?

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1. Little Richard, Keep A-Knockin' (Richard Penniman, BMI). Accord, Smiley Lewis, I Hear You Knocking (Dave Bartholomew & Pearl King, BMI) ("I hear you knocking, but you can't come in."); Jim Lowe, The Green Door (Bob Davie & Marvin J. Moore, BMI) ("Knocked once, tried to tell them I'd been there; Door slammed, hospitality's thin there; Wonder just what's going on in there."); The Sensations, Let Me In (Yvonne Baker, Alphonso Howell Jr. & George Minor, BMI) ("Open up, I want to come in again; I thought you were my friend."); See also The Genies, Who's That Knocking (Claude Johnson, Fred Jones & Leroy Kirkland, BMI) ("I hear approaching footsteps; boom boom boom, bang bang bang, on my door."); But see Mary Hopkin, Knock Knock Who's There (John Carter & Geoffrey Stephens, BMI) ("Knock knock, who's there .... The door is always open wide .... Take off your coat and come inside.").

2. The focus of the inquiry here is Delaware law, whose pertinent statutory section for shareholder access to corporate information is DEL. CODE ANN. tit. 8, § 220 (1991 & Supp. 1998). See also MODEL BUS. CORP. ACT §§ 7.20, 16.01-16.03 (1984 & Supp. 1997). Both Delaware and the Model Business Corporate Act require a "proper purpose" for shareholder access to information maintained by the corporation. See DEL. CODE ANN. tit. 8, § 220(b) (1991) (defining "proper purpose").
The law in this respect is relatively clear and simple. As explained in Section II, a court’s reaction to shareholder suits seeking corporate information depends (a) on the type of information sought, and (b) on the perceived purpose for the shareholder request. Some purposes are deemed insufficient to require equitable intervention by courts to force corporate disclosure of the information demanded. Adopting a contractual model of the corporate firm, Section III explains how the law ordinarily comports well with what shareholders as a group would want corporate management to do when individual shareholders request information.

But suppose that, extraordinarily, Ms. Shareholder is interested in taking over the firm, perhaps by a tender offer, and seeks corporate information to decide whether to bid for the firm, and if so, at what price. As Section IV explains, shareholder access to information in the context of possible takeover bids presents a different situation from that presented in the majority of shareholder information-access cases. Courts have not analyzed shareholder-raider demands for information very convincingly, as evidenced by a series of recent Delaware decisions: BBC Acquisition Corp. v. Durr-Fillauer Medical, Inc., Thomas & Betts Corp. v. Leviton Manufacturing Co., Golden Cycle, LLC v. Global Motorsport Group, Inc., and NiSource Capital Markets, Inc. v. Columbia Energy Group.

To summarize, this article makes two arguments. The first concerns the statutory law of shareholder access to information. Shareholders generally have liberal access to relatively routine information, such as shareholder lists. But the law governing individual shareholder access to information about the firm itself, such as that contained in corporate books and records, reflects judicial suspicion as to the purpose for requesting the information. That is as it should be, because individual shareholders might otherwise take advantage of other shareholders by

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3. For a recent overview and citations to the cases and literature, see Randall S. Thomas, Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information, 38 ARIZ. L. REV. 331 (1996). Professor Thomas’ excellent overview does not discuss the relatively narrow situation of particular interest here, access to information as part of corporate takeovers.


5. 681 A.2d 1026 (Del. 1996).


seeking access to information for purely personal purposes. Unrestricted access to corporate information risks to benefit the requesting shareholder while all other shareholders bear the costs, which may well be greater than the benefits to the individual shareholder seeking access.

Courts have perceived information requests from a single shareholder motivated by a possible takeover in the same way. But in some situations, that perception may be erroneous. Admittedly, when information is requested as part of a possible takeover, the requesting shareholder is motivated by her own personal welfare. But access to the information requested can benefit the other shareholders, too. Thus, courts should be less tolerant of management refusals to provide information than they currently are when Ms. Shareholder seeks information for possible takeover purposes.

The second point of the article concerns not shareholders’ statutory rights to information but management’s common-law obligation to provide that information when it is sought in the context of a takeover. In a takeover situation, management is held to certain fiduciary duties toward shareholders. Yet in the shareholder-raider cases noted above, as apparently in all other shareholder-raider demands for information, courts have ignored management’s common-law fiduciary duties toward shareholders.

Shareholders’ statutory rights to information in a takeover context and management’s common-law fiduciary duties incident to takeovers are not mutually exclusive, but are complementary. Both should be evaluated as part of management’s overall obligation to maximize the value of the firm to its shareholder-owners. The rest of this article explains (a) when shareholders would want a shareholder-raider to get access to corporate books and records, and (b) how courts—notably, Delaware courts—have failed to appreciate how management as fiduciaries should react so as to maximize shareholder value when a shareholder-raider seeks corporate information.

II. THE LAW OF SHAREHOLDER ACCESS TO CORPORATE INFORMATION

Modern statutes give shareholders greater access to information than they had at common law, but access is neither total nor automatic.

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8. See 18A AM. JUR. 2D Corporations § 349 (1985). For an interesting discussion of the history of shareholders’ rights to corporate information, first at common law and then by statute, see Thomas, supra note 3, at 335-49. For a good judicial discussion of the evolution of state corporation statutes with respect to shareholder access to information, see MMI Investments, L.L.C. v. Eastern Co., 701 A.2d 50 (Conn. Super Ct. 1996).
And so, the issue of information access engenders considerable litigation. Indeed, the statutes are sufficiently general that litigation has been required to define precisely when access can or must be granted.

The statutes are generally of two sorts. Some, such as the Model Business Corporation Act, first specify information that must be provided to shareholders as long as they conform to minimal procedural requirements, such as adequate notice. Information automatically available includes the current articles of incorporation, by-laws, names and addresses of directors and officers, and similarly uncontroversial matters. Under the Model Act, access to all other information requires a "proper purpose." A second statutory model is that found in Delaware. Unlike the regime established by the Model Act, Delaware firm management is not statutorily required to provide any information without a showing of a "proper purpose." However, if a shareholder seeks inspection of a Delaware firm's stock ledger or list of stockholders, the firm has the burden of proof that the purpose is improper.

Although the statutes in the Model Act states and Delaware have their differences, their practical workings are rather similar. True, management in Model Act states must provide some information upon shareholder demand. But this information—the articles of incorporation, board members' names and addresses, and so forth—is generally of little interest to shareholders. Beyond this sort of largely uncontroversial information, both the Model Act and Delaware statutory regimes subject informational access to the "proper purpose" requirement.

In that great majority of cases when a proper purpose is required, two sorts of corporate information are recognized, with correspondingly different rights of shareholders to obtain information. Relatively

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13. See DEL. CODE ANN. tit. 8, § 220(c) (1991 & Supp. 1998). As under the Model Business Corporate Act, supra note 9, the shareholder must also comply with certain procedural ("form and manner") requirements. See Jeffrey J. Clark, Compaq Computer Corp. v. Horton: A Straightforward, Clarifying Statutory Interpretation of Section 220(B) and (C), 20 DEL. J. CORP. L. 622, 623-24 (1995).
routine information, notably shareholder lists, is relatively easy for shareholders to obtain. To quote a recent non-Delaware case, "[t]he right of a shareholder to examine the corporation's list of shareholders for a proper purpose is to be liberally construed."15 The same rule holds in Delaware.16 Another category of information, however, is more difficult for a Delaware shareholder to obtain. When seeking inspection of more sensitive information from the firm's books and records, such as accounting information or minutes of board meetings, a shareholder not only must have a "proper purpose," but also "has the burden of showing, by a preponderance of the evidence, a proper purpose entitling the stockholder to an inspection of every item sought."17

In brief, some types of information are easier for shareholders to obtain than others. But the distinctions are judicial, not statutory. Information that shareholders typically seek is all subject to the statutory requirement of showing a proper purpose. The commonality of the "proper purpose" requirement increasingly has meant that different states' information-access cases tend to focus on the same issues. As Robert Clark writes, "[w]hatever the variations in statutory procedure, proper purpose has become the substantive touchstone in most jurisdictions."18

What, then, constitutes a "proper purpose"? The statutes are of little help. The Model Act does not define what purpose is "proper," and the Delaware statute defines it as "a purpose reasonably related to [one's] interest as a stockholder,"19 leaving it to courts to define what that means. The cases have tended to identify two proper purposes.20

The first relates to shareholders' seeking information related to the value of their investment, particularly when a firm is closely held and so

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15. MMI Investments, L.L.C. v. Eastern Co., 701 A.2d 50, 59 (Conn. Super. Ct. 1996). An issue that often arises in information-access cases is what the demanding shareholder's "true" purpose is. This is naturally a question of fact that courts ordinarily have little difficulty resolving. Relatedly, shareholder-demanders sometimes have multiple interests in demanding information. Courts ordinarily look only at the shareholder's "primary" interest, and if that primary purpose is proper will order access to information without regard to any additional, subsidiary purposes. See, e.g., CM & M Group, Inc. v. Carroll, 453 A.2d 788 (Del. 1982).


20. A good summary of the case holdings is found in Thomas, supra note 3, at 334-35. See also Clark, supra note 18, § 3.1, at 100 (providing four-part taxonomy of the cases).
market information about the value of shares is not available. 21 When a shareholder seeks information for purposes that are entirely personal, or when disclosure of the information would actually hurt the firm (and so degrade investment values), the purpose is not proper. 22 The second reason deemed legitimate to force disclosure of corporate information concerns shareholders’ desire for information in order, not to value their own investment, but to communicate with other shareholders. However, shareholders’ purpose to communicate with other shareholders still must relate to the underlying investment purpose of their share ownership. Communications for purposes unrelated to shareholders’ investment, such as advancement of wider “social” goals, will not suffice to gain access to non-routine information such as corporate books and records. 23

Clark summarizes the distinction between the routine items to which shareholders have liberal access because their purpose is “proper,” such as shareholder lists, and the more sensitive items to which access is more difficult under the “proper purpose” requirement:

[The list of things subject to the “easy” inspection right leaves out some important items, including those that management might be most reluctant to show. The accounting records and the minutes of the directors’ meetings, for example, are records in which a shareholder contemplating a lawsuit against management would be most interested. The record of shareholders might be of special interest to a shareholder contemplating a proxy contest against management or a hostile takeover bid. 24]

In the present article, the interest is the last situation mentioned, takeovers, but more specifically takeovers attempted by shareholders of the target firm. To further those attempts, Ms. Shareholder may seek access to more sensitive corporate information that corporate management may refuse to provide. In those circumstances, the law of shareholder access to corporate information has been unambiguous. Management is accorded virtually absolute discretion to refuse information, a legal rule tantamount to per se legality when management denies access to the information sought. The law on this

22. See Clark, supra note 18, § 3.1, at 102 (citing the relevant cases). A hypothetical example is perhaps useful. The law would never accord shareholder access to financial information claimed necessary for the shareholder to write a master’s thesis or doctoral dissertation in business. While the purpose is perfectly “proper” in many ways, it forces the corporation to incur the costs of providing information—costs borne by all shareholders—for benefits received only by the requesting shareholder.
24. Clark, supra note 18, § 3.1, at 97-98.
point is discussed in Section IV with respect to the quartet of Delaware cases noted in the Introduction. However, one cannot evaluate the law of shareholder access to corporate information without a more general model of shareholders' role in the corporation.

III. SHAREHOLDER ACCESS TO CORPORATE INFORMATION IN THE CONTRACTUAL THEORY OF THE FIRM

Corporations are a web of contracts that bind shareholder-investors among themselves, and bind shareholders and the managers for whom they vote to manage their investments. Shareholders acquire their pieces of paper via contract, either with the firm at the time the shares are first issued, or later from those selling the shares. In either event, the terms of the contract as initially agreed to by the corporation and the purchasing shareholders apply. When disputes later arise between shareholders and firm management, the question is what rights shareholders have, either via the initial purchase or via the subsequent purchase subject to the initial terms.

In principle, issues of access to information could easily be resolved _ex ante_ by agreement among shareholders themselves. Under the typical state corporation statute today, shareholders can write into the firm's articles of incorporation almost any clause agreed to concerning their firm's governance. Courts will enforce shareholder agreements, doing so even when shareholders have not complied with statutory formalities necessary to perfect their agreement under the prevailing statute. In the ordinary case of contested access to information, inclusion in the corporate charter of a liberal access provision would suffice for Ms. Shareholder to get the information she sought. But such agreements are apparently rare, if they exist at all. And so questions of information access must be resolved later, by courts, on the basis of shareholders' more general contractual rights.

A. Shareholder Rights Generally

Ordinarily, shareholders have two principal contractual rights. First, because shareholders are investors, they have the right to the

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appreciation in the value of their shares that corporate performance produces. Were shareholders unable to appropriate the increased value of their investments, they would not invest in the first place. Appropriating the investment value of their shares includes the right of alienability that ordinarily attaches to any property.  

Second, shareholders have the right to vote, including a vote for their agents who, as corporate directors, will manage the firm. Choosing to own corporate shares is choosing to have ownership and management of the firm legally separated; owners (shareholders) are not managers. They choose the managers by voting for those who will serve on the board of directors, and then await the hoped-for success their board will produce so as to increase the value of the firm's shares.

In short, shareholders serve two roles in the corporation. They are investors, and so have the right to increases in the value of their investments. (As investors, they also have the "right" to suffer any losses in the value of their investments.) And, as otherwise passive owners, they have the right to choose the agents who will actively manage the firm on whose success the value of their investment depends. In both respects, shareholders seek to maximize investment returns.

Because shareholders' arrangements among themselves and with their firm are a matter of contract, the arrangements discussed in the preceding paragraphs may well be altered by contract so as to increase shareholder returns. As investors, shareholders may agree to limitations on their ability to transfer their shares, thus constraining their ability at any given point in time to realize the investment value built up in their shares. Courts will ordinarily enforce these agreed-upon limitations, relying on ordinary concepts of contract and commercial law.

Likewise, shareholders may agree to restrictions among themselves in


29. The typical state statute in fact requires that some shares be able to vote. See, e.g., MODEL BUS. CORP. ACT § 6.01(b) (1984 & Supp. 1997). Modern statutes allow shareholders to operate their firms directly rather than through boards of directors (e.g., MODEL BUS. CORP. ACT§ 7.32 (1984 & Supp. 1997)), but in those situations the importance of the ability to vote is all the greater.

30. Shareholders typically have other rights. By statute, ordinarily, they will receive the residual value of the firm's assets should the firm liquidate. See, e.g., MODEL BUS. CORP. ACT § 14.05 (1984 & Supp. 1997). But receiving their pro rata liquidation value of the firm is just part of shareholders' more general rights to the value of their investment. Shareholders also have a right to receive dividends — but only if they are declared by management that they elect. And so shareholders exercise control over their firm's dividend policies through their power to vote for management.


32. See, e.g., Ling & Co. v. Trinity Sav. & Loan Ass'n, 482 S.W.2d 841 (Tex. 1972).
their second role, as voters. Arrangements like vote pooling, voting trusts, special voting shares and the like will, again, ordinarily be enforced by courts as a matter of contract.33

Two points follow from the fact that shareholders, within the nexus of contracts called the corporation, function as passive investors except for their active role as voters. First, as with any other contract, there may be gaps. All contracts are incomplete. Not all events conceivably (or inconceivably) possible in the future history of the corporation are worth negotiating over, as their probabilities of occurring and/or their consequences if they do occur may be relatively slight.34

Second, therefore, the role of corporate law will be to provide default options, i.e., rules that govern disputes after the fact in areas that parties to the incomplete corporate contract did not consider and agree to before the fact. Two sorts of incomplete contracts are generally of interest, the contract among shareholders themselves and the contract between shareholders collectively and their agent-managers. As to both contracts, disputes will be resolved according to what courts can infer the parties would have agreed to, had the later-arising controversy been anticipated and contracted for. And to resolve disputes, courts must assume that shareholders—had they actually bargained among themselves over the eventually-encountered problem, and then with management representing shareholders collectively—would have negotiated so as to maximize the value of their investments.

B. Shareholder Rights to Corporate Information

What would shareholders have provided, had they considered at the time of establishing their firm the issue of one shareholder desiring information and management refusal to provide it? One thing is clear: information is like any other valuable resource. More information is beneficial, but information is costly to produce. At some point, the costs of generating more information fall short of the benefits of having more information.35 At that point, compelling production of information would be wealth-reducing, and so shareholders would not want it

33. The important cases concerning vote-pooling agreements, voting trusts and other voting arrangements are cited and discussed by Clark, supra note 18, at 772-81.
34. See, e.g., Benjamin Klein, Transaction Cost Determinants of "Unfair" Contractual Arrangements, 70 AM. ECON. REV. 356 (1980).
35. The literature is voluminous. For starters, see George J. Stigler, A Theory of Information, 69 J. POL. ECON. 213 (1961). The costs of providing corporate information are both pecuniary and non-pecuniary. The former include out of pocket expenses of gathering and disseminating information, and the latter such non-pecuniary costs as the risk of having the information leaked to competitors, revelation of trade secrets and so forth.
produced. The issues are thus how much and exactly what information shareholders, in keeping with the corporate contract, would want management to make available.

In analyzing how shareholders would bargain among themselves if they established their own rules concerning later access to information, it is useful to consider three different situations and the rules that would be chosen for each.\(^6\) For each of the three, it is assumed hypothetically that the firm consists of three shareholders (A, B and C), each of whom will contribute the same amount ($50) to establish the firm's initial capital, once the article of incorporation—including rules for access to corporate information—have been established. Each receives 50 shares, worth $1 each. In each of the hypothetical access situations, the cost of providing the information sought is $9. With these general assumptions, consider three situations in which a particular shareholder might later demand information from the firm, and what rule shareholders would provide for in advance.\(^7\)

1. Situation I: Information Costing the Firm More than Gains to Requesting Shareholder

First, access to information that benefits one shareholder but harms the firm as a whole (and so shareholders as a group) would never be agreed to. Such a rule would be wealth-reducing, and so inimical to shareholders' interests as investors.

Suppose that Ms. A, the shareholder seeking access to corporate information, would get a gain of $5 from having the information provided. She shares pro rata in the cost of providing the information,

\(^36\) The analysis uses an admittedly simple model of voting rules. It is assumed that any rule that might have been chosen, had shareholders actually considered it, would have required unanimous consent. This is perhaps not too simplistic, as no shareholder need assent to anything he does not want by way of subsequent access to information. But a voting model based on unanimity should include the possibility of log-rolling. Corporate charters are multi-faceted documents, detailed along several margins. Shareholders might well trade off expected losses concerning information access against expected gains in other respects, but those more complicated situations are ignored here. For summaries of the basics concerning voting rules and log-rolling, see JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); Henry G. Manne, Some Theoretical Aspects of Share Voting: An Essay in Honor of Adolf A. Berle, 64 COLUM. L. REV. 1427 (1964); DENNIS C. MUELLER, PUBLIC CHOICE II (1989).

\(^37\) One simple rule might be that a shareholder will be given access to information as long as she is willing to pay the cost of obtaining it. It is interesting that, for the most part, corporate statutes do not condition access to information on the requesting shareholder's paying the cost of providing it. The exception is shareholder lists. See DEL. CODE ANN. tit. 8, § 220(b) (1991). This may indicate that the true cost to the firm of providing information is non-pecuniary and so less susceptible of accurate measurement. See supra note 35.
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$9 ($3 per shareholder), but still comes out ahead. The following summarizes the gains and losses to the three shareholders:

SITUATION I
Shareholder Gain/Loss

<table>
<thead>
<tr>
<th>Shareholder</th>
<th>Gain/Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$5 gain - $3 loss = $2 net gain</td>
</tr>
<tr>
<td>B</td>
<td>$3 loss</td>
</tr>
<tr>
<td>C</td>
<td>$3 loss</td>
</tr>
</tbody>
</table>

It is clear that shareholders, contemplating a situation such as that described above, would never want management to provide the information demanded by Ms. A. She gains on net by $2 (her $5 personal gain offset by her portion of the $9 cost to the firm of providing the information). But Shareholders B and C lose $6 together, more than Ms. A gains. Shareholders collectively would never vote for a rule that required management to provide information to A in Situation I.

2. Situation II: Information Increases Value Only to One Shareholder But Value Exceeds Cost

So, any rule concerning shareholder access to information would have to increase firm wealth overall. However, a rule requiring that provision of information increase wealth overall is a necessary but not a sufficient condition for shareholders to permit information access. Individual shareholders are not interested in overall wealth increases that do not redound to their personal welfare. Access to information that benefited one class of shares but not another, even if access was beneficial to shareholders as a group, would not be agreed to by shareholders as a whole, all other things equal.

Consider Situation II, in which there are net gains to shareholders from allowing Ms. A access to the information she seeks. Suppose now that the gains to her are $10, against the $9 loss to the firm.

SITUATION II
Shareholder Gain/Loss

<table>
<thead>
<tr>
<th>Shareholder</th>
<th>Gain/Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$10 gain - $3 loss = $7 net gain</td>
</tr>
<tr>
<td>B</td>
<td>$3 loss</td>
</tr>
<tr>
<td>C</td>
<td>$3 loss</td>
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</tbody>
</table>

Although in Situation II gains exceed losses collectively, B and C would not support a rule that allowed A access to information.
Ultimately, if there are net gains from allowing access to the information, those benefited may be able to compensate the losers. Ms. A could compensate B and C for their losses (totaling $6) and still would have a gain for herself ($1). But the fact that B and C could be compensated does not mean that they would vote to allow A access to information in Situation II. Shareholders would do so only if either (a) Ms. A's access to information is conditioned on her compensating the losers after the fact; or (b) the before-the-fact odds are such that, expectationally, each shareholder still benefits. As an example of the latter scenario, if A, B and C are equally likely to be the ones able to gain $10 by getting access to the information, each shareholder will favor a rule of liberal access *ex ante*, even if he ends up losing *ex post* when a particular problem causes application of the rule.  

3. Situation III: Information Increases Wealth of All Shareholders

A third set of potential outcomes seems somewhat easier to analyze, at least at first glance. Suppose now that when Ms. A obtains information, the value to shareholders collectively of giving her access is $15. If access to information sought by one shareholder would improve the lot of all shareholders—both *ex ante* and *ex post*—all shareholders seemingly would be in favor of that information being provided.

However, to say that shareholders would favor rules that make everyone better off invites the question, “better off compared to what?” Consider Situation III-A, in which all shareholders gain equally, that is, share the total $15 gain and the $9 loss equally.

38. In more formal economic terms, a Hicks-Kaldor improvement, whereby some shareholders gain and others lose, would not be the solution chosen by shareholders as a group unless losing shareholders would be compensated by winning shareholders after the fact, or before the fact shareholders are expectationally more likely to gain than to lose. For a general discussions of Hicks-Kaldor superiority, see NICHOLAS MERCURO & STEVEN O. MEDEMA, ECONOMICS AND THE LAW 45-50 (1997). The Hicks-Kaldor criterion is ordinarily invoked to justify government regulation/redistribution that is allegedly wealth-increasing overall but as a result of which gainers are not actually required to compensate losers. But government action is coercive, whereas shareholder arrangements (for example, the articles of incorporation) are contractual. So, while government actors can perhaps justify coercive solutions on the basis of overall wealth increases, even though losers are not actually compensated by winners, in contractual settings losers will never agree to actions that increase wealth overall but work to their personal disadvantage.

39. To resort again to economics, unlike rules that require merely net (Hicks-Kaldor) increases in net wealth overall, the agreement in this third situation is Pareto optimal, improving the lot of every shareholder.
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SITUATION III-A
Shareholder Gain/Loss

<table>
<thead>
<tr>
<th>Shareholder</th>
<th>Gain/Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$5 gain - $3 loss = $2 net gain</td>
</tr>
<tr>
<td>B</td>
<td>$5 gain - $3 loss = $2 net gain</td>
</tr>
<tr>
<td>C</td>
<td>$5 gain - $3 loss = $2 net gain</td>
</tr>
</tbody>
</table>

That is, there is a net total of $6 in gain to providing the information ($15 gain less the $9 cost of providing it), and stockholders share these gains equally.

Compare Situation III-A with an unequal-sharing situation, such as that portrayed in Situation III-B. Assume now that Ms. A will garner $7 of the total $15 gain to shareholders from gaining access to the information, or $4 of the gain on net.

SITUATION III-B
Shareholder Gain/Loss

<table>
<thead>
<tr>
<th>Shareholder</th>
<th>Gain/Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$7 gain - $3 loss = $4 net gain</td>
</tr>
<tr>
<td>B</td>
<td>$4 gain - $3 loss = $1 net gain</td>
</tr>
<tr>
<td>C</td>
<td>$4 gain - $3 loss = $1 net gain</td>
</tr>
</tbody>
</table>

In Situation III-B, as compared to Situation III-A, there is unequal sharing of the gains from information access. Does that mean that shareholders would prefer Ms. A not to have access if she will reap the lion’s share of the gains? At first glance, it would seem so. Shareholders as a group would not vote for information access when the distribution of gains was as portrayed in Situation III-B, if the alternative distribution of Situation III-A was available. Shareholders B and C are better off with the distribution as portrayed in Situation III-B.

However, shareholder insistence on more equal sharing ignores the possibility that Ms. A herself is the cause of the gains. If A is able to increase the value of the firm, while B and C are merely passive shareholders, B and C can only gain if A undertakes actions that inure to the benefit of all, albeit unequally. If A is not motivated to undertake the actions that increase value collectively, no one—neither A, B nor C—will gain anything. In that case, illustrated by Situation III-B here, B and C would assent to allowing Ms. A access to

40. In more formal terms, Shareholders B and C will settle for a rule that gets them inside the trading lens of the Edgeworth Box, even if most of the gains from subsequent trade go to Shareholder A, if B and C would not be in the trading lens otherwise. Once inside the lens, B and C will prefer a rule that gets them more of the gains from trade. But that is irrelevant.
information, and the proportionately large share of the gains that would follow.

It is precisely to avoid squabbling over a division of the gains that shareholders would want to install voting rules \textit{ex ante}. Squabbling \textit{ex post} reduces the \textit{ex ante} likelihood of gains for any shareholder. As long as Shareholder A knows that she will reap the rewards of her activities that increase value for all shareholders, she has the incentives to undertake them. If she must contemplate the possibility of \textit{ex post} attempts of other shareholders to extract from her the value of her actions, she has less incentive to undertake them in the first place. B and C only gain to the extent that A creates wealth. Shareholders, in short, would choose a rule of informational access that left them all better off, but accorded more of the gains to the shareholder responsible for creating the wealth.\footnote{This principle is quite general, applying to change-of-control situations generally. See Frank H. Easterbrook & Daniel R. Fischel, \textit{Corporate Control Transactions}, 91 YALE L.J. 698 (1982); Frank H. Easterbrook & Daniel R. Fischel, \textit{The Economic Structure of Corporate Law} 109-144 (1991). Shareholders will prefer unequal-sharing rules when requiring equal sharing of the gains from control changes will prevent (or diminish) creation of the gains in the first place.}

To summarize, shareholders would never agree to a rule that leaves their firm (and thus themselves) worse off collectively. They might or might not agree to a rule whereby some shareholders would gain and others lose, as long as gains exceeded losses and either (a) winners ultimately would compensate losers, or (b) the process governed by the rule was such that before the fact each one could expect gains outweighing losses. They would certainly agree to a rule whereby everyone was certain to gain, as long as they could agree on the division of the gains among themselves. An equal-sharing rule may make agreement easier, but such a rule is not a requirement. Unequal gains will be agreed to when a single shareholder is the source of the hoped-for gains, but she requires the incentive of possibly unequal gains in order to create the gains in the first place.

\subsection*{C. Law of Shareholder Access to Information}

The law of shareholder access to corporate information closely mirrors the three-part schema sketched in the previous situation. Again, the law's role is to evaluate management action concerning access to information according to what shareholders would have wanted, had they anticipated the situations that arise. It is suggested here that "proper purpose" for the most part is defined judicially along the lines just described.
Thus, in a Situation I setting, access will be denied when the firm as a whole (and thus shareholders as a whole) are made worse off.\textsuperscript{42} For example, seeking information to aid competitors of the firm is not a proper purpose.\textsuperscript{43} The cases involving advancement of one shareholder's notion of the firm's supposed "social purpose" also fall into this category of improper purpose.\textsuperscript{44} One shareholder would gain by having the information provided to further his social goal, while the firm as a whole (and so shareholders collectively) would lose.

In the second category above, Situation II, gains accrue only to the one shareholder seeking information and other shareholders lose, but the gains to the one shareholder exceed losses collectively. Still, shareholders might be compensated after the fact, or agree to a rule by which expectationally they all gain. That situation typifies perhaps the largest group of cases for which access to information has regularly been deemed proper: information needed to value one's investment, particularly in a closely held corporation.\textsuperscript{45} True, an individual shareholder seeking information to value his shares imposes some costs on other shareholders at the time access is granted. But unlike the situation involving the firm's "social purpose," where only one shareholder has a particular social concern, all shareholders are potentially interested in valuing their investments and so all are benefited \textit{ex ante} by the ability to seek information to value their shares, even if \textit{ex post} some are made to pay for others' demands for information.\textsuperscript{46}

In the third category of information-access situations, Situation III, the firm and all shareholders are benefited by the demand made for information by one shareholder. But in this situation, shareholders may benefit equally (Situation III-A) or unequally (Situation III-B). As to the former, the law has granted liberal access, under the "proper purpose" heading, to shareholders seeking information that would benefit the firm


\textsuperscript{43} See \textit{Shipley, supra} note 18, \S 15:

Consonant with the general rule that a corporation will not be required to submit its books and records to the inspection of a stockholder who seeks such an examination for purposes inimical to the corporation, it has generally been held that no inspection will be granted where the stockholder is acting in the interest of a business competitor of the corporation, seeking to discover its trade secrets or injure it in some other manner.

\textit{Id.} (citations omitted). For citations to cases, see \textit{Shipley, supra} note 18, \S\S 13-15.

\textsuperscript{44} See \textit{supra} note 23 and accompanying text.

\textsuperscript{45} For cites to various cases, see \textit{Clark, supra} note 18, \S 3.1, at 100-01 nn.22, 24 & 25 and \textit{Shipley, supra} note 18, \S 8.

\textsuperscript{46} If other shareholders are interested as well in valuing their investment, they also gain at the time information is obtained.
and all shareholders equally. A typical case is that in which the demand is made to investigate suspected management incompetence or wrongdoing, about which the inquiring shareholder will communicate with other shareholders. The gains to the firm from whatever the shareholder learns about management shortcomings, presumably reflected subsequently in management changes or at least in corporate policies, are shared by stockholders in accordance with their holdings.

The legal rules thus reflect what one would expect from an economic model of voting rules that shareholders as investors would choose. The law recognizes basic property rights of shareholders as investors when issues of access to information arise, and those rights are the ones that shareholders predictably would create contractually among themselves. Information access that would reduce share values overall would never be chosen. Access that would increase the value of all shares would always be chosen. Information that would benefit some but not all shareholders would be made available when share value would be increased overall and shareholders could expect before the fact that they would benefit from access to information.

IV. ACCESS TO INFORMATION IN POTENTIAL CHANGE OF CONTROL SITUATIONS

How does this model of shareholder agreements concerning access to information fit the situation of particular interest here, information sought by a particular shareholder also seeking control of the firm? Suppose that Ms. Shareholder approaches firm management to get access to information, perhaps as a friendly bidder, but with the threat of litigation in the event a friendly arrangement cannot be reached. It is suggested here that the law, which ordinarily does reflect what shareholders would want when an individual shareholder demands information, may not fully understand what shareholders would want in the shareholder-raider situation. But, as will be seen, the misunderstanding is due at least in part to shareholders’ failure to raise the appropriate issues when information is sought as part of an overall change of control in the firm.

47. For a discussion of the basic problem, see Thomas, supra note 3, at 332-33. For cites to cases, see Clark, supra note 18, § 3.1, at 100 n.23 and Shipley, supra note 18, § 7.
To appreciate fully the way the law operates when information is sought in the context of a control change, it is useful to begin with attempts to acquire shareholder lists as part of a proxy campaign to depose current management. As noted above, when information as to the identity of other shareholders is sought, a shareholder is ordinarily entitled to stockholder ledgers or shareholder lists for a proper purpose. That general rule is no different when access to corporate information concerns a possible proxy fight. For the most part, the law has permitted shareholder access to shareholder lists for mounting a proxy campaign,\(^{48}\) whether intended to oppose management on a specific issue\(^{49}\) or to depose current management altogether.\(^{50}\)

There can be no question but that the desire to solicit proxies for a slate of directors in opposition to management is a purpose reasonably related to the stockholder's interest as a stockholder. It has been held in this State [Delaware] that such a purpose is directly related to stockholder status and, as such, proper.\(^{51}\)

Obtaining information to replace incumbent management falls under Situation III-A described above. Getting better management increases the value of the firm, and shareholders benefit equally, according to their respective holdings. Shareholders would surely contract among themselves for access to shareholder lists when the information would be used to replace inferior firm management. The law of access coincides with what shareholders would have chosen for themselves.

Likewise, in other Situation III-A settings the law will order production of information designed to effect, not just a change in management, but a change of control. Seeking information to communicate with shareholders about the benefits of a pending tender offer is deemed a "proper purpose."\(^{52}\) The same rule applies to a

\(^{48}\). See generally Shipley, supra note 18, § 16.3.

\(^{49}\). See generally 18A AM. JUR. 2D Corporations § 386 (1985).

\(^{50}\). Referring specifically to Delaware law, Randall Thomas writes, "If the shareholder's purpose in requesting the inspection was to obtain a stocklist in order to communicate with the shareholders to seek their proxies to oust the management, the Chancery Court will order its production." Thomas, supra note 3, at 354.

\(^{51}\). Gen. Time Corp. v. Talley Indus., Inc., 240 A.2d 755, 756 (Del. 1968). See generally Shipley, supra note 18, § 17:

Since the management of a corporation acts as the agents or servants of the stockholders, who should be permitted to place their affairs in other hands if they so desire, it has frequently been held that a denial of the right of inspection is not justified by the fact that it may be sought to facilitate a plan to remove the present offices or directors.

merger that would result in a change of control. A recent Connecticut case, *MMI Investments, L.L.C. v. Eastern Co.*, involved shareholder MMI Investments' demand for access to the Eastern Company shareholder list in order to interest other Eastern shareholders in a merger with MMI.\(^{53}\) The Connecticut court ordered production of the shareholder list, agreeing that Eastern shareholders should be apprised of the merger proposal since it may have a direct impact on the value of Eastern stock, and, as a result, the proposal would directly impact the shareholders' interests as shareholders.

Courts in other jurisdictions have permitted inspection of lists of shareholders for similar takeover, stock related or control purposes.\(^{54}\)

*MMI Investments*, and the cases it refers to, concern access to shareholder lists, information of the sort now routinely available to shareholders under modern corporation statutes, not to corporate books and records. But in ordering production of the information, courts necessarily hold that obtaining information to depose management or to facilitate a change of control can be a proper purpose under the relevant statute. State corporation codes do not distinguish between shareholder lists and other books and records, stating that access to all such corporate information requires a proper purpose. Delaware draws a statutory distinction, but only shifts the burden of showing a purpose is proper to the shareholder when she seeks information other than a shareholder list.\(^{55}\) It would logically seem that if obtaining a shareholder list to effectuate a change in management or even control can be a proper purpose, so could obtaining other corporate books and records for the same purposes constitute a proper purpose.

**B. Information Access and Change of Control: Hostile Bids**

In the change of control situations described above—proxy campaigns, tender offers from outside bidders—all shares would benefit equally from any change in control that resulted. They occur in typical Situation III-A settings. But suppose now that access to information is sought in a Situation III-B world, with all shareholders benefiting but one shareholder garnering most of the gains.

That may be the result in a shareholder-led takeover. In a successful takeover, the benefits to the raider are usually not the same as those to

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54. *Id.* at 58.
55. See supra note 17 and accompanying text.
the target firm shareholders.\textsuperscript{56} To return to the figures used above to illustrate Situation III-B, suppose that A will gain by $7 from the takeover, and B and C by only $1. When the would-be acquiror is already a shareholder, the takeover bid effectively separates shareholders into two groups, one vying for control, and the others who will have to decide whether to allow that change in control. The equivalence of interest between shareholders that, in Situation III-A, typifies rules allowing all shareholders access to information for valuation purposes is gone. Passive shareholders will want the highest possible offer for their shares; the raider-shareholder will offer the lowest possible price for the shares at which she can obtain them.\textsuperscript{57}

However, just because in Situation III-B shareholders no longer have the same interests overall does not mean that their interests diverge along every margin. In two respects, all shareholders' interests overlap (although not perfectly) once a takeover looms. First, passive shareholders may want the raider-shareholder to have more information about the firm. Takeovers are bargained-for transactions. There is no set price at which a firm will be taken over: the transaction is negotiated. In friendly takeovers, the would-be acquiror negotiates with firm management over an offer to be presented to shareholders. In hostile takeovers, different “raiders” present their offers directly to shareholders, who choose whether to accept.

Provision of information in negotiated transactions is a delicate proposition. “In bargaining, potential trading partners have two contradictory incentives. Each wants to know the attributes of the items the other offers and seeks. Transaction costs are lowered by quick and easy discovery of the terms of trade. Hence, each trader has an incentive to transmit some information\textsuperscript{58} but, in seeking the best deal for itself, each party may also have an incentive to limit the information available to the other side. Notably, an offeree may not want to provide information that would facilitate an offeror’s

\textsuperscript{56} The term “raider,” is unfortunate, as “raiders” are often a shareholder’s best friend. See, e.g., Clifford G. Holderness & Dennis P. Sheehan, Raiders or Saviors? The Evidence on Six Controversial Investors, 14 J. FIN. ECON. 555 (1983).

\textsuperscript{57} In fact, when a takeover attempt results in an auction for a firm, target-firm, shareholders of the target firm typically benefit to a greater extent than does the winning bidder. The statistical evidence is summarized in Michael C. Jensen & Richard S. Ruback, The Market for Corporate Control: The Scientific Evidence, 11 J. FIN. ECON. 11 (1983); Frank H. Easterbrook & Gregg A. Jarrell, Do Targets Gain from Defeating Tender Offers?, 59 N.Y.U. L. REV. 277 (1984); Gregg A. Jarrell et al., The Market for Corporate Control: The Empirical Evidence Since 1980, 2 J. ECON. PERSP. 49 (1988). Of course, when passive shareholders like B and C gain more than does bidder A, B and C are all the more likely to favor a rule that gives A access to the information necessary for her to complete a takeover.

computation of the offeree's reservation price (the minimum price offeree would accept).

How much and what kind of information is optimally transferred will depend on the particular situation, and bright-line rules are impossible. Bargaining is as much an art as a science. Just as some firms will want to keep information to themselves that would reveal their reservation prices, so might others wish to provide that same information if they believe the offeror would otherwise undervalue them.

However, there is an additional complication that attends access to information in the context of corporate takeovers. Although it is essential to think about what shareholders would agree to among themselves, the issue of access to information only arises when, in fact, shareholders have not agreed to information access rules. In that case, it is management, bound to act in the shareholders' interest, that must determine whether access is value-enhancing in a way that shareholders themselves (had they contracted explicitly) would find acceptable. "The corporation's management must balance the interests of all shareholders against those of the shareholder seeking to obtain the corporate information." The voting rules discussed in the various situations above assume that management will attempt to find the value-maximizing solution for all shareholders, in the face of a particular shareholder's demand for information.

But that perspective may not apply very well to shareholder demands for information when the shareholder is also a raider. The construct of bilateral negotiation between active bidders and passive shareholders does not capture the complete nature of a takeover. In takeovers, it is management that in the first instance bargains on shareholders' behalf, and which therefore is entrusted with the art and science of negotiation. Ideally, managers are disinterested agents, seeking only to maximize the returns to shareholders as a whole. But, realistically, there is the possibility that management—whose fate may well be affected by any change in control—may not work as faithful agents, and may choose sides in a control contest so as to maximize their own personal welfare.

Both passive shareholders and the raider need be mindful of the agency costs that firm management can impose in the takeover context. The law has shown itself mindful of these potential agency

60. Otherwise stated, provision of some information is necessary to reveal to the parties that there are gains from trade (i.e., a trading lens in an Edgeworth Box). But provision of other information may worsen a bargaining party's position within the trading lens.
61. Thomas, supra note 3, at 334.
62. See generally Michael Jensen & William Meckling, Theory of the Firm: Managerial Behavior, Agency Costs
costs of firm management when a takeover looms, imposing fiduciary duties on management to do what is best for shareholders, not itself. The principal fiduciary duties are defined in two cases.

In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware court disallowed various arrangements that effectively elevated the welfare of management over that of shareholders in the context of a hostile takeover. Once a change of control is inevitable the court held, directors are "charged with the duty of selling the company at the highest price attainable for the stockholders’ benefit."

The *Revlon* decision recognized that in takeover situations management may well favor their interests over those of shareholders. By use of the devices challenged, (lock-up and no-shop clauses), "the Revlon board ended the auction in return for very little actual improvement in the final bid. The principal benefit went to the directors ..." But the *Revlon* court also showed a sophisticated understanding of how the challenged devices employed by management in the takeover context may be good for shareholders in some instances. Discussing lock-up and no-shop clauses, the court stated:

A lock-up is not per se illegal under Delaware law. Its use has been approved in an earlier case. Such options can entice other bidders to enter a contest for control of the corporation, creating an auction for

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and Ownership Structure, 3 J. Fin. Econ. 305 (1976).

63. 506 A.2d 173 (Del. 1985). The relevant facts and holding of *Revlon* are summarized in the first paragraph of the Delaware Supreme Court's opinion:

In this battle for corporate control of Revlon, Inc. (Revlon), the Court of Chancery enjoined certain transactions designed to thwart the efforts of Pantry Pride, Inc. (Pantry Pride) to acquire Revlon. The defendants are Revlon, its board of directors, and Forstmann Little & Co. . . . [Forstmann]. The injunction barred consummation of an option granted Forstmann to purchase certain Revlon assets (the lock-up option), a promise by Revlon to deal exclusively with Forstmann in the face of a takeover (the no-shop provision), and the payment of a $25 million cancellation fee to Forstmann if the transaction was aborted. The Court of Chancery found that the Revlon directors had breached their duty of care by entering into the foregoing transactions and effectively ending an active auction for the company. The trial court ruled that such arrangements are not illegal per se under Delaware law, but that their use under the circumstances here was impermissible. We agree.

Id. at 175-76.

64. The *Revlon* court said that, as the bidding firms' offers for Revlon mounted, "the break-up of the company was inevitable." Id. at 182. A series of subsequent cases has defined the situations in which *Revlon* standards apply. See, e.g., Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989); Paramount Communications, Inc., QVC Network, Inc. 637 A.2d 34 (Del. 1994); Sante Fe Pacific Corp. Shareholder Litigation, 669 A.2d 59 (Del. 1995).

65. *Revlon*, 506 A.2d at 184 n.16.

66. 506 A.2d at 184. As the court also wrote, "when a board implements anti-takeover measures there arises 'the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.'" Id. at 180 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d at 946, 954 (Del. 1985)).
the company and maximizing shareholder profit. . . . [A bidder] might only enter the bidding for the target company if it receives some form of compensation to cover the risks and costs involved.67

This approach to lock-ups and no-shop clauses in the takeover context parallels the discussion above concerning access to information in bargaining situations, including takeovers. In some situations, provision of information is value-enhancing for shareholders. In others, it may reduce value. A faithful agent (management) will maximize value to its principal (the firm, and ultimately its shareholders) by diligent and disinterested use of the techniques available. An unfaithful manager may decline to make information available if there is some reason for management to prefer one party seeking control of the firm rather than another.

Economically, there is no principled distinction in takeover contexts between management policies concerning provision of information to bidders and other devices to maximize value to shareholders. All are weapons in management's arsenal when a takeover bidder appears, seeking a change of firm control.68 And under Revlon, there would seem to be no legal distinction, either. In a takeover context, refusal to provide information works like any other defensive tactic. Corporation law accords management wide latitude to employ defensive tactics, as well it should.69 Use of things like poison pills or greenmail benefit target firms in some situations, harm them in others.70

The law therefore should be—and is—mindful of the advantages to shareholders provided by management’s use of defensive tactics to resist takeover bids, even if a takeover is not imminent and so Revlon duties are not at issue. That distinction underlies the second sort of takeover-related fiduciary duty, defined by the Delaware Supreme Court in Unocal Corp. v. Mesa Petroleum Co..71 In situations when a takeover is not inevitable, management is free to use defensive tactics to rebuff a takeover attempt, as long as doing so is consistent with its fiduciary duties to maximize shareholder value.72 At some point, a takeover may

67. Id. at 183 (citation omitted).
68. As Thomas writes, management may be “hostile to the ideas that the shareholders are proposing, [in which case management] can cut off their access to certain information.” Thomas, supra note 3, at 332.
71. 493 A.2d 946 (Del. 1985).
72. “In the board's exercise of corporate power to forestall a takeover bid our analysis begins with
become a virtual certainty, at which point the directors’ duties become those defined in *Revlon*. But until a change of control becomes inevitable, a board’s *Unocal* obligations permit resistance to takeover bids.

Management’s fiduciary duties in cases of possible changes in control are by definition important in the context of access to information by shareholder-raiders. One advantage of many defensive tactics, of the sort discussed in *Revlon* and *Unocal*, is their ability to slow down takeover attempts and force hostile bidders to contract with management—sometimes (but not always) to shareholders’ advantage. Refusal of access to information can work in that way, forcing raiders to negotiate with management or go to court.³

The speed with which takeover bidders can construct and complete their offers is a crucial aspect of success, and resort to courts is a notoriously slow way of resolving disputes. Forcing a raider into court is therefore one way that management can defeat takeover attempts.⁴ Even if management ultimately loses in court and is required to provide the information sought, its loss legally may well be a victory practically. Professor Thomas found, in his empirical investigation of attempts to obtain information through use of the Delaware courts, that the “median successful stocklist plaintiffs spend over a month in litigation, while unsuccessful plaintiffs wait significantly longer.”⁵ But access to stock lists, as noted above, is the least controversial area of shareholder rights to corporate information. Access to books and records, a more controversial area, required over three months of litigation for successful shareholders, and over eight months for unsuccessful litigants.⁶ One suspects that access to information in a takeover context is even more contentious, and so the time required for judicially ordered access to information even more protracted.

In short, the optimal legal rule concerning shareholder-raider access to corporate information would begin with a definition of “proper purpose” by which management, as shareholders’ faithful agent, was

the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation’s stockholders.” *Id.* at 955.

³. An academic colleague very involved in drafting his state’s corporation statute reports that, when he pressed for more liberal shareholder access to corporate information, practitioner-members of the drafting committee resisted, saying that limited statutory access increased the need to hire corporate lawyers to get access to information. On the problem of special interests determining the shape of legislation, even supposed “model” legislation, see Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislation*, 143 U. Pa. L. REV. 595 (1995).


⁵. Thomas, *supra* note 3, at 335.

⁶. See *id.*
required to accord access in situations where shareholders would want the information provided. Shareholders would never want the information provided when it reduced the value of the firm, and thus of their shares (Situation I). Shareholders would always want the information provided when all shareholders would gain as much as possible. Division of the gains would be a matter for bargaining among shareholders at the time of a takeover bid, admittedly, but avoiding the necessity of strategic bargaining over the division of the gains would not be permitted to defeat access to information that would leave all stockholders better off. To avoid the very possibility of strategic bargaining that could defeat any agreement at all, shareholders would want a voting rule whereby all would gain. And in Situation III-B, if a particular shareholder—call her a "raider"—was the source of the gains, shareholders would not define her getting information advancing a takeover as improper under section 220 or the Delaware Code (or the equivalent statutory section in Model Act jurisdictions).

However, just because the raider's purpose is proper does not mean that shareholders would always want the information provided. Section 220 does not purport to define the obligations that management has to provide or deny information in takeover situations. Denying access may be consistent with maximizing shareholder value in a takeover. At the same time, shareholders in a control-change situation would be attentive to the possibility that management would be more concerned with its own welfare than with that of shareholders. So, the law governing management's ability to defeat demands for corporate information would take this possibility into account as well as whether there was a "proper purpose" under the statute.

But balancing the pluses and minuses of providing information in takeover settings is the domain of the law of fiduciary (Revlon/Unocal) duties. Section 220 adds little, if anything, to what management, as fiduciaries, already must do in a takeover setting.

C. Information Access and Change of Control: Delaware Cases

Yet the Delaware courts have resolved disputes over shareholder-raider access to information solely in terms of section 220. Courts have effectively declared that when a shareholder seeks information related to taking over the firm, that purpose is per se improper. Those cases are inconsistent with the proxy cases, ignore what shareholders would themselves want in certain situations, and cannot be squared with management's Revlon/Unocal duties that supposedly apply in change-of-control situations. The cases have focused uniquely on the limits faced
by shareholder-raiders seeking information, without considering management’s obligations.77

1. BBC Acquisition Corp. v. Durr-Fillauer Medical, Inc.78

Perhaps the most important case is the BBC Acquisition case. Bergen Brunswig Corporation ("Bergen") sought to acquire Durr-Fillauer, Inc. ("Durr"), a publicly-held corporation. Durr had already agreed to be acquired by Cardinal Distribution, Inc. ("Cardinal"). To compete belatedly with Cardinal in acquiring Durr, Bergen formed BBC Acquisition Corporation ("BBC"), bought 100 shares of Durr in the market, and proposed a friendly cash tender offer for all of Durr's outstanding shares at a better price than Cardinal had offered (and Durr had accepted). When Durr management refused to deal with BBC, BBC as a shareholder demanded to inspect various books and records, in particular information on the agreement between Durr and Cardinal, including the same information that Durr had furnished Cardinal in connection with the Durr-Cardinal agreement. BBC’s demand letter to Durr management stated that the purpose of its request was inter alia communication with other shareholders concerning (a) the Durr-Cardinal transactions "or alternatives thereto," (b) a possible proxy solicitation for purposes of voting on the Durr-Cardinal deal, and (c) BBC’s valuation of its 100 shares.

Durr did not respond to BBC’s shareholder demand, and refused to meet with Bergen about BBC’s tender offer. Cardinal then made a new offer at a price topping BBC’s offer. BBC did not rebid in response to Cardinal’s higher offer, taking the position that “to decide whether to increase its bid, it must first be afforded access to the same nonpublic information that Durr earlier provided to Cardinal. . . . [which] is essential to enable it to determine the target company’s worth.”79 The Durr-Cardinal agreement, however, forbade Durr from negotiating with or furnishing to a competing bidder the information that BBC sought, unless in response to a written competing offer. In short, Durr maintained that it could not provide the information without a new bid from BBC, while BBC said that it could not make a second offer without

77. As will be seen, however, it is unclear to what extent plaintiffs have relied on management’s fiduciary duties in contesting denial of access to corporate information. In at least one case, however, the issue was raised explicitly by plaintiff, and in another it was implicitly discussed by the court. See notes 89 108-109 and 117, and accompanying text.


79. 623 A.2d at 88.
the information. BBC then brought suit to force access to the information.

The Delaware Chancery Court held that Durr was not required to provide the records to shareholder BBC. Under section 220, said the court, there was no showing of a proper purpose: "BBC's true (and primary) purpose is to determine whether to reprice or restructure the [BBC] Tender Offer, which purpose is not cognizable under § 220."80 In effect, the BBC demand as part of a possible takeover was per se not a proper purpose. The demand was unrelated to BBC's investor status, because it was unnecessary to value Durr's shares, which were traded publicly:

BBC's nominal stock interest is not what this inspection dispute is about. This is not a case where an investor in a nonpublicly-held corporation needs to inspect corporate books and records to value his investment in order to determine how to protect or preserve it, viz., whether to sell his shares, buy more shares (or possibly seek control), or take some other course of action. In that circumstance there is reality to a petitioning shareholder's contention that he needs to value his stock interest in the corporation because that interest (however large or small it might be) and its preservation are of real significance to him. In that situation, and in others where that reality drives the valuation purpose, § 220 relief is available to aid shareholders who demonstrate their entitlement to it.

That is not this case. BBC's characterization of its purpose as being one of valuing its interest in Durr obscures what truly is going on here. To repeat, BBC is not seeking to value its 100 shares of Durr, but Durr as a whole. For purposes of § 220, the chasm between those two purposes is fatally unbridgeable: valuing a stockholder's interest in the corporation is a proper purpose. Valuing the corporation for the sole purpose of acquiring it, unrelated and without regard to the acquiror's particular and pre-existing investment in the corporation, is not. In terms of the present case, that latter purpose relates only to BBC's status as a bidder for Durr, not to its status as a Durr stockholder. Section 220 is intended to serve shareholders whose need for inspection is truly related to their stock interest. BBC is not such a stockholder.81

80. Id. at 89. Durr raised other defenses to BBC's demand, but the Chancery Court held that the "proper purpose" argument was legally controlling. See id. Indeed, said the court, Durr's other defenses were largely without merit. For example, the Durr-Cardinal agreement that information not be provided to a shareholder-raider unless a written tender offer had been made could not in itself defeat shareholders' statutory rights to information. See id. Other Durr defenses are considered later. See infra notes 81-85 and accompanying text.
81. 623 A.2d at 91-92 (emphasis added).
There are three objections to the outcome and reasoning of \textit{BBC Acquisition}. As the language in the court's opinion italicized above indicates, the Delaware courts have generally recognized internal attempts to mount proxy contests in order to facilitate a change of control as a "proper purpose" compelling corporate disclosure of information. There seems no principled distinction between control changes through proxy fights from changes achieved without proxy contests but nonetheless requiring access to corporate information.

Second, the absence of a principled reason to distinguish among different paths toward control changes is perhaps clearer in light of the true purpose of constraining shareholder access to corporate information, i.e., the purposes that shareholders themselves would impose upon themselves \textit{ex ante}. Would passive Durr shareholders choose to have Durr management provide the information sought by BBC? It is hard to see why they would object. Durr was about to be acquired by Cardinal,\textsuperscript{82} meaning that current shareholders were about to surrender their shares at a price possibly lower than the price BBC would offer—if BBC could get the information demanded. Having the information turned over could only benefit Durr shareholders. If the information enabled BBC to make a second offer superior to Cardinal's second offer, the shareholders gain. If not, they lose nothing from having the information turned over.\textsuperscript{83} The Chancery Court's opinion makes it clear that, but for the information, BBC would not increase the price of its tender offer without the information. Shareholders had everything to gain and nothing to lose by having the information provided.\textsuperscript{84}

\textsuperscript{82} Technically, the Cardinal transaction would result in "a spinoff of certain of Durr's product divisions, and a sale of the remainder of Durr to Cardinal in a stock-for-stock merger." \textit{Id.} at 87.

\textsuperscript{83} In theory, Durr shareholders could lose if the information turned over allowed Bergen to compete better with Durr in the medical products market: the two firms were "in the same business." \textit{See id.} The value of the Cardinal shares that Durr shareholders were about to own (assuming BBC did not make a second offer higher than Cardinal's second offer) would be lower if release of the information to BBC lowered the returns to a Cardinal-controlled Durr. But apparently Durr did not contend that such was the purpose or possible outcome of BBC's demand; the point never arose in the case.

\textsuperscript{84} It is conceivable that allowing subsequent bidders access to the information Cardinal received would have reduced Cardinal's incentive to undertake the takeover in the first place, and that shareholders therefore would want management to deny that information to BBC Acquisition. Had the court resolved the matter on that basis, there would be less to quibble about concerning the outcome of the case. But the court explicitly held that any agreement with Cardinal not to reveal the information to BBC Acquisition would not constitute a valid defense for Durr's management. More important, it is one thing to say that management should be free to grant or deny access to information to a hostile bidder; such a holding is entirely consistent with management's Revlon/Unocal obligations to shareholders. But the court's holding in \textit{BBC Acquisition} says nothing of management's duties in a takeover context, relying solely on section 220 to deny the shareholder's request as lacking a "proper purpose."
Therefore, it is hard to reconcile the holding in *BBC Acquisition* with that in *Revlon*. In *Revlon*, the Delaware Supreme Court held that once a takeover was inevitable, managers’ duty to shareholders was selling the company at “the highest price attainable for the stockholders’ benefit.”\(^{(85)}\) BBC had already indicated a strong interest in Durr shares, and had made a first offer topping Cardinal’s first offer. It said it might make a second offer higher than Cardinal’s, if only it could get the demanded information.

It is noteworthy that Cardinal’s second offer only topped BBC’s first offer because Cardinal, as a friendly suitor, was granted access to information denied to BBC.\(^{(86)}\) The *BBC* court stated,

> Without question the sought-after documents were needed by Cardinal to determine Durr’s value and, as a consequence, the price Cardinal was willing to pay to acquire Durr. At the trial Durr’s President and Chief Operating Officer conceded that Cardinal needed those documents—all nonpublic—for that purpose. That being the case, Durr cannot credibly argue that those same documents are not necessary for a competitive bidder that is identically situated (BBC), or that BBC must be relegated to inspecting publicly-filed documents when Cardinal was not so limited. Thus, if BBC were found to be otherwise entitled to inspect the requested documents, that defense [of Durr’s] would pose no obstacle.\(^{(87)}\)

This candid observation underscores the incongruity between *BBC Acquisition* and *Revlon*. In *Revlon*, the court criticized the Revlon board for dealing preferentially with Forstmann, even when it was clear that Pantry Pride sought to bid actively for Revlon. Preferential “access to financial data” was noted as one of the ways the board had been “playing favorites with the contending factions.”\(^{(88)}\) But the Durr board

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85. *See supra* notes 63-65 and accompanying text.

86. Courts have upheld board-adopted restrictions that apply equally to all bidders, such as conditioning access to information on signing a confidentiality agreement. *See, e.g.*, Samjens Partners I v. Burlington Indus., Inc., 663 F. Supp. 614 (S.D.N.Y. 1987) (refusing to grant a preliminary injunction against completion of a merger because “[m]anagement had offered to provide [plaintiff] Edelman with the same information it had given other interested parties, but Edelman refused to sign a confidentiality agreement” that other bidders had signed). Another case, *Golden Cycle, L.L.C. v. Allan*, No. CIV.A.16501, 1998 Del Ch. LEXIS 80 (Del. Ch. May 20, 1998), concerns a confidentiality (and a standstill) agreement required as a condition for obtaining access to target-firm information, which plaintiff bidder resisted signing. *See infra* notes 109-18 and accompanying text. But in that case, it was alleged that other bidders had already been given access to the information. *See id.*

87. *BBC Acquisition Corp.*, 623 A.2d at 90.

88. *Revlon*, Inc. v. MacAndrews & Forbes Holdings, Inc. 506 A.2d 173, 184 (Del. 1985). The court in *Revlon* said it was “significant that Forstmann, to Pantry Pride’s exclusion, had been made privy to certain Revlon financial data. Thus, the parties were not negotiating on equal terms.” *Id.* at 178.
was likewise playing favorites with Cardinal, in a Revlon situation in which a change in Durr ownership was inevitable. Yet the Revlon issue was never mentioned in BBC Acquisition.

Why was it ignored? It appears that BBC Acquisition never raised the issue of Durr-Fillauer's Revlon duties. Perhaps one should not fault a court—even a court of equity like the Delaware Chancery Court—for not considering an issue not raised, although one can wonder why the plaintiff failed to raise it. It is possible that the plaintiff believed that complaining as a shareholder made it more sympathetic than complaining as a "hostile" raider. Section 220 and Revlon are not mutually incompatible, however. The former defines statutory limits on shareholder access to information, but does not in any way absolve management of its common-law fiduciary duties to maximize shareholder wealth when a takeover impends.

The opinion in BBC Acquisition underscores a true irony. In effect, BBC was penalized for litigating as a shareholder of Durr, with its demand for information treated solely under section 220 of the Delaware statute. BBC's other status as a takeover bidder was ignored. Had BBC Acquisition stressed its status as a bidder rather than a shareholder, it would have been entitled to raise the fiduciary duties of Durr management. But there is nothing in the law that requires a

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89. This information comes from one of the lawyers involved in the BBC Acquisition litigation.
90. In Capital City Assoc., L.P. v. Interco, Inc., 551 A.2d 787 (Del. Ch. 1988), appeal dismissed as moot, 556 A.2d 1070 (Del. 1988), plaintiff Capital City Associates (CCA) bid to acquire Interco, which resisted by refusing to redeem "flip-in" and "flip-over" shareholder rights plans that hindered CCA from acquiring Interco. CCA, which also owned Interco shares, challenged the refusal of Interco management to redeem the rights plan as invalid under Unocal. The Delaware court agreed that Unocal had been violated, focusing on CCA's raider, not shareholder, status:

While CCA is a shareholder, it here asserts interests as a buyer, not a seller of stock. The question of a bidder/shareholder's right to enforce fiduciary duties owed to shareholders does not often arise as a practical matter, because there are typically several shareholder class actions that proceed on the same schedule as an action by the bidder. Therefore, to my knowledge, this court has not been required to focus upon either the question whether a bidder may enforce such rights, qua stockholder, or whether a bidder may, at least in some circumstances, have some other state law source of right to enforce duties owed to shareholders.

As the courts are principally concerned with interests of shareholders in actions in which corporate fiduciary duties are tested, and as the interests of the shareholders of Interco in this instance are implicated here to precisely the same extent as they would have been had the pending class action been consolidated with this action, it seems to make little sense for the court, having determined that the board now has a duty to shareholders to redeem the rights, to fail to protect shareholders by not enforcing that duty specifically. Therefore, in this case, I will hold that CCA, as a shareholder, has standing to assert the rights of a shareholder of Interco to require the board to redeem the stock rights in issue.

Id. at 800 (footnote omitted).
shareholder-raider to choose one set of legal provisions over another. Section 220 and Revlon/Unocal duties are not mutually inconsistent.91

Because BBC Acquisition (and other cases to be discussed below) never consider shareholder-raider access to information in the Revlon context, the courts implicitly assume that directors are entitled to the protections of the business judgment rule, with access denied almost automatically. Indeed, with that standard applied, the courts never inquire into what might be motivating incumbent management’s preference for a friendly suitor rather than the hostile shareholder-raider. No explanation of Durr management’s preference for Cardinal is ever discussed. But in friendly takeover deals it is at least conceivable that management will receive benefits from the coming change of control or are otherwise on both sides of the transaction. In those situations, an “entire fairness” standard would attach to directors.92

But even when this highest standard is not applied, it does not follow that the business judgment rule applies. In Yanow v. Scientific Leasing, Inc., another Delaware case involving access to information, the Chancery Court evaluated a non-raider shareholder challenge to a friendly takeover, finding first that the board of target Scientific Leasing could act disinterestedly.93 However, the court continued,

91. The ease of combining proper-purpose analysis with evaluation of management’s fiduciary duties can be seen in Bond Purchase, LLC v. Patriot Tax Credit Properties, L.P., 746 A.2d 842 (Del Ch. 1999). Plaintiff, a limited partner in defendant limited partnership, sought a list of other limited partners as part of an attempt to purchase more limited partnership interests (called Beneficial Unit Certificates, or BUCs) in what the court called a “mini tender offer.” Management of the limited partnership refused to provide the information. Under the relevant section of the Delaware limited partnership statute, 6 Del. C. § 17-305, plaintiff was required to show a proper purpose for the requested information. “In determining whether a specific purpose is a ‘proper purpose’ under Section 17-305, this Court in the past has referred to whether that purpose has been deemed a ‘proper purpose’ under 8 Del. C. § 220, which is the corporate analogue to Section 17-305.” 746 A.2d at 851 (footnote omitted). The Court held that seeking the requested information to facilitate the tender offer was a proper purpose, but that management still had a obligation to maximize the value of the firm to its shareholders, and withhold the information sought—even if for proper purpose—if release of the information would damage the firm. On that basis, the court found management’s fear that completion of the mini tender offer would have adverse tax consequences for the firm was sufficient basis to deny revelation of the information.


93. See Yanow v. Scientific Leasing, Inc., No. CIV.A.9536, 9561, 1991 WL 165304 (Del Ch. July 31, 1991), reprinted in 17 DEL. J. CORP. L. 549. In Yanow, shareholders of target firm Scientific Leasing (SLI) complained of shareholder-bidder LINC Group’s preferential access to information. Another firm, Mediq, was known to be interested in SLI, and LINC had indicated that it wanted to retain members of SLI’s senior management upon acquiring SLI. Mediq was not given information available to LINC. Despite the disparate treatment in favor of LINC, the court agreed with the SLI board that there were valid reasons for the favorable treatment, and in addition found that the approach taken by the board was carefully “designed to elicit the best available [bid]” and “did, in fact, obtain the highest [bid] available for its shareholders.” Id. at *11, reprinted in 17 DEL. J. CORP. L. at 680.
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from this it does not necessarily follow that the business judgment rule is the appropriate standard of review. Where, as here, issues of corporate control are at stake, the actions of even a disinterested board must satisfy an enhanced level of scrutiny before they will qualify for the deference that courts ordinarily accord to good-faith business judgments. Our Supreme Court so held in Macmillan, where it stated:

[As] we recognized in Unocal, where issues of corporate control are at stake, there exists the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporations and its shareholders. For that reason, an 'enhanced duty' must be met at the threshold before the board receives the normal protections of the business judgment rule.94

Again, it is hard to square this general scrutiny of board action in the face of control changes with the business-judgment standard applied specifically to board denial of information to shareholder-raiders.95 If the specter of management self-interest is omnipresent in any change of control care; by definition it is present in shareholder-raider cases.

2. Other Cases

Subsequent Delaware cases have largely continued the approach of BBC Acquisition in two important respects. First, shareholder attempts to secure information other than shareholder lists for takeover-related purposes are per se not a "proper purpose" under Delaware law. Second, the overlap between the traditional law of shareholder access to corporate information (statutorily requiring a "proper purpose") and the Revlon/Unocal-based case law governing corporate takeovers generally is not perceived. It is unclear how arduously plaintiffs in these takeover-related cases advanced their claims to information on the basis of management's fiduciary (Revlon/Unocal) duties, in addition to whatever rights they had under section 220 of the Delaware statute. As will be


95. A board is not required to sit by and run an auction passively. "It may never appropriately favor one buyer over another for a selfish or inappropriate reason, such as occurred in Revlon, but it may favor one over another if in good faith and advisedly it believes shareholder interests would be thereby advanced." In re Fort Howard Corporation Shareholders Litigation, No. CIV.A.9991, 1988 WL 83147 (Del. Ch. Aug. 8, 1988), reprinted in 14 DEL. J. CORP. L. 699. For a specific application to shareholder information access, see Tanase, supra note 91.
seen, however, Revlon was raised in at least one shareholder-raider case, although the Delaware court ultimately did not consider its applicability.

a. Thomas & Betts Corp. v. Leviton Manufacturing Co.

In *Thomas & Betts Corp. v. Leviton Manufacturing Co.*, publicly held Thomas & Betts sought to acquire closely held Leviton. Leviton Manufacturing's shares were all family owned; Harold Leviton was the president, CEO, and majority stockholder, and (with his wife) controlled a voting trust representing 76.45% of the Leviton firm's voting stock. Leviton refused to participate in Thomas & Betts' plan to buy Leviton Manufacturing, so Thomas & Betts bought the Leviton shares of Thomas Blumberg and his wife, Harold Leviton's niece. This gave Thomas & Betts 29.1% of the Leviton shares, including the other 23.55% of the voting stock. Ten months later, after attempting unsuccessfully as a shareholder to interest the Leviton board in a friendly acquisition, Thomas & Betts demanded inspection of various Leviton books and records. When Leviton refused to provide the information, litigation followed.

Thomas & Betts claimed its motive was to uncover waste and mismanagement and to cause the firm to switch its accounting methods. The Chancery Court found that Thomas & Betts' true aim "was to further its plans for acquiring Leviton and that this interest was antithetical to the interests of the corporation," and thus that Thomas & Betts lacked a proper purpose. Citing *BBC Acquisition*, the Delaware Supreme Court affirmed.

*Thomas & Betts* continues the pattern of *BBC Acquisition*: when a shareholder-raider seeks access to corporate information, the takeover motive constitutes an improper purpose under section 220. To reach that conclusion, the Delaware court claimed without explanation (other than citation to *BBC Acquisition*) that access to information would damage the corporation (i.e., that a takeover posed a Situation I problem). Equation of takeover with corporate damage is both unfounded and irrelevant. Management has a duty to maximize value to current shareholders. Even were it the case that the corporation

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98. 681 A.2d at 1034.
99. See id. at 1030 n.1.
would be damaged (worth less) under a subsequent ownership and management regime, the new owners (Thomas & Betts) would bear the consequences of their own subsequent policies. Of what concern is it to the court that the later owners would find the value of their investment diminished?

It is not suggested here that the outcome in *Thomas & Betts* was wrong. Rather, the point is that the opinion limits its analysis to what access to information is required under section 220 of the Delaware statute. As in *BBC Acquisition*, Delaware law governing takeover-related fiduciary duties was never discussed. Had it been, a court would probably not have applied *Revlon* duties to evaluate the Leviton board’s refusal to deal with Thomas & Betts, because the firm was not on the brink of being taken over. As the Delaware Supreme Court stated in the *Time-Warner* case, if “the board’s reaction to a hostile tender offer is found to constitute only a defensive response and not an abandonment of the corporation’s continued existence, Revlon duties are not triggered.”

But, the *Time-Warner* court continued, its decision in *Unocal* meant that the business judgment rule would not apply automatically to the use of a defensive tactic. In this respect, too, it is likely that the Leviton board’s conduct would survive scrutiny. But directors’ fiduciary duties are not considered in *Thomas & Betts*. The refusal to provide information is treated as governed solely by section 220, even though the refusal occurs in the context of a takeover and so raises larger issues of the board’s duty to its shareholders.

**b. Golden Cycle, L.L.C. v. Global Motorsport Group, Inc.**

The difficulty of reconciling *BBC Acquisition* with *Revlon* is again made clear in a set of unreported Delaware decisions concerning Golden

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100. Paramount Comm., Inc. v. Time, Inc. 571 A.2d 1140, 1150 (Del. 1990).
101. See id. at 1151 n.14.
102. See id. at 1151-52.
   In *Unocal*, we held that before the business judgment rule is applied to a board’s adoption of a defensive measure, the burden will lie with the board to prove (a) reasonable grounds for believing that a danger to corporate policy and effectiveness existed; and (b) that the defensive measures adopted was reasonable in relation to the threat posed. . . . We have repeatedly stated that the refusal to entertain an offer may comport with a valid exercise of a board’s business judgment.

103. In that respect, it is worth noting that, although Harold Leviton controlled the votes of Leviton Manufacturing, he did not own all the voting shares, nor all of the non-voting shares. Other shareholders stood to gain from Thomas & Betts’ attention, just as the Blumbergs had gained previously in selling their shares to Thomas & Betts.
Cycle's attempt to take over Global Motorsport (Global). Golden Cycle was formed in January 1998 to acquire Global. By March, it had acquired 10% of Global's shares, making it the single largest Global shareholder. In late March, it approached the Global board with an offer of $18 per share, 26% above the market price. When the Global board refused to negotiate, Golden Cycle on April 4 commenced a hostile tender offer.

In the meantime, the Global board had engaged an investment banking firm to advise it as to "various possible alternatives to maximize stockholder value for the immediate future." To that end, management provided the investment firm with corporate information. On April 9 and 11, the board heard the investment firm's advice, rejected Golden Cycle's offer, and determined "to explore alternatives available to it to maximize stockholder value," although "without making any decision to sell the Company or to engage in a business combination with another Company." On April 13, the board announced publicly that it had rejected the Golden Cycle offer, and that it had authorized management to consider alternatives to maximize shareholder value, "including entering into discussions with other parties who have expressed an interest in acquiring the Company at a more attractive price" than Golden Cycle's offer.

To that end, Global would permit those expressing an interest in the company, including Golden Cycle, to examine various pieces of corporate information. Access was conditioned, however, on signing a standstill agreement not to acquire or offer to acquire Global stock for two years. Golden Cycle then filed for a preliminary injunction requiring production of the information unconditioned by the standstill agreement. The Delaware Chancery Court, for once, mentioned the board's Revlon duties:

Golden Cycle contends that the Board's dealings with actual and potential bidders must be evaluated by whether they are reasonably calculated to maximize stockholder value in the sale of the Company.


105. Golden Cycle also announced it would pursue a consent solicitation campaign with shareholders, an aspect of the case not discussed here.


107. Id.
Plaintiff contends that a sale of the Company is inevitable, therefore, the Board’s duty has “change[d] from the preservation of [the Company] as a corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit.”

Denying the motion for a preliminary injunction on May 20, the Chancery Court took no position on whether Revlon applied. Even if it did, the board had satisfied any Revlon duties.

A full trial on the matter began May 22, two days after denial of the preliminary injunction. The same day, however, Global announced that it had signed a letter of intent to sell itself for $23 per share. Golden Cycle continued to press for the information, but in June the Chancery Court found for defendant Global. Gone was any discussion of Revlon; the matter was decided solely on the basis of BBC Acquisition.

As the parties recognize, this case is closely analogous to Vice Chancellor Jacob’s decision in BBC Acquisition Corp. v. Durr-Fillauer Medical, Inc. . . . As is true here, the target company in BBC Acquisition had entered into a higher priced transaction with a third party, and the plaintiff sought information to determine whether or not to raise its bid. . . . The Court determined that, as a matter of law, this purpose was not reasonably related to the plaintiff’s interest as a shareholder, and therefore was not a proper purpose within the meaning of Section 220.

BBC Acquisition is not readily distinguishable from the present application. Here, plaintiff Golden Cycle was formed only recently, and specifically for the purpose of acquiring Global. . . . I find that Golden Cycle’s stated purpose for its demand is not a purpose related to its interests as a stockholder, as is required in a Section 220 demand.

Noteworthy in the Chancery Court’s opinion is the total reliance on BBC Acquisition and thus the absence of any consideration of Revlon, although the Revlon issue had been raised just days earlier in the denial of the preliminary injunction. There was no doubt that sale of Global was inevitable, since the firm itself had signed a letter of intent to be acquired. Plaintiffs sought the information to study the possibility of a

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109. See id. at *11 (“[A]ssuming, arguendo, that Revlon duties apply in the current situation, as long as the Board acts with care and in the good faith pursuit of shareholder interest, it may tilt the playing field, and, at least for some period of time, keep Golden Cycle at arms-length.”).

110. See 1998 Del Ch. LEXIS 92, at *2. The identity of the acquiror was not revealed in the letter opinion. But see infra note 117.

111. 1998 Del Ch. LEXIS 92, at *4- *6 (emphasis added).
higher bid. But to the Chancery Court in *Golden Cycle*, that merely increased the similarity of the case to *BBC Acquisition*: “As in the present action, the plaintiff in *BBC Acquisition* did not increase its offer in response to the higher-bid; rather, it took the position that it needed access to the same information provided the other bidder in order to decide whether to increase its bid.”

In such a situation, given that shareholders were about to surrender their shares anyway, it is difficult to believe that other shareholders would not want *Golden Cycle* to have access to the information it sought. Shareholders had nothing to lose and everything to gain from its disclosure.

Again, this is not to say that shareholders would always want shareholder-raiders to have easy access to such information. When the information would help a bidder establish the firm’s reservation price, shareholders might want the information withheld. *Golden Cycle* sought two sorts of information that would predictably be very useful in that respect: (a) “[d]ocuments relating to any proposal or offer to acquire or to sell [Global], its stock or more than 50% of the assets of [Global] (determined by value or by revenue production);” and (b) “[d]ocuments showing valuations, projections or business plans relating to [Global], its stock or its assets.” Thus, denial of the information to *Golden Cycle* when it appeared as the first suitor for Global may well have justified denial of the preliminary injunction. (Likewise, it would appear from the opinion in *Thomas & Betts* that the shareholder-raider demanding information was the first, and perhaps the only, bidder on the scene.)

But the shareholder demand for information was rejected in *Golden Cycle*, not because revelation of the information would impede management’s obtaining the best price for Global’s shares, but because “as a matter of law” a shareholder-seeking access to corporate information

112. *Id.* at *4 n.1.

113. To repeat a point made earlier, see supra note 85, denial of the information might well be justified as part of the inducements necessary to obtain a bid in the first place. But that is not the basis on which the Delaware court resolved *Golden Cycle*’s complaint. *See id.* at *4-*6. As also noted, refusal to supply the information seemingly would not fulfill the Global board’s Revlon duties, as Global had already agreed to be acquired. *See id.* An interesting case in that respect is *CM & M Group, Inc. v. Carroll*, 453 A.2d 788 (Del. 1982). Shareholder Carroll sought inspection of CM & M books and records, for purposes of valuing his investment but also to use the information to interest a third-party buyer in CM & M. Distinguishing primary from secondary purposes, the Delaware court held that Carroll’s desire to interest a buyer in CM & M was only secondary. Had it been primary, the analysis here would indicate that, in what was apparently a non-Revlon situation, management should decide whether the information should be disclosed so as ultimately to interest a potential buyer.

114. *Id.* at *2.

115. However, by the time the preliminary injunction was denied, Global’s share price had risen to $20, suggesting that the firm was in play once *Golden Cycle*’s bid of $18 two months earlier (a 26 percent premium over market) had been rejected.
lacks a proper purpose. That is, even when release of the information might lead to shareholders’ obtaining a higher price (as was true in BBC Acquisition and Golden Cycle), the information legally could not be released. Particularly as Golden Cycle had raised the issue of Global’s Revlon duties, it is difficult to see why access to the information demanded would be denied solely on the basis of section 220 (as interpreted in BBC Acquisition).

116. See 1998 Del Ch. LEXIS 92, at *5 (emphasis added). *See also supra note 110 and accompanying text.

117. Golden Cycle revisited the well one more time, when the issue of Revlon duties was again raised by the court but not held to be particularly important under new facts in the case. In *Golden Cycle L.L.C. v. Allen*, No. CIV.A.16301, 1998 WL 892631, at *14 (Del. Ch. Dec. 10, 1998), it sought an injunction against Global’s being acquired by another bidder, complaining again of the prior rebuff to its attempt to acquire information. The agreement worked out in June 1998 (with Fremont Partners, the December opinion reveals) had fallen through. The Global board then negotiated in November a new agreement for Global to be acquired by Stonington. As before, Global would not negotiate with Golden Cycle, which Golden Cycle protested in its continued litigation. The Chancery Court upheld the Global board’s decision:

> The strikingly unusual aspect of this case is the fact that the Global board twice approved merger agreements without contacting Cycle, a party known to be interested in acquiring Global, and offering it an opportunity to bid higher. At first glance, it seems incongruous to conclude that directors can fulfill their Revlon duties without contacting a known interested party who might be willing to offer more. However, in the peculiar circumstances here, including the fact that the terms of the Stonington Merger Agreement do not preclude a higher bid, I am persuaded that the directors did so.

> ... Most importantly, Cycle’s briefs gloss over the fact that Cycle made a strategic decision, on or shortly after October 5, 1998, that it would no longer deal directly with the Global Board. Cycle levels a broadside attack at what it characterizes as the Board’s selective, preferential and exclusive dealing with Stonington, citing the Board’s failure to contact Cycle after Cycle issued the October 27 press release and before it approved the Stonington Merger Agreement. Cycle fails to acknowledge that these decisions were importantly influenced by Cycle’s own decision to disengage from the Board. In effect, Cycle went AWOL but now seeks leave to criticize the actions taken by the Board to compensate for Cycle’s refusal to participate. In my judgment, these considerations seriously undermine the credibility of Cycle’s arguments on this preliminary injunction motion.

> It is also disturbing to me that Cycle’s decision to disengage from the Board’s process has deprived this proceeding (or at least important aspects of it) of a firm grounding in reality. We do not know that would have happened if Cycle had signed the confidentiality agreement. We do not know what would have happened if Cycle had made a nonbinding indication of interest to the Board at a price above $18 per share. Instead of presenting a factual record on these matters, Cycle asks me to join it in speculating that, if Cycle had signed the confidentiality agreement proffered on October 5 and again on October 29, Global nevertheless would have erected barriers to Cycle’s due diligence and its participation in the Board-created process. Is it appropriate to adjudicate questions relating to the Board’s satisfaction of its Revlon duties in such a hypothetical way? In my view, it is not. Rather, as the cases make clear, decisions in this context on motions for preliminary injunction are, of necessity, highly fact specific. For these reasons, I find myself unable to give much weight or credence to Cycle’s attacks on the Board process.

*Id.* at *14-*15. In short, having been rebuffed in its two previous attempts to acquire information, Golden Cycle gave up.
c. NiSource Capital Markets, Inc. v. Capital Energy Group

The distinction between information a shareholder would and would not want released is made clearer in a more recent Delaware Chancery case, NiSource Capital Markets, Inc. v. Capital Energy Group.118 Hostile-bidder NiSource sought "highly confidential information" from Capital Energy Group (CEG). Refusing to compel production of the documents, the court explained:

The information sought by plaintiffs (that I have reviewed in camera) would disclose CEG's reservation price and would effectively remove the possibility of arms length bargaining between the parties. If this Court orders CEG's internal valuations to be disclosed, NiSource's offers will likely not exceed the value CEG places on its own stock, despite NiSource's potential willingness to pay more per share, because the bidder will not offer a price per share that exceeds the value the target itself places on its own stock. Consequently, because NiSource will tailor its offers to CEG's own valuations, the CEG shareholders may lose an opportunity to receive a premium that NiSource might have paid. . . ."

Here, although once again the result is non-revelation of information, the Delaware court correctly interprets when and why other shareholders would not want information to be revealed to shareholder-raiders in a takeover situation.

But conversely, the courts seem not to understand when shareholders would want that information revealed, despite the guidance provided by Revlon/Unocal. Providing the information sought by BBC Acquisition and Golden Cycle seemingly could only increase shareholder value. Shareholders as a group in those two cases would hardly consider the shareholder-raider's purpose "improper." And under Revlon, because a basic change in firm ownership impended, management seemingly would have an obligation to provide the information.

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118. No. CIV.A.17341, 1999 Del. Ch. LEXIS 198 (Del. Ch., Sept. 24, 1999). NiSource was apparently not a shareholder itself in the case, but other plaintiffs were. The court's opinion treats the non-shareholder raider and plaintiff shareholders alike.

119. Id. at *2-*3. The discussion here seems the sort of analysis that one would expect under Revlon. It is perhaps of interest, therefore, that neither side's briefs in NiSource raised Revlon.
D. Shareholder-Raider Motives in Acquiring Shares

In addition to the difficulties already noted, the opinions on shareholder-raider access to corporate books and records present several other points of dubious validity. One of these has already been noted in the discussion of Thomas & Betts, the claim that facilitating a raider's acquisition of the firm damages the corporation. The court in Thomas & Betts did not explain exactly how this would happen. If it meant only that sometimes providing information to a shareholder-raider may not be in the interest of shareholders as a group, that is of course true, as explained in NiSource. But from its unexplained claim that providing information to the shareholder was "antithetical to the interests of the corporation," plus the statement (both in Thomas & Betts and the other cases discussed above) that acquisition of information to further a takeover is never a proper purpose, one must infer that the Delaware courts believe that access to information for shareholder-raiders is always injurious to the firm.

To the contrary, providing a raider information is sometimes just what shareholders would want. The claim is also difficult to understand as a matter of statutory interpretation. Courts order production of information to further changes of control in the context of proxy fights, for example, deeming access in those cases a "proper purpose." And even if a change of control were injurious, why should it matter? Under Revlon, as long as shareholders maximize the value of their shares, the fact that the raider acquires an "injured" firm should be of no consequence to the courts.

One other aspect of the shareholder-raider information access cases bears consideration. The opinions discussed above regularly denigrate the raider for purchasing its shares to use shareholder status to pry information out of the target firm. The Delaware court's disparaging reference in BBC Acquisition to plaintiff BBC's merely "nominal stock interest" that was not a "pre-existing investment" shows that shareholder-raider motives mattered in that case. Motive is likewise a factor in the other cases discussed. "Thomas & Betts acquired its shares in Leviton with the acknowledged purpose of acquiring the company." " Plaintiff Golden Cycle was formed only recently, and specifically for the purpose of acquiring Global. Its acquisition of

121. See supra notes 48 to 55 and accompanying text.
122. Thomas & Betts, 681 A.2d at 1032.
Global stock was made entirely for the purpose of facilitating the acquisition of Global.\footnote{Golden Cycle, L.L.C. v. Global Motorsport Group, Inc., No. CIV.A.16292, 1998 Del Ch. LEXIS 92, at *5 (Del. Ch. June 18, 1998).}

Consideration of how large and lengthy an interest a shareholder possesses, is a feature of some state corporation statutes.\footnote{See, e.g., N.Y. BUS. CORP. LAW § 624 (McKinney 1986). Although such provisions have disappeared from the current Model Business Corporation Act, section 52 of the 1969 version of the Model Act did contain provisions that gave more favorable access to shareholders with larger and longer share ownership.} But as Clark notes, "[t]o its credit, the corresponding Delaware statute, Section 220 of the Delaware General Corporate Law, makes no discriminations among shareholders on the basis of size or length of holdings."\footnote{Clark, supra note 18, §3.1, at 99.}

Noting that Delaware instead distinguishes between shareholder lists and corporate books and records, Clark then says of the former:

Shareholders often want a shareholder list in order to mount a proxy contest or to make a tender offer, both of which are viewed with horror by incumbent management but may very well be in the economic interest of all the shareholders. In these situations management almost instinctively resists inspection, even though there is little or no legitimate basis for delay.\footnote{Id. § 3.1, at 99-100.}

The same thing is of course true of many requests for books and records. They will be resisted by management, but "very well may be in the economic interests of all the shareholders."\footnote{See Thomas & Beuts, for example, the Delaware court quickly dismissed plaintiff's claim that it wanted the information to impel a change in Leviton's accounting methods. See 681 A.2d at 1034. Given the per se holdings against allowing shareholder-raiders access to information, it is hardly surprising that plaintiffs advance patently false reasons for seeking access.}

Which is why Delaware has defined Revlon/Unocal duties in takeover situations.

The issue of shareholder motivation has apparently led the Delaware Chancery Court to hold now that management denial of information sought by a shareholder-raider will never be invalidated. In NiSource, the court spoke of a board's "immunity" when management refuses shareholder-raider demands for books and records:

The defendants have also raised a question as to the motivation behind plaintiffs' request for discovery. . . . This Court has always
been hesitant to grant discovery where the information disclosed may not be used for proper legal purposes, but rather for practical business advantages. . . . The Court's desire to prevent this sort of behavior, and its emphasis on maintaining a level playing field for both bidder and target, has often lead this Court to narrowly tailor discovery. It is largely this concern that gave rise to the business strategy immunity, and it is in this spirit as well that I deny plaintiffs' discovery request.  

As noted above, denial of access to the information sought in NiSource was almost certainly a good thing for shareholders. The information, if obtained, could be used to figure out the target firm's reservation price. But it is one thing to uphold refusal of access on the basis of the facts of one case, and another to speak of a general "business strategy immunity," applicable to any shareholder-raider seeking access to information, based on the shareholder's motivation.  

Two final aspects of this jurisprudence are curious. First, when a shareholder seeks access to shareholder lists rather than corporate books and records, the fact that the shareholder purchased its shares as part of an overall takeover campaign has repeatedly been held irrelevant, even if the purchase was recent and for a nominal amount. This has long been clear in Delaware, and has become the law elsewhere. Ordering
production of shareholder lists and related information in *MMI Investments, L.L.C. v. Eastern Co.*, the Connecticut court stated that “even if MMI desired control of Eastern from the start, there is nothing unlawful about that purpose and Eastern does not cite any cases that state the contrary.”  

Second, to return to a point discussed above, it should be irrelevant in terms of a board’s fiduciary (*Revlon/Unocal*) duties why a raider has acquired its shares. Once the firm is in play, the board’s obligation to shareholders is to maximize the return that shareholders will realize from the impending change of control. Outsiders contemplating a takeover often acquire shares in the contemplated target prior to launching a takeover. Recognition that “toe-hold” share purchases are often made to acquire control of the firm has motivated promulgation of SEC Schedule 13D, requiring those acquiring five percent of the ownership of a public company to make disclosures about the purpose of their acquisition. But there is no economic or legal reason that a board should approach its *Revlon* duties differently when a would-be acquiror chooses to purchase shares before attempting the takeover. Thus, in the *Revlon* context, it makes no sense for a court to consider the motives of Ms. Shareholder in acquiring her shares. Shareholder’s motives have nothing to do with the price that management can obtain for its shareholders. In fact, a bidder’s acquiring shares in anticipation of launching the takeover bid is good news for shareholders seeking the highest return on their investment.

A.2d 842 (Del Ch. 1999), discussed in note 90, *supra*, in which the court considered the fact that plaintiff limited partner seeking information from limited partnership had purchased its Beneficial Unit Certificate to launch a mini tender offer for other limited partners’ BUCs. Said the judge, “I do not consider Bond’s purpose to be made improper because it might have purchased its BUC as a prelude to a demand for the Investor List.” 746 A.2d at 851.


132. For example, prior to launching its hostile tender offer for Walt Disney shares in 1984, Saul Steinberg purchased a sizeable proportion (some 12 percent) of Disney shares. *See generally* McCchesney, *supra* note 70. Jay Pritzker insisted on the purchase of 1.75 million (ultimately reduced to 1 million shares) of Trans Union as a condition for his takeover bid. *See* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).


134. The most obvious reason why a potential acquiror would buy shares before making the takeover offer is the financial hedge that share ownership provides against being outbid by another acquiror. The first bidder for a firm puts the firm in play, but will only do so to the extent that it will profit from its efforts. If ultimately outbid, the firm will only lose, having invested in putting the offer together—unless it purchases shares that appreciate when sold to the ultimate acquiror paying a higher price.
V. CONCLUSION

It is difficult to believe that the current law of shareholder-raider access to information constitutes a sustainable equilibrium. The law is too anomalous in too many ways. In Delaware, section 220's requirement of a "proper purpose" (the requirement in Model Act jurisdictions also) is currently used to deny a shareholder-raider information in situations where shareholders collectively would want the information turned over. Obtaining information for a proxy fight to oust management or to effectuate a change of control via an outside tender offer is a proper purpose, but obtaining other information to facilitate a shareholder-raider's own offer is not a proper purpose. Section 220 automatically defeats shareholder-raider attempts at information, when under Revlon the same information might have to be disclosed to a non-shareholder raider. Shareholder-raider motives, plus the length and size of share holdings, are deemed important, even though such considerations are irrelevant in any other context.

None of this is to say that, in a takeover context, target-firm management should always be required to accede to shareholder demands for information. As discussed, a negotiator's optimal use of information will sometimes call for more disclosure, sometimes for less. Faithful managers may well conclude that value maximization for shareholders demands withholding information. A shareholder who happens to disagree with that strategy should not be allowed to interfere with what faithful management—more specialized in the governance of the firm, and entrusted by shareholders as a group with making control-related decisions—has decided.

Rather, the foregoing is to argue that court decisions (including, notably, decisions from Delaware courts) do not distinguish when shareholders would and would not want their firms to release information other than shareholder lists to hostile bidders. The decisions recite by rote that information need not be provided to raider-shareholders because their purpose is not "proper" under section 220. But shareholders themselves would not adopt such a rule. Rather, they would hold their board of directors to the duties outlined in Revlon/Unocal once a takeover looms. Maximization of shareholder value may or may not demand release of corporate information to a would-be acquiror. But the per se ability to resist demands for information under section 220 would never be the rule chosen by shareholders, any more than they would choose a rule of non-cooperation with higher-bidding offerors generally.
Hence, section 220 is not helpful in resolving when shareholder-raiders should have access to corporate information. Whether a shareholder-raider's purpose is proper under the statute should depend on whether it will help or hinder in obtaining the highest price available for the target firm's shares, the standard already embodied in the fiduciary duties of Revlon/Unocal. Not only does section 220 not help in shareholder-raider situations, it can actually thwart the goal of maximizing shareholder returns, as cases like BBC Acquisition and Golden Cycle demonstrate.