Disclosure as Delaware's New Frontier

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INTRODUCTION

Corporate law, as epitomized by the statutes and common law of the State of Delaware, has painted itself into a corner. Shareholders are too often unprotected—whether it be by statute or through the well-known and articulated fiduciary duties of care, loyalty, or good faith. This Article argues that the least-theorized and utilized fiduciary duty—disclosure or candor—represents the last frontier for corporate law, assuming it retains even a small hope of providing protection for shareholders. My thesis is counter-intuitive; after all, how can a topic that barely merits a footnote in most discussions of corporate law represent a "new frontier" for Delaware?

The argument proceeds in three principal sections. Part I discusses how few protections shareholders actually enjoy in the corporate law canon. The Delaware General Corporate Law (DGCL), the state's corporate code, is often labeled as an "enabling statute." Rather than providing for mandatory regulatory protections, the statute outlines a series of default protections around which corporate insiders and shareholders can, at least in principle, contract around. For their part, the well-theorized fiduciary duties, in all of their rhetorical allure, too often actually do very little work. The duty of care—watered down to a gross negligence standard by the business judgment rule, and further eroded by statutory exculpation clauses permitted under DGCL section 102(b)(7)—is notoriously weak. The duty of loyalty, while correctly characterized as more robust, provides a way out for defendants who are smart enough to enlist sophisticated lawyers who understand clever procedural maneuvers under the rubric of "disinterested" approval. For its part, after the famous *Disney* case, the duty of good faith provides no protection unless the defendant has demonstrated a "conscious disregard" or "intentional dereliction" of duty—a standard that is unbearably difficult for a plaintiff to meet.

Part II tells the story of the most under-theorized and under-utilized fiduciary duty: the duty of disclosure, interchangeably called the duty of candor. Cases remind us that directors perhaps need to disclose information to shareholders, but the duty remains painfully unclear and the case law sparse. How much information? When does this duty kick in? I argue that one must conceptualize a robust duty of disclosure under state law and use this newly enhanced fiduciary duty to protect shareholders—something with which the duties of care, good faith, and perhaps even loyalty, have struggled mightily. Part II ends by acknowledging the weaknesses of relying on disclosure for shareholder protection—not only that it might be counterproductive in reinforcing a romantic narrative of shareholder autonomy, but that the duty of disclosure is, at least in the eyes of the Delaware judiciary, excruciatingly difficult to distinguish from the duties of care and loyalty.

Part III suggests that notwithstanding these legitimate, and even powerful criticisms, the duty of disclosure under state law is worthy of serious consideration for a number of reasons. First, it exposes a fundamental weakness in corporate theory: shareholders have a fundamental right to participate in governance—notably through the vote—but without a duty of disclosure, apparently no concomitant right to receive information. This is beyond strange, and in fact may explain why two of the seminal cases in the corporate canon—*Smith v. Van Gorkom* and *Weinberger v. UOP, Inc.*—may actually be disguised duty of disclosure cases. I also contend that the duty of disclosure, or more precisely a lack thereof, can help explain several recent developments in Delaware corporate law: (1) the often befuddling jurisprudence surrounding section 220 "books and records" requests; (2) the on-again, off-again reemergence of state insider trading claims (so-called "*Brophy*" cases); and (3) litigation focused on "disclosure-only" settlements and quasi-appraisal remedies. Last, but certainly not least, engaging in a conversation about the state duty of disclosure forces corporate law to confront a difficult question of federalism: perhaps the conventional wisdom is incorrect to assume that federal securities regulation, not state corporate law, should remain the locus of disclosure obligations.

I. A PLETHORA OF EXISTING WEAK PROTECTIONS

A. THE DELAWARE GENERAL CORPORATION LAW

The underlying statutory framework for Delaware corporations is provided by the DGCL. It is important to remember that the overarching "rationale behind this statutory scheme is that the business of business is better left to those in charge of it rather than to judges and legislators."[1]

As such, the statute has few mandatory terms; rather, it sets up a series of default provisions around which management and shareholders can theoretically contract. As Professor Mark Roe has observed, corporation codes reflect the belief that "the corporate law is, or should be, the contract that investors and managers want."[2] Or, in the words of Professor Kent Greenfield, "[t]he dominant contemporary view of corporate law is contractarian, meaning that corporate constituencies are assumed to be best able to determine their mutual rights and obligations by way of voluntary arrangement."[3] In the jargon of corporate law, state corporate law statutes like the DGCL are "enabling statutes." As Professor Roberta Romano observes, "[s]tate corporate law is in essence enabling, following a menu approach that permits firms to alter statutory defaults to fit their needs."[4] If one considers this reality from the perspective of political economy, this result is altogether unsurprising. After all, "in most states, the only well-organized groups that care about corporate law are corporate managers and corporate lawyers. The latter group dominates the lawmaking process and the state legislature often rubberstamps changes proposed by the corporate bar."[5] As legal commentators Marcel Kahan and Edward Rock have observed:

> Although formally adopted by the legislature, Delaware's elected representatives have no significant role in crafting Delaware's statutory corporate law. It is the Council of Corporation Law Section of the Delaware Bar

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1. Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 457 (2004).

2. Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2496 (2005) [hereinafter Roe, *Delaware's Politics*]. Within this mindset, "[c]ontract law seems good, and corporate law, which also seems good, is in many dimensions a special form of contract law." Mark J. Roe, *Corporate Law's Limits*, 31 J. LEGAL STUD. 233, 262 (2002) [hereinafter Roe, *Corporate Law's Limits*].

3. Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 583–84 (2002).

4. Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL'Y 212, 216 (2005); *see also* William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619, 652 (2006) ("[The legislation] added an enabling section liberalizing indemnity of officers and directors found liable for breaches of fiduciary duties.").

5. Brett H. McDonnell, *Two Cheers for Corporate Law Federalism*, 30 J. CORP. L. 99, 118 (2004) (footnote omitted); *see also* William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. REV. 1861, 1887–88 (1995) ("Delaware delegates to its bar association both agenda control and drafting responsibility for any amendments to its corporate code."); William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715, 716 (1998) ("At least two interest groups benefit from modern corporate laws—local corporate lawyers and managers of firms incorporated within a state.").

> Association, rather than a legislative committee, that prepares drafts of proposed amendments to the General Corporation Law.[6]

By contrast, shareholders have far less political sway in crafting legislative focus.[7] The result is simple: a statute that does not focus on shareholder rights.

B. Traditional Fiduciary Duties

In the face of a statute that shies from regulation, one could imagine a world where fiduciary duties, ex post, pick up the slack. After all, "the Delaware legislature and courts cannot promulgate ex ante the standards to govern new situations until they see a variety of cases and figure out how well or badly people behaved."[8] One might plausibly argue that the "common law simply could not live with an unfettered freedom of contract because of the abuses that might occur."[9] Yet here, there is a supervening irony. On the one hand, as Robert Charles Clark's well-known corporate law treatise emphasizes, the fiduciary principle is "[c]orporate law's major conceptual contribution."[10] Yet on the other hand—as I will argue below—these duties as applied are surprisingly weak, notwithstanding superficially impressive rhetoric.

Consider three duties that are the mainstay of corporate law treatments: the duty of care, the duty of loyalty, and the duty of good faith. A good starting point is the American Law Institute's (ALI) Principles of Corporate Governance, which state that corporate fiduciaries must act "[1] in good faith, [2] in a manner that he or she reasonably believes to be in the best interests of the corporation,

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6. Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1599–1600 (2005) (footnote omitted).

7. *See, e.g.*, Mark J. Loewenstein, *The Quiet Transformation of Corporate Law*, 57 SMU L. REV. 353, 384–85 (2004) ("Shareholders have not yet become effective lobbyists at the state level, while corporate management has been for a long time. State legislators respond to a CEO who might threaten to move corporate offices outside of the state, but not to a shareholder who threatens to dump her shares.").

8. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1102 (1997); *see also* Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1593 (1989) ("Fiduciary duties provide a set of standards to restrain insiders in exercising their discretionary power over the corporation and its shareholders in contingencies not specifically foreseeable and thus over which the parties could not contract.").

9. Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic*, 71 U. COLO. L. REV. 497, 537 (2000).

10. ROBERT CHARLES CLARK, CORPORATE LAW xxiii (Francis A. Allen et al. eds., 1986); *cf.* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859, 861 (2001) ("[W]hat emerged as a counterpoint to the evolution of the enabling model of corporation law [statutes] was the second key function of the law of corporations: the *ex post* judicial review of the actions of corporate officers and directors, measured by fiduciary principles."). As one Delaware jurist put it, "[t]he 'flesh and blood' of corporate law is judge-made. It is the common law formulation of principles of fiduciary duties articulated on a case-by-case basis." E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004?: A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1411 (2005).

and [3] with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances."[11]

The ALI's third point, referencing the care of an "ordinarily prudent person," sounds like the perennial "reasonable person" test in negligence-based tort claims. But corporate law is not torts, and there is a significant difference: the "business judgment rule" (BJR). The BJR is a common law doctrine that presumes that "in making a business decision the directors of a corporation acted on an informed basis . . . and in the honest belief that the action was taken in the best interests of the company."[12] As students of corporate law are well aware, the BJR transmutes what is ostensibly a negligence standard to one that can perhaps best be characterized as "gross negligence." Violations are found only where there is "reckless indifference to or a deliberate disregard of the interests of the whole body of stockholders"[13] or actions which are "without the bounds of reason."[14] Gross negligence is best shown by following proper process—put succinctly, "[p]rocess review is, of course, duty of care review."[15] As a consequence, review under the BJR is largely outcome-determinative and defendants often win.[16]

To be sure, there is one famous counter-example in duty of care jurisprudence where a CEO and directors were found to be "grossly negligent"—*Smith v. Van Gorkom*.[17] As Professor Roe emphasizes, "[o]ne does not exaggerate much by saying that American corporate law has produced only one major instance in which nonconflicted managers were held liable to pay for their mismanagement: *Smith v. Van Gorkom*, a decision excoriated by managers and their lawyers, and one promptly overturned."[18] But even *Van Gorkom* is problematic, since sophisticated commentators suggest that it is really a hostile

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11. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01, at 181 (AM. LAW INST., Proposed Final Draft 1992); *cf.* REV. MODEL BUS. CORP. ACT. § 8.30 (AM. BAR ASS'N, amended 2002).

12. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). The BJR "operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation." Cede v. Technicolor, 634 A.2d 345, 360 (Del. 1993).

13. Allaun v. Consol. Oil Co., 147 A. 257, 261 (Del. Ch. 1929).

14. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 750 (Del. Ch. 2005) (citations omitted).

15. Sean J. Griffith, *The Good Faith Thaumatrope: A Model of Rhetoric in Corporate Law Jurisprudence* 37 (Dec. 17, 2004) (unpublished manuscript) (on file with the Hastings Law Journal), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=571121. As three prominent Delaware judges themselves admit, the BJR "is not, functionally speaking, a standard of review at all. Rather, it is an expression of a policy of non-review of a board of directors' decision when a judge has already performed the crucial task of determining that certain conditions exist." Allen, Jacobs, & Strine, *supra* note 10, at 870.

16. *See* Allen, Jacobs, & Strine, *supra* note 10, at 867 ("A judicial standard of review is a value-laden analytical instrument that reflects fundamental policy judgments. In corporate law, a judicial standard of review is a verbal expression that describes the task a court performs in determining whether action by corporate directors violated their fiduciary duty."); *see also id.* at 869 ("[S]tandards of review reflect significant value judgments about the social utility of permitting greater or lesser insulation of director conduct from judicial scrutiny.").

17. 488 A.2d 858 (Del. 1985).

18. *See* Roe, *Corporate Law's Limits*, *supra* note 2, at 243 (footnote omitted).

takeover case, not a duty of care one—in other words, the real worry of the Delaware Supreme Court was the "lock up" to Pritzker, to the detriment of other bidders.[19]

Alternatively, as I argue in Subpart III.A, *Van Gorkom* may in fact best be conceptualized as a disclosure case.[20] Notwithstanding *Van Gorkom*'s seeming bite, a statute allowing a waiver of duty of care claims for monetary damages was enacted a few months after the *Van Gorkom* decision was handed down.[21] Thus, put simply, shareholder-plaintiffs cannot even remotely count on the duty of care to help them.[22]

The duty of loyalty is admittedly more shareholder-plaintiff friendly. This duty "mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer, or controlling shareholder and not shared by the stockholders generally."[23] In examining the modern doctrine, it is important to reflect on a threshold question: there is no prophylactic ban against self-dealing transactions.[24] As a baseline standard of review, as long as the conflicted fiduciary can show that the transaction is "fair," the transaction passes muster.[25] However, if the fiduciary's lawyers are sophisticated, they will recognize that approval from an "independent" body—disinterested directors or unaffiliated shareholders—will provide relief from this baseline standard of review. After approval from an independent body, if the conflicted fiduciary is a director or officer, she will, perhaps shockingly, enjoy

19. Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of* Schnell v. Chris-Craft, 60 BUS. LAW. 877, 902 (2005); *see also* Robert T. Miller, Smith v. Van Gorkom *and the* Kobayashi Maru*: The Place of the Trans Union Case in the Development of Delaware Corporate Law*, 9 WM. & MARY BUS. L. REV. 65, 73–76 (2017) ("*Van Gorkom* was an attempt by the Delaware Supreme Court to begin working out a regime to regulate negotiated transactions. *Van Gorkom* should have been *Revlon*, and what the Delaware Supreme Court got wrong in *Van Gorkom* in January of 1985 it would get right in *Revlon* in November of that year." (footnotes omitted)).

20. *See infra* notes 65–67 and accompanying text.

21. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2018). For a discussion of section 102(b)(7) in the context of the duty of good faith, see *infra* note 129 and accompanying text.

22. As one commentator summarizes:

> A director is only liable if he or she is grossly negligent, and the rule presumes that the director acted with due care. . . . If the company has an exculpatory provision in its articles of incorporation, as nearly all publicly-held corporations do, the plaintiff-shareholder must prove that the director failed to act in good faith or intentionally harmed the corporation. As if these legal standards were not enough to reduce a director's incentives to act with care, directors invariably have indemnification rights and insurance, and courts have limited the ability of shareholders to obtain discovery in derivative actions alleging director misconduct.

Loewenstein, *supra* note 7, at 377–78 (footnotes omitted).

23. Cede v. Technicolor, 634 A.2d 345, 361 (Del. 1993).

24. *See* Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. 333, 334 (2002) ("[T]he decisional law has recognized a relaxation of the rigor of trust law, primarily with respect to tolerance of self-dealing transactions.").

25. *See, e.g.*, Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc., 430 N.W.2d 447, 452 (Iowa 1988).

BJR deference.[26] And even a controlling shareholder as a conflicted fiduciary will obtain a burden shift; that is, the plaintiff will still need to make a prima facie case that the transaction is "unfair."[27]

Emerging jurisprudential trends only heighten these liberalizations of doctrine. First, recent cases—notably *In re CNX Gas Corp. Shareholders Litigation*,[28] in the context of controlled tender offers and *Kahn v. M & F Worldwide Corp.*,[29] in the context of controlled mergers—suggest that in the context of these specific controlled transactions, even controlling shareholders can enjoy BJR deference if they get approval from both unconflicted board members and unaffiliated shareholders.

The Delaware judiciary could easily extend this jurisprudence more generally to conflicted transactions involving controlling shareholders, thereby further loosening the doctrine described above. Second, one might have argued that at least Delaware jurisprudence paid some attention to shareholder concerns in the context of mergers and acquisitions, notably hostile tender offers. To the extent this might have been correct, however, it "focuses on a few discrete areas of corporate governance that are more limited and occur more sporadically than might be expected for a plenary governance system."[30] Perhaps even more importantly, new takeover jurisprudence, such as *Lyondell Chemical Co. v. Ryan*[31] and *C&J Energy Services, Inc. v. City of Miami General Employees*[32], chip away at what is arguably the most important shareholder-plaintiff friendly case of the "golden era" of Delaware takeover jurisprudence, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*.[33] If one combines this with allowing waivers of the corporate opportunity doctrine[34]—not to mention a move to allow waivers of the duty of loyalty in unincorporated associations[35]—the future of the duty of loyalty as a tool to protect shareholders looks quite bleak.

26. *See, e.g.*, Cooke v. Oolie, No. 11134, 1997 Del. Ch. LEXIS 92, at *33 (Del. Ch. June 23, 1997).

27. *See, e.g.*, *In re* Wheelabrator Tech., Inc. S'holders Litig., 663 A.2d 1194, 1200–01, 1204 (Del. Ch. 1995) (still finding a reviewing function for courts even where the challenged transaction is approved, but finding the plaintiff did not shift the burden). Note that courts have been true to the language of the so-called "safe harbor" statutes. *See, e.g*., REV. MODEL BUS. CORP. ACT. § 8.61 (AM. BAR ASS'N, amended 2002); DEL. CODE ANN. tit. 8, § 144 (2018).

28. C.A. No. 5377-VCL, 2010 WL 2291842 (Del. Ch. May 25, 2010).

29. 88 A.3d 635 (Del. 2014), *overruled by* Flood v. Synutra Int'l, Inc., 88 A.3d 635 (Del. 2018).

30. Robert B. Thompson, *Delaware, the Feds, and the Stock Exchange: Challenges to the First State as First in Corporate Law*, 29 DEL. J. CORP. L. 779, 788 (2004).

31. 970 A.2d 235 (Del. 2009).

32. 107 A.3d 1049 (Del. 2014).

33. 506 A.2d 173 (Del. 1986).

34. *See* DEL. CODE ANN. tit. 8, § 122(17) (2018) (giving a Delaware corporation the power to "[r]enounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or 1 or more of its officers, directors or stockholders").

35. The Delaware Limited Liability Company Act aims, for instance, "to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." DEL. CODE

Waste and good faith are even weaker. Plaintiffs have been singularly unsuccessful at arguing "waste,"[36] even though several million or even billion dollars were at stake.[37] For predictable reasons, courts do not want to venture into the adequacy of consideration in corporate transactions. For its part, good faith has been a disappointment post-*Disney*. Consider the pre-*Disney* aspirations expressed by thoughtful commentators espousing a synthetic view of good faith:

> Whether the question is confronted from the angle of the duty of care or the duty of loyalty is just a difference in approach. To put it another way, *the fundamental question underlying both duties really is good faith*. Are the directors doing their best in acting for someone else? Arguably, that is the only question in all of corporate law. It is simply asked in different ways in different contexts.[38]

Juxtapose this lofty idea with the jurisprudential reality in *Disney*, which set a very low bar for "good faith" by noting that "the concept of intentional dereliction of duty, a conscious disregard for one's responsibilities, is an appropriate (although not the only) standard for determining whether fiduciaries have acted in good faith."[39] It is now even unclear whether good faith is an independent fiduciary duty. For instance, the Delaware Supreme Court has suggested that:

> [A]lthough good faith may be described colloquially as part of a "triad" of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only the latter two duties, where violated, may directly result in liability, whereas a failure to act in good faith may do so, but indirectly.[40]

To the extent that good faith is not conceptualized as an independent duty, it renders the exculpation provision in DGCL section 102(b)(7) problematic, given that the statute seems to treat three distinct fiduciary duties: care, loyalty, and good faith.[41]

Surveying the duties of care, loyalty, and good faith suggests an overarching theme: from the point of view of a shareholder-plaintiff, state fiduciary duties are weak. As one commentator summarizes it:

ANN. tit. 6, § 18-1101(b) (West 2019); *see also* Pappas v. Tzolis, 982 N.E.2d 576, 579–80 (N.Y. 2012) (allowing fiduciaries to contract out of fiduciary obligations). For a general discussion of this issue, see generally Reza Dibadj, *The Misguided Transformation of Loyalty into Contract*, 41 TULSA L. REV. 451 (2006).

36. To show waste, plaintiffs must prove "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." Glazer v. Zapata Corp., 658 A.2d 176, 183 (Del. Ch. 1993).

37. *See, e.g.*, *In re* Goldman Sachs Grp., Inc. S'holder Litig., No. 5215-VCG, 2011 Del. Ch. LEXIS 151, at *14 (Del. Ch. Oct. 12, 2011); *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005).

38. Griffith, *supra* note 15, at 47 (emphasis added) (footnote omitted).

39. *In re Walt Disney Co.*, 907 A.2d at 755 (emphasis omitted).

40. Stone v. Ritter, 911 A.2d 362, 370 (2006) (footnote omitted); *cf. In re Walt Disney Co.*, 907 A.2d at 753 ("Decisions from the Delaware Supreme Court and the Court of Chancery are far from clear with respect to whether there is a separate fiduciary duty of good faith.").

41. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2018).

> Over time, state courts interpreted the [fiduciary] duties in a manner that left little substance. The business judgment rule and universal adoption of waiver of liability provisions all but eliminated causes of action for breach of the duty of care. The duty of loyalty, particularly self-dealing by officers and directors, could be validated through procedural mechanisms. With proper procedures, the fairness of the transaction was not subject to judicial review. This approach allowed self-dealing by officers and directors almost without limits.[42]

As William Bratton and Joseph McCahery succinctly put it: "the genius of Delaware lawmakers lies in their ability to generate a thick fiduciary law without at the same time imposing a significant compliance burden."[43]

II. THE REGRETTABLY BRIEF HISTORY OF THE DUTY OF DISCLOSURE

As the Delaware Supreme Court has noted, the "fiduciary duty of disclosure is somewhat nebulous."[44] An overview of its history, however, may prove instructive.[45] While there are some suggestions of a duty of candor in the early and mid-twentieth century,[46] the modern duty emerged in 1977 with *Lynch v. Vickers*.[47] In *Lynch*, a former shareholder argued that the controlling shareholder provided incomplete disclosure in the context of a going-private tender offer.[48] The Delaware Supreme Court held "that it was a *breach of the fiduciary duty of candor* for defendants to fail to disclose the Harrell estimate to

42. J. Robert Brown, Jr., *The Irrelevance of State Corporate Law in the Governance of Public Companies*, 38 U. RICH. L. REV. 317, 318–19 (2004) (footnotes omitted); *see also* Leo E. Strine, *A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1279 (2001) ("Delaware corporate law generally permits corporate managers wide flexibility and errs on the side of managerial freedom.").

43. Bratton & McCahery, *supra* note 4, at 691.

44. *In re* Transkaryotic Therapies, 954 A.2d 346, 357 (Del. 2008).

45. For a thorough review of the history of the duty of disclosure, see Lawrence A. Hamermesh, *Calling Off the* Lynch *Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087 (1996). Hamermesh notes that "[a] reconsideration of the historical and varied contexts of fiduciary disclosure duties and an examination of how those contexts largely dovetail with generally accepted rationales of fiduciary doctrine should contribute to a more precise and justifiable development and application of fiduciary disclosure duties in future cases." *Id.* at 1177.

46. *See* Empire S. Gas Co. v. Gray, 46 A.2d 741, 746 (Del. Ch. 1946) ("The accepted and desirable tendency has been to place the burden of candor upon those who would communicate with stockholders rather than to require the stockholders to be eternally vigilant."); Cahall v. Lofland, 114 A. 224, 234 (Del. Ch. 1921) ("The burden is on him who relies on a ratification to show that it was made with a full knowledge of all material facts."). There is also a nineteenth-century Delaware statute which reads:

> If the directors or officers of any corporation organized under the provisions of this Act, shall knowingly cause to be published or given out any written statement or report of the condition or business of the corporation that is false in any material respect, the officers or directors causing such report or statement to be published, or given out, or assenting thereto, shall be jointly and severally, individually liable for any loss or damage resulting therefrom.

21 Del. Laws 451 (1899). While some commentators suggest this is the earliest articulation of the duty of candor, it is more likely simply a codification of common law fraud. *See* Hamermesh, *supra* note 45, at 1104.

47. 383 A.2d 278 (Del. 1977).

48. *See id.* at 281 ("[T]he limited function of the Court was to determine whether defendants had disclosed all information in their possession germane to the transaction in issue.").

those persons to whom they owed the duty and whose stock Vickers was attempting to acquire."[49]

Nine years later, in a case from 1986, *In re Anderson, Clayton Shareholders Litigation*, the Delaware Chancery Court extended the duty of candor from controlling shareholders to boards of directors.[50] The case was litigated in the context of a corporate recapitalization; as such, as in *Lynch*, there was a call to shareholder action. In the words of the court, "[i]t is established by our law that one element of the fiduciary duty that *directors of a Delaware corporation owe to shareholders is the duty to provide full and honest disclosure of material facts* relating to any transaction that requires shareholder approval."[51] Beyond its extension to boards of directors, *Anderson Clayton* also applied a "materiality" standard that the Delaware courts have taken directly from federal law.[52]

Similarly, the case of *Stroud v. Grace* concerned the validity of the notice of an annual meeting as well as the charter amendments and bylaws adopted at that meeting.[53] The Delaware Supreme Court affirmed that "Delaware law imposes upon a board of directors the fiduciary duty to disclose fully and fairly all material aspects within its control that would have a significant effect upon a stockholder vote."[54] Significantly, however, the court refused to extend the duty of disclosure beyond specific disclosures.[55]

Perhaps the most significant open question in the 1990s regarding the duty of disclosure was whether or not the duty was implicated in situations where there was no call to shareholder action. Some Court of Chancery decisions

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49. *Id.* (emphasis added).

50. *See* 519 A.2d 680, 689–90 (Del. Ch. 1986).

51. *Id.* (emphasis added).

52. *See* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944–45 (Del. 1985) ("[A] showing of a substantial likelihood that, under all of the circumstances, the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available." (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976))). The landmark U.S. Supreme Court cases are *TSC Indus., Inc.*, 426 U.S. 438, which developed the materiality standard in the context of proxy solicitations, and Basic v. Levinson, 485 U.S. 224 (1988), which extended the materiality standard beyond proxy solicitations and rejected a bright-line approach.

53. 606 A.2d 75, 78 (Del. 1992).

54. *Id*. at 85.

55. *See, e.g.*, DEL. CODE ANN. tit. 8, § 222 (West 2019) ("Whenever stockholders are required or permitted to take any action at a meeting, a written notice of the meeting shall be given which shall state the place, if any, date and hour of the meeting . . . ."); *id.* § 242(b)(1) ("Every amendment authorized by subsection (a) of this section shall be made and effected in the following manner: (1) If the corporation has capital stock, its board of directors shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment or directing that the amendment proposed be considered at the next annual meeting of the stockholders . . . Such special or annual meeting shall be called and held upon notice in accordance with § 222 of this title."); *see also Stroud*, 606 A.2d at 86 ("All of our previous decisions involving disclosure requirements, and subsequent shareholder ratification, involved proxy solicitations. In the absence of that circumstance, questions of disclosure beyond those mandated by statute become less compelling.").

suggested yes;[56] others, no.[57] Interestingly, the well-known 1996 Delaware Supreme Court case *Kahn v. Roberts* consciously ducked the question.[58] It was not until *Malone v. Brincat*, in 1998, that the court suggested that the duty applies even in the absence of a request for shareholder action:

> Whenever directors communicate publicly or directly with shareholders about the corporation's affairs, *with or without a request for shareholder action*, directors have a fiduciary duty to shareholders to exercise due care, good faith, and loyalty. It follows *a fortiori* that when directors communicate publicly or directly with shareholders about corporate matters the *sine qua non* of directors' fiduciary duty to shareholders is honesty.[59]

III. THE CENTRALITY OF DISCLOSURE

A. *LACUNA*, *VAN GORKOM*, *WEINBERGER*, AND *CAREMARK*

At first glance, the duty of disclosure appears as a bleak candidate. The duty, which in its traditional form "obligates directors to provide the stockholders with accurate and complete information material to a transaction or other corporate event that is being presented to them for action,"[60] is sometimes noted not even to be its own independent duty. A leading case suggests it derives merely "from the combination of the fiduciary duties of care, loyalty, and good faith."[61] As if this were not devastating enough, any state duty of disclosure is generally believed to be eclipsed by federal disclosure obligations.[62]

The duty of disclosure, however, deserves a fresh look. First, as Professor Faith Stevelman Kahn perceptively noted, the duty of disclosure cannot be separated from fundamental questions in corporate governance:

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56. *See, e.g.*, Levy *ex rel.* Durex, Inc. Profit Sharing Plan v. Stern, No. 11955, 1996 Del. Ch. LEXIS 25, at *3–8 (Del. Ch. Mar. 12, 1996), *rev'd on other grounds*, 687 A.2d 573 (Del. 1996) (unpublished table decision); Freedman v. Rest. Assocs. Indus., Inc., No. 9212, 1990 Del. Ch. LEXIS 142, at *13–16 (Del. Ch. Sept. 19, 1990).

57. *See, e.g.*, Bragger v. Budacz, No. 13376, 1994 Del. Ch. LEXIS 202, at *16–21 (Del. Ch. Dec. 7, 1994); Herd v. Major Realty Corp., No. 10707, 1990 Del. Ch. LEXIS 211, at *27–37 (Del. Ch. Dec. 21, 1990).

58. The *Kahn* court observed:

> This Court has held that full disclosure is required when management is seeking stockholder action. Notably, this Court has never stated that full disclosure is required *only when* seeking shareholder action. Because none of the disclosure violations alleged by Kahn are material, *we need not and do not reach today the question of whether a duty of disclosure exists absent shareholder action*. Even if the duty of disclosure is implicated here, such a duty lacks a factual basis.

679 A.2d 460, 467 (Del. 1996) (emphasis added) (citations omitted) (footnote omitted).

59. 722 A.2d 5, 10 (Del. 1998) (emphasis added); *see also infra* notes 143–144 and accompanying text.

60. *Brincat*, 722 A.2d at 10.

61. *Id*. at 11.

62. *See, e.g.*, Eric A. Chiappinelli, *The Moral Basis of State Corporate Law Disclosure*, 49 CATH. U. L. REV. 697, 698 (2000) ("Thus, even though state disclosure obligations remained moribund, the federal government imposed the appropriate solution on corporate America."); Hamermesh, *supra* note 45, at 1090 ("Although these state common law doctrines have been applied to transactions in corporate securities, their significance has been largely eclipsed by comprehensive federal regulation.").

> [C]orporate disclosure must be studied as an aspect of corporate governance because shareholders cannot exercise their governance rights—including their right to determine whether to hold or to sell their shares on an informed basis—without adequate, accurate information about their firms' financial condition and material business affairs. This principle is axiomatic, and indeed self-evident as it relates to shareholder voting. *The dysfunctionality of shareholders' rights to vote (which arise under state corporation law), without rights to receive adequate, accurate information (which are afforded public companies' shareholders by virtue of the federal proxy laws and regulations) accounts for why most basic courses, notwithstanding a nod to the concept of "rational shareholder apathy," include a discussion of the federal proxy regulations and the disclosures to shareholders required thereunder*.[63]

Stevelman Kahn's point is a profound one: how can state corporate law purport to regulate corporate governance without a concomitant duty of disclosure? Why must we resort to teaching federal proxy rules?[64]

Second, and relatedly, the duty of disclosure necessarily appears without properly being acknowledged. Consider, for instance, *Smith v. Van Gorkom*[65]—a canonical case in the lexicon of business associations. *Van Gorkom* is known to generations of law students as a duty of care case—where the board of directors and TransUnion were found to be grossly negligent in "negotiating" the sale of the company to the Pritzker family.[66] But a careful reading of the opinion suggests that the case is at least as much about disclosure as it might be about care. The terms "candor" and "disclosure" appear multiple times in the opinion, and the court concludes:

> To summarize: we hold that the directors of Trans Union breached their fiduciary duty to their stockholders (1) by their failure to inform themselves of all information reasonably available to them and relevant to their decision to recommend the Pritzker merger; and (2) by their failure to disclose all material information such as a reasonable stockholder would consider important in deciding whether to approve the Pritzker offer.[67]

So, why is *Van Gorkom* not studied as a disclosure case?

Similarly, consider *Weinberger v. UOP, Inc.*,[68] a classic case typically poured over for its analysis of the duty of loyalty and the "fair dealing and "fair

63. Faith Stevelman Kahn, *Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Corporate Disclosure*, 34 GA. L. REV. 505, 515–16 (2000) (emphasis added) (footnotes omitted).

64. *Cf. Brincat*, 722 A.2d at 11 ("In the absence of a request for stockholder action, the Delaware General Corporation Law does not require directors to provide shareholders with information concerning the finances or affairs of the corporation. Even when shareholder action is sought, the provisions in the General Corporation Law requiring notice to the shareholders of the proposed action do not require the directors to convey substantive information beyond a statutory minimum." (footnote omitted)).

65. 488 A.2d 858 (Del. 1985), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

66. *Id.* at 874.

67. *Id.* at 893; *see also id.* at 890 ("[T]he Board was required to disclose 'all germane facts' which a reasonable shareholder would have considered important in deciding whether to approve the merger.").

68. 457 A.2d 701 (Del. 1983).

price" aspects of loyalty analysis.[69] But at its core, *Weinberger* may also hinge on disclosure—as students of corporations law remember, arguably the key factor against the defendants was the non-disclosure of a report stating that the acquirer would be willing to go beyond the price offered,[70] as well as non-disclosure of how the investment bank reached its valuation.[71] Another good example is *In re Caremark International Inc. Derivative Litigation*.[72] While the case is typically studied as a "duty to monitor" case under duty of care, there is also an under-appreciated component that revolves around disclosure. Specifically, Chancellor Allen noted, "the elementary fact that relevant and timely information is an essential predicate for satisfaction of the board's supervisory and monitoring role under Section 141 of the Delaware General Corporation Law."[73] As Stevelman Kahn notes:

> William Allen's now famous dicta in *In re Caremark International, Inc. Derivative Litigation* indicates that managers will be looked to, as a matter of fiduciary care, to administer appropriate, efficacious systems of internal information-gathering and reporting. In addition, Allen's acknowledgment in *Caremark* of directors' responsibilities for overseeing internal information-gathering and reporting systems has established a doctrinal and conceptual foundation, albeit retrospectively, for the Delaware Supreme Court's recognition of directors' obligations to monitor the integrity of their firms' public disclosures in the interest of shareholders, as was first articulated in the court's 1985 *Van Gorkom* decision.[74]

B. Recent Developments as Disguised Duty of Disclosure Puzzles

1. *Section 220 "Books and Records" Requests*

One of the contributions that a robust duty of candor could make would be to bring some clarity to the increasingly confusing doctrine that has emerged

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69. *See id.* at 711 ("The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.").

70. *See id.* at 712 ("As we have noted, the matter of disclosure to the UOP directors was wholly flawed by the conflicts of interest raised by the Arledge-Chitiea report. All of those conflicts were resolved by Signal in its own favor without divulging any aspect of them to UOP."); *see also id.* at 707 ("Furthermore, it is clear beyond peradventure that nothing in that report was ever disclosed to UOP's minority shareholders prior to their approval of the merger.").

71. *See id.* at 708 ("The proxy statement indicated that the vote of UOP's board in approving the merger had been unanimous. It also advised the shareholders that Lehman Brothers had given its opinion that the merger price of $21 per share was fair to UOP's minority. However, *it did not disclose the hurried method by which this conclusion was reached*." (emphasis added)); *cf.* Jack B. Jacobs, *The Fiduciary Duty of Disclosure After* Dabit, 2 J. BUS. & TECH. L. 391, 398 (2007) ("In interested transactions, the duty [of disclosure] is an element of "fair dealing," which in turn is a critical component of entire fairness review.").

72. 698 A.2d 959 (Del. Ch. 1996).

73. *Id.* at 970.

74. Stevelman Kahn, *supra* note 63, at 511 (emphasis omitted) (footnote omitted).

around DGCL section 220, "Inspection of Books and Records."[75] This provision in the Delaware code allows a stockholder or her agent "upon written demand under oath stating the purpose thereof, . . . the right . . . to inspect for any proper purpose"[76] both the stock ledger and "books and records."[77] While obtaining access to the shareholder list is usually non-controversial,[78] recent controversies abound over what "proper purpose" means with respect to other "books and records"—notably because the statute offers little guidance other than to note that a "proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder."[79] There is also similar broad guidance from the Delaware Supreme Court that states that the "plaintiff bears the burden of proving that each category of books and records is essential to the accomplishment of the stockholder's articulated purpose for the inspection."[80]

Perhaps the drafters of section 220 did not foresee how important it would become. With the advent of heightened standards and "particularized facts" in pleadings, the plaintiffs' bar has increasingly turned to "books and records" requests in an attempt to obtain more detailed facts in complaints to try to survive motions to dismiss[81] or the demand requirement in derivative suits.[82] As such, and given the ambiguity around "proper purpose," litigants have increasingly turned to the Chancery Court to determine the scope of inspection rights—as specifically contemplated by the statute.[83]

A growing common law around section 220 has emerged in the face of disputes between stockholders and corporations. For example, can a stockholder

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75. *See* DEL. CODE ANN. tit. 8, § 220 (2019).

76. *Id.* § 220(b).

77. *Id.* § 220(b)(1).

78. *See, e.g.*, Gen. Time Corp. v. Talley Indus., Inc., 240 A.2d 755, 755–56 (1968). With respect to obtention of a stockholder list, the statute specifically places the burden on the stockholder. *See* DEL. CODE ANN. tit. 8, § 220(c) ("Where the stockholder seeks to inspect the corporation's stock ledger or list of stockholders . . . the burden of proof shall be upon the corporation to establish that the inspection such stockholder seeks is for an improper purpose.").

79. DEL. CODE ANN. tit. 8, § 220(b).

80. Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 569 (Del. 1997).

81. *See, e.g.*, *In re* VeriFone Holdings, Inc., No. C 07-06347 MHP, 2009 U.S. Dist. LEXIS 44138, at *37 (N.D. Cal. May 26, 2009) (suggesting plaintiffs make a section 220 motion to obtain particularized facts for complaint).

82. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 817 (Del. 1984) ("In Delaware mere directorial approval of a transaction, absent particularized facts supporting a breach of fiduciary duty claim, or otherwise establishing the lack of independence or disinterestedness of a majority of the directors, is insufficient to excuse demand."); *cf.* Rales v. Blasband, 634 A.2d 927, 934 n.10 (1993) ("Nothing requires the Court of Chancery, or any other court having appropriate jurisdiction, to countenance this process by penalizing diligent counsel who has employed these methods, including section 220, in a deliberate and thorough manner in preparing a complaint that meets the demand excused test of Aronson.").

83. *See* DEL. CODE ANN. tit. 8, § 220(c) ("If the corporation . . . refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder . . . or does not reply to the demand within 5 business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection. *The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought*." (emphasis added)).

inspect books and records that pre-date the stockholder's purchase of stock?[84] Does a shareholder lose standing for the purposes of section 220 if there will be a merger?[85] How broadly may information obtained from a section 220 request be shared?[86] What effect does an exculpatory provision in a corporate charter have on a section 220 request?[87]

A dizzying array of line-drawing exercises exists. For example, it is proper to use section 220 to inquire as to violations of fiduciary duties,[88] but the shareholder must demonstrate that there is a reasonable basis to suspect wrongdoing.[89] In a similar vein, it is proper to use section 220 to solicit proxies[90]—but the request must be significantly limited because of a perceived risk of abuse in this context.[91] In another application, it is proper to use a section 220 to investigate a discrepancy in financial reports,[92] but using a section 220

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84. *See* Saito v. McKesson HBOC, Inc., 806 A.2d 113, 117 (Del. 2002) ("Even where a stockholder's only purpose is to gather information for a derivative suit, the date of his or her stock purchase should not be used as an automatic 'cut-off' date in a § 220 action.").

85. *See* Deephaven Risk Arb Trading, Ltd. v. UnitedGlobalCom, Inc., No. 379-N, 2005 Del. Ch. LEXIS 107, at *17–27 (Del. Ch. July 13, 2005) (standing preserved). *But see* Weingarten v. Monster Worldwide, Inc., No. 12931-VCG, 2017 Del. Ch. LEXIS 31, at *11–14 (Del. Ch. Feb. 27, 2017).

86. The Delaware Chancery Court provides the following guidance:

> The court understands that there can be exigent circumstances (*e.g.*, an active election contest) in which time constraints will not allow a stockholder to draft and file a complaint and then deal with issues of confidentiality in the ordinary course. In those limited circumstances, and upon a clear showing, this court will entertain extraordinary applications to remove "confidential" designations from documents produced as the result of a Section 220 proceeding. In other circumstances, however, a stockholder making a books and records demand can expect that documents designated as confidential pursuant to a reasonable confidentiality agreement will remain confidential unless the stockholder concludes that grounds exist to initiate litigation and the court in which that proceeding is brought determines to include those documents in the public record.

Disney v. Walt Disney Co., 857 A.2d 444, 450 (Del. Ch. 2004); *see also* Hurd v. Espinoza, 34 A.3d 1084, 1086 (Del. 2011) ("The Allred letter does not contain any nonpublic financial information, trade secrets, or other proprietary information. The question thus becomes whether the letter contains third-party confidential information. Several factors support the trial court's conclusion that it does not. . . . [W]e conclude that the Court of Chancery acted well within its discretion in holding that the Allred letter (as redacted) should be unsealed."); Pershing Square, L.P. v. Ceridian Corp., 923 A.2d 810, 817–24 (Del. Ch. 2007) ("This Court is required under 8 *Del. C.* § 220 to ensure that a stockholder's primary purpose in demanding access to corporate books and records is proper and to prevent abusive use of such demands. Where those elements are in doubt, the Court will use its statutory powers to deny relief. . . . Pershing Square initiated this § 220 action with a single objective in mind: to find a legal mechanism by which it can publicly broadcast otherwise improperly obtained and confidential information. This does not state a proper purpose.").

87. *See, e.g.*, Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 785–86 (Del. Ch. 2016); Se. Pa. Transp. Auth. v. AbbVie Inc., C.A. No. 10374-VCG, C.A. No. 1408-VCG, 2015 Del. Ch. LEXIS 110, at *39–46 (Del. Ch. Apr. 15, 2015).

88. *See, e.g.*, Nodana Petroleum Corp. v. State *ex rel.* Brennan, 123 A.2d 243, 246 (Del. 1956).

89. *See, e.g.*, Seinfeld v. Verizon Commc'ns, Inc., 909 A.2d 117, 123 (Del. 2006).

90. *See, e.g.*, Hatleigh Corp. v. Lane Bryant, Inc., 428 A.2d 350, 352 (Del. Ch. 1981).

91. *See, e.g.*, Highland Select Equity Fund, L.P., v. Motient Corp., 906 A.2d 156, 164 (Del. Ch. 2006) ("Recent experience teaches that the potential for abuse is very much alive when the Section 220 demand is made—as this one is—in the context of an impending or ongoing proxy contest.").

92. *See, e.g.*, Dobler v. Montgomery Cellular Holding Co., No. 18105, No. 18499, 2001 Del. Ch. LEXIS 126, at *23–37 (Del. Ch. Oct. 19, 2001).

request as part of an attempt to have a corporation change its financial reporting practices is improper.[93] Or a plaintiff can use section 220 to revisit the issue of demand futility after a derivative suit has been dismissed without prejudice, but not when it has been dismissed with prejudice.[94]

The Delaware courts are also not consistent on how specific the stated purpose in a books and records request should be. For instance, one case holds that stating "[t]he purpose of this request is to enable the B. F. Goodrich Company to communicate with the other stockholders of our company with reference to a special meeting of the stockholders of your company" is "insufficient[ly]" specific,[95] whereas another court holds that stating "for the purpose of communicating with them on matters relating to our mutual interest as stockholders and for the purpose of soliciting their proxies in connection with the annual meeting of stockholders" is "sufficient."[96] There are even controversies as to a director's ability to use section 220 to obtain access to books and records.[97] And while section 220(c) applies to a corporation's subsidiaries, even defining what a "subsidiary" is has become a point of contention.[98] The most recent Delaware Supreme Court opinion on books and records requests takes an expansive view of section 220: discussing when email communications may be inspected, and frowning upon restrictions on the jurisdictions in which the books and records obtained may be used.[99]

The root of the problem is that voting is a central paradigm in corporate governance, but there is no concomitant duty to receive information. The only thing shareholders have under Delaware state law is section 220, which results in intense litigation. To the extent a robust duty of disclosure would make information available ex ante, then much of this can be avoided.

This emerging mess exists because of a lack of an overarching framework for the duty of disclosure—to the extent such a framework can be introduced, the problem can be managed much more effectively.

93. *See, e.g.*, Thomas & Betts Corp. v. Leviton Mfg. Co., 685 A.2d 702, 712 (Del. Ch. 1995).

94. *See, e.g.*, King v. VeriFone Holdings, Inc., 12 A.3d. 1140, 1148–49 (Del. 2011).

95. Nw. Indus., Inc. v. B.F. Goodrich Co., 260 A.2d 428, 428–29 (Del. 1969).

96. Kerkorian v. W. Air Lines, Inc., 253 A.2d 221, 222–23 (Del. Ch. 1969) (internal quotation marks omitted).

97. *See, e.g.*, Kortüm v. Webasto Sunroofs, Inc., 769 A.2d 113, 115 (Del Ch. 2000); McGowan v. Empress Entm't, Inc., 791 A.2d 1, 2 (Del. Ch. 2000).

98. *See, e.g.*, Weinstein Enters., Inc. v. Orloff, 870 A.2d 499, 505 (Del. 2005) ("Establishing that an entity is a 'subsidiary' of the corporation that is before the Court of Chancery is a condition precedent to invoking the 2003 amendment to section 220. As in this case, usually the extent of the parent corporation's direct or indirect ownership will not be an issue. Therefore, the dispositive inquiry in making that determination will be whether the stockholder 'controls the affairs' of the corporation.").

99. *See* KT4 Partners LLC v. Palantir Techs., Inc., No. 281, 2018, 2019 Del. LEXIS 40, at *27–29 (Del. S.C. Jan. 29, 2019).

2. *Reemergence of State Insider Trading Claims*

Insider trading cases are almost always brought under federal securities laws. These federal claims are typically based on section 10(b) of the Securities and Exchange Act of 1934 ("1934 Act") and rule 10b-5 promulgated thereunder. The complexity of these claims lies in adapting an interpretation of section 10(b) and rule 10b-5 fundamentally based on common law fraud to insider trading on electronic securities markets—a task of immense complexity that has led to several landmark decisions by the U.S. Supreme Court. Additional causes of action exist under section 16(b) of the 1934 Act, as well as rule 14e-3 promulgated under section 14(e) of the 1934 Act.

As such, attorneys do not typically consider insider trading claims as state fiduciary duty actions. There is, however, a fascinating mid-twentieth century Delaware Chancery Court opinion, *Brophy v. Cities Service Co.*,[100] which suggests that insider trading can be conceptualized as a breach of fiduciary duty.[101] While essentially dormant for decades, there has been a recent resurgence of so-called "*Brophy*" claims.[102] This resurgence has brought to the fore some complex questions—for instance, whether a shareholder must show that the corporation was actually harmed in order to bring a state law claim for insider trading,[103] or to what extent circumstantial evidence can be evoked to establish such a claim.[104]

While *Brophy* claims are conceptualized as breaches of the duty of loyalty, perhaps an even stronger argument can be made that they actually represent duty of disclosure cases. The analogy here would be to the "disclose or abstain" doctrine under federal securities law.[105] The point has been under-appreciated in the literature, though Professor Lawrence Hamermesh notes that "imposing a fiduciary duty of disclosure provides a convenient, ready-made substitute for what selling stockholders would want in any event—presentation of the material

100. 70 A.2d 5 (Del. Ch. 1949).

101. *See id.* at 7 ("But if an employee in the course of his employment acquires secret information relating to his employer's business, he occupies a position of trust and confidence toward it, analogous in most respects to that of a fiduciary, and must govern his actions accordingly.").

102. *See, e.g., In re* Oracle Corp., Derivative Litig., 867 A.2d 904, 905 (Del. Ch. 2004) ("The plaintiffs thus raise a claim under the venerable case of *Brophy v. Cities Service Co.*").

103. *See, e.g.*, Kahn v. Kolberg Kravis Roberts & Co., L.P., 23 A.3d 831, 840 (2011) (holding that a shareholder need not show actual harm).

104. This is particularly relevant in the context of proving scienter. *See, e.g.*, Silverberg v. Gold, No. 7646-VCP, 2013 Del. Ch. LEXIS 312, at *30–54 (Del. Ch. Dec. 31, 2013) (addressing what facts a plaintiff must plead to survive a *Brophy* motion to dismiss).

105. *See In re* Cady, Roberts & Co. 40 S.E.C. 907, 911 (1961) ("We, and the courts have consistently held that insiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment. Failure to make disclosure in these circumstances constitutes a violation of the anti-fraud provisions. If, on the other hand, disclosure prior to effecting a purchase or sale would be improper or unrealistic under the circumstances, we believe the alternative is to forego the transaction." (footnote omitted)); *see also* SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1304–05 (2d Cir. 1971).

facts—and what directors, by virtue of their role as centralized repositories of corporate information, are well suited to provide efficiently."[106] The duty may emerge in a somewhat disguised and sublimated manner, but it is the under-appreciated duty of disclosure nonetheless.

C. "Disclosure-Only" and Quasi-Appraisal Litigation

The appraisal right under DGCL section 262 represents a relatively esoteric cause of action. A shareholder who dissents from a qualifying merger[107] has the right to ask a court for her pro-rata share of the fair going-concern value of the corporation.[108] "Quasi-appraisal" actions relate to appraisals in a perhaps counter-intuitive way. Quasi-appraisal is simply a short-hand description of a measure of damages. "It refers to the quantum of money equivalent to what a stockholder would have received in an appraisal, namely the fair value of the stockholder's proportionate share of the equity of the corporation as a going concern."[109]

How does all of this relate to the duty of disclosure? In the words of the Delaware Court of Chancery:

> One cause of action where the Delaware Supreme Court and the Court of Chancery consistently have held that quasi-appraisal damages are available is when a fiduciary breaches its duty of disclosure in connection with a transaction that requires a stockholder vote. *The premise for the award is that without the disclosure of false or misleading information, or the failure to disclose material information, stockholders could have voted down the transaction and retained their proportionate share of the equity in the corporation as a going concern*. Quasi-appraisal damages serve as a monetary substitute for the proportionate share of the equity that the stockholders otherwise would have retained.[110]

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106. Hamermesh, *supra* note 45, at 1153; *see also id.* at 1151 ("The next context in which a fiduciary duty of disclosure has been identified is the purchase by a director of the corporation's stock from an outside stockholder.").

107. Del. Code Ann. tit. 8, § 262(b) (2019) provides an extraordinarily convoluted treatment of which mergers qualify. As a general matter, shareholders of a private company with fewer than 2,000 shareholders will qualify for an appraisal remedy assuming they have the right to vote on the merger. *Id.* § 262(b)(2)(b). By contrast, shareholders of a public company, or a private company with 2,000 or more shareholders, do not receive appraisal rights in a stock-for-stock deal—where they receive either stock of the acquiror, or stock traded on a national securities exchange; however, the shareholder do receive appraisal rights if the consideration they receive is cash. *See id.* § 262(b)(1); *see also id.* § 262(g).

108. In turn, "the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors." Del. Code Ann. tit. 8, § 262(h) (2019). Typically, a "discounted cash flow" analysis is performed. *See* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

109. *In re* Orchard Enters., Inc. Stockholder Litig., 88 A.3d 1, 42 (Del. Ch. 2014).

110. *Id.* at 42; *see also* Zachary A. Paiva, Note, *Quasi-Appraisal: Appraising Breach of Duty of Disclosure Claims Following "Cash-Out" Mergers in Delaware*, 23 Fordham J. Corp. & Fin. L. 339, 342 (2017) ("Based on the Delaware Court of Chancery's 'fair value' determination, quasi-appraisal damages attempt to compensate minority shareholders for out-of-pocket damages they suffered following the loss of their shares and the breach of a controlling shareholder's duty of disclosure."(footnote omitted)).

Sometimes plaintiffs' lawyers do not seek monetary remedies, but obtain a "disclosure-only" settlement:

> Once the litigation is on an expedited track and the prospect of an injunction hearing looms, the most common currency used to procure a settlement is the issuance of supplemental disclosures to the target's stockholders before they are asked to vote on the proposed transaction. The theory behind making these disclosures is that, by having the additional information, stockholders will be better informed when exercising their franchise rights.[111]

These settlements have both become common in recent years[112]—as well as roundly criticized by the Delaware courts. Consider, for example, these recent and harsh words from the Delaware Court of Chancery:

> Today, the public announcement of virtually every transaction involving the acquisition of a public corporation provokes a flurry of class action lawsuits alleging that the target's directors breached their fiduciary duties by agreeing to sell the corporation for an unfair price. . . . But far too often such litigation serves no useful purpose for stockholders. Instead, it serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent.[113]

My point here is not to wade into the normative merits of these arguments. Rather, it is to make two related points. First, "quasi-appraisal" and disclosure actions are—like insider trading and section 220 actions—causes of action that have at their heart the duty of disclosure. Second, recognizing these causes of action for what they are could help us ascertain the relative merits of these actions.

Pondering "disclosure-only" and quasi-appraisal remedies also leads into consideration of the broader question of remedies for violations of the duty of disclosure. Generally speaking, some cases suggest damages, while others emphasize equitable relief. As the *Malone v. Brincat* court suggests:

> Delaware law also protects shareholders who receive false communications from directors even in the absence of a request for shareholder action. When the directors are not seeking shareholder action, but are deliberately misinforming shareholders about the business of the corporation, either directly or by a public statement, there is a violation of fiduciary duty. That violation may result in a

111. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 892 (Del. Ch. 2016).

112. *See, e.g.*, *id.* at 887 ("The proposed settlement is of the type often referred to as a 'disclosure settlement.' It has become the most common method for quickly resolving stockholder lawsuits that are filed routinely in response to the announcement of virtually every transaction involving the acquisition of a public corporation.").

113. *Id.* at 891–92; *see also id.* at 907 ("[N]one of plaintiffs' Supplemental Disclosures were material or even helpful to Trulia's stockholders. The Proxy already provided a more-than-fair summary of J.P. Morgan's financial analysis in each of the four respects criticized by the plaintiffs."); *In re* Activision Blizzard, Inc. Stockholder Litig., 124 A.3d 1025, 1067 (Del. Ch. 2015) ("The negotiation process falls at the opposite end of the spectrum from the routine disclosure-only settlements, entered into quickly after ritualized quasi-litigation, that plague the M & A landscape.").

> derivative claim on behalf of the corporation or a cause of action for damages. There may also be a basis for equitable relief to remedy the violation.[114]

But at a finer level of granularity, there remains significant ambiguity. Some case law suggests damages are not an appropriate remedy.[115] By contrast, other case law emphasizes damages[116]—though there is a debate as to how significant those damages should be.[117] As such, consideration of "disclosure-only" and quasi-appraisal remedies could provide a valuable opportunity to assess the intersection of disclosure and remedies more generally.

D. Analytical Independence and Federalism

1. Analytical Independence from Care, Loyalty, and Good Faith?

To the extent that courts and commentators might begin to take the duty of disclosure seriously, my hope is that it will force a reckoning on two difficult questions: whether the duty is analytically independent, and how it might relate to federal disclosure obligations.

First, is the duty of disclosure an independent duty? While there remains some controversy,[118] the bulk of the case law suggests that the answer is no. The Delaware Supreme Court has recently noted that:

> Although usually labeled and described as a duty, the obligation to disclose all material facts fairly when seeking shareholder action *is merely a specific application of the duties of care and loyalty*. That it is an application of well-established duties—rather than an independent duty itself—however, does not render this area of law clear.[119]

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114. 722 A.2d 5, 14 (Del. 1998) (footnote omitted).

115. For instance, one Chancery Court opinion suggests that:

> Delaware case law recognizes that an after-the-fact damages case is not a precise or efficient method by which to remedy disclosure deficiencies. A post-hoc evaluation will necessarily require the court to speculate about the effect that certain deficiencies may have had on a stockholder vote and to award some less-than-scientifically quantified amount of money damages to rectify any perceived harm.
>
> *Therefore, our cases recognize that it is appropriate for the court to address material disclosure problems through the issuance of a preliminary injunction that persists until the problems are corrected.*

In re Staples, Inc. S'holders Litig., 792 A.2d 934, 960 (Del. Ch. 2001) (emphasis added).

116. *See, e.g.*, *In re* Tri-Star Pictures, Inc., Litig., 634 A.2d 319, 333 (Del. 1993) ("[L]aw and policy have evolved into a virtual per se rule of damages for breach of the fiduciary duty of disclosure.").

117. *See, e.g.*, Loudon v. Archer-Daniels-Midland Co., 700 A.2d 135, 141–42 ("Tri-Star [sic] stands only for the narrow proposition that, where directors have breached their disclosure duties in a corporate transaction that has in turn caused impairment to the economic or voting rights of stockholders, there must at least be an award of nominal damages.").

118. *See* Z. Jill Barclift, *Senior Corporate Officers and the Duty of Candor: Do the CEO and CFO Have a Duty to Inform?*, 41 VAL. U. L. REV. 269, 289 (2006) ("Delaware law is somewhat muddled on whether the duty to disclose is a separate duty."); *see also id.* at 286 ("[I]t remains unclear whether a duty of disclosure is an independent duty outside of the transactional communication to shareholders.").

119. *In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 357 (Del. 2008) (emphasis added) (footnotes omitted); *see also* Malpiede v. Townson, 780 A.2d 1075, 1086 (Del. 2001) ("We begin by observing that the

And, unsurprisingly, the Delaware Chancery Court has followed the appellate court in this perspective, as in the famous Disney litigation:

> The Delaware Supreme Court has been clear that outside the recognized fiduciary duties of care and loyalty (and perhaps good faith), there are not other fiduciary duties. In certain circumstances, however, specific applications of the duties of care and loyalty are called for, such as. . .the duty of candor or disclosure.[120]

Yet it is unsatisfactory simply to say, as for example the court in *Brincat* does, that "[t]he duty of directors to observe proper disclosure requirements derives from the combination of the fiduciary duties of care, loyalty and good faith."[121] As students of corporate law know, each of these fiduciary duties espouses a different set of doctrines—for instance, a very permissive BJR standard for duty of care,[122] fairness for loyalty,[123] and "intentional dereliction of duty" for good faith.[124] Under what doctrines should disclosure be analyzed? It is not enough to note, for instance, that "[t]he duty of disclosure is, and always has been, a specific application of the general fiduciary duty owed by directors."[125] More generally, and without wading into an abstract philosophical discussion, it remains unclear to me why "candor" or "disclosure" is not an analytical duty independent from care, loyalty, and good faith. After all, a fiduciary might conceivably meet these three standards without being candid. To the extent the duty of disclosure is an after-thought in our jurisprudence, these questions can be swept under the rug—but to the extent its importance is affirmed, then they cannot be avoided.

Bringing the duty of disclosure out from under the shadows of care, loyalty, and good faith will allow courts and commentators to finally address some novel questions. First, should the duty of disclosure be conceptualized as extending beyond communications to shareholders? If so, then as former Delaware

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board's fiduciary duty of disclosure . . . is not an independent dut[y] but the application in a specific context of the board's fiduciary duties of care, good faith, and loyalty."); *Brincat*, 722 A.2d at 10 ("The issue in this case is not whether Mercury's directors breached their duty of disclosure. It is whether they breached their more general fiduciary duty of loyalty and good faith by knowingly disseminating to the stockholders false information about the financial condition of the company.").

120. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 745 n.400 (Del. Ch. 2005); *see also In re* Tyson Foods, Inc. Consol. S'holder Litig., 919 A.2d. 563, 597–98 (Del. Ch. 2007) ("[W]here there is reason to believe that the board lacked good faith in approving a disclosure, the violation implicates the duty of loyalty."); *In re* CheckFree Corp. S'holders Litig., No. 3193-CC, 2007 Del. Ch. LEXIS 148, at *6 (Del. Ch. Nov. 1, 2007) ("This 'duty of disclosure' is not a separate and distinct fiduciary duty, but it clearly does impose requirements on a corporation's board.").

121. *Brincat*, 722 A.2d at 11.

122. *See, e.g.*, Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 813 (Sup. Ct. 1976) ("[T]he substitution of someone else's business judgment for that of the directors 'is no business for any court to follow.'" (quoting Holmes v. Saint Joseph Lead Co., 147 N.Y.S. 104, 107 (Sup. Ct. 1914))).

123. *See, e.g.*, Lewis v. Vogelstein, 699 A.2d 327, 338 (Del. Ch. 1997).

124. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 64–66 (Del. 2006) (upholding the Chancery Court's articulation of this standard).

125. *Brincat*, 722 A.2d at 10.

Supreme Court Justice Joseph Walsh suggests, then perhaps it cannot be subsumed within the duty of loyalty:

> The responsibility to consider merger or sale of the corporation has been generally viewed as falling under the directors' duty of loyalty and occasionally the limited application of the duty of care. There is, however, another aspect of the directors' fiduciary duty that is increasingly emerging as a matter of concern—I refer to the duty of disclosure. More and more, directors are sought to be held accountable for what they disclose or fail to disclose to shareholders and other parties affected by the financial health, or lack thereof, of the corporation. If the duty of disclosure affects only the interests of the shareholders it may be deemed to be subsumed within the duty of loyalty, but the duty of disclosure may have wider implications.[126]

Second, should the duty of disclosure be identical for different fiduciaries—directors, officers, or controlling shareholders?[127] Given officers' roles in corporate scandals, should the duty of disclosure emphasize the obligations of officers?[128] Third, do the exculpatory provisions in the well-known waiver permitted by DGCL section 102(b)(7) apply to the duty of disclosure?[129] More broadly, might section 102(b)(7) be someday revised to include a duty of disclosure—given that today it only references care, loyalty and good faith?

2. *Thorny Questions of Federalism*

A second question is the relationship between a state law duty of disclosure and federal disclosure requirements. Traditionally, the state duty of disclosure has paled vis-à-vis the federal duties.[130] And to the extent the duty of disclosure

126. Justice Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. 333, 337 (2002).

127. *See, e.g.*, Barclift, *supra* note 118, at 270 ("[A]ccepting the fact that senior corporate officers and directors owe the same fiduciary duties fails to acknowledge the nature of the agency relationship that exists between officers and directors, and between officers and shareholders.").

128. As one commentator observes:

> State corporation law has implications for future corporate scandals, which are likely to involve intentional misconduct by corporate officers and concealment of that misconduct from the board of directors. Extending the duty of candor beyond its current application, as a duty that directors owe to disclose material information to the shareholders, would provide a way to seek redress for harm to the corporation that the board may not seek otherwise.

Shannon German, *What They Don't Know Can Hurt Them: Corporate Officers' Duty of Candor to Directors*, 34 DEL. J. CORP. L. 221, 274 (2009).

129. *See, e.g.*, Hamermesh, *supra* note 45, at 1095–96 ("So long as the courts characterize the director's fiduciary disclosure duty as an ill-defined hybrid of the duties of care and loyalty, directors and corporate counsel will be uncertain as to whether exculpatory provisions in the certificate of incorporation can effectively limit or eliminate damages liability for breach of that fiduciary disclosure duty." (footnote omitted)); *see also* Holly M. Barbera, Note, *Fiduciary Duties and Disclosure Obligations: Resolving Questions After* Malone v. Brincat, 26 DEL. J. CORP. L. 563, 581–83 (2001).

130. *See, e.g.*, Stevelman Kahn, *supra* note 63, at 520–21 ("Because the federal securities laws and regulations define the reporting system operating in public companies, and because the federal securities laws have historically been of preeminent importance in defining private causes of action for investors seeking recovery for losses caused by corporate misrepresentation, the primary legal development and study of the

has been asserted, the traditional approach has been to duck the question by arguing that state law only applies if shareholders are requested to take action. As Justice Walsh has observed:

> For many years the duty of disclosure was primarily a concern of federal law directed to the issuance and trading of securities. *Under state law, particularly Delaware law, it was generally accepted that the duty of disclosure was triggered only if shareholder approval was sought with respect to the transaction to which the disclosure was directed*. That is, if the corporation sought shareholder approval for the issuance of securities or a merger transaction, it was required to disclose all information that a reasonable shareholder would deem necessary to form a judgment about the merits of the proposed transaction.[131]

Yet notwithstanding a tendency to cabin the duty of disclosure,[132] there exists significant ambiguity in the jurisprudence on this point. In the oft-cited *Malone v. Brincat* opinion, the Delaware Supreme Court observes:

> Delaware law also protects shareholders who receive false communications from directors *even in the absence of a request for shareholder action*. When the directors are not seeking shareholder action, but are deliberately misinforming shareholders about the business of the corporation, either directly or by a public statement, there is a violation of fiduciary duty. That violation may result in a derivative claim on behalf of the corporation or a cause of action for damages. There may also be a basis for equitable relief to remedy the violation.[133]

And in a similar vein, the Delaware courts have sustained section 220 requests[134] in the face of preemption arguments.[135] As Stevelman Kahn has noted, "[t]he Delaware Supreme Court's reversal of the chancery court's decision in *Brincat* validates the idea that shareholders' informational needs, whether they relate to voting their shares or determining whether or not to continue to hold them, are core concerns of corporate fiduciary law and corporate governance."[136]

Again, a more muscular duty of disclosure could distinguish itself from federal disclosure obligations. There are already good ideas in this regard. First,

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problem of corporate (mis)disclosure has fallen outside the traditional boundary of state corporate law . . . ." (footnotes omitted)).

131. Walsh, *supra* note 126, at 337 (emphasis added).

132. *See, e.g.*, Arnold v. Soc'y of Sav. Bancorp, Inc., 678 A.2d 533, 539 (Del. 1996) ("We see no legitimate basis to create a new cause of action which would replicate, by state decisional law, the provisions of . . . the 1934 [Securities and Exchange] Act.").

133. 722 A.2d 5, 14 (Del. 1998) (emphasis added) (footnote omitted).

134. *See supra* Subpart III.B.1.

135. *See, e.g.*, Shamrock Assocs. v. Tex. Am. Energy Corp., 517 A.2d 658, 662 (Del. Ch. 1986). In considering the interrelationship between SEC Rules 14a-7 (the stockholder name "list or mail" rule), 17 C.F.R. § 240.14a-7 (2018), and section 220, DEL. CODE ANN. tit. 8, § 220 (2019), the Delaware Chancery court has observed that "there is no express conflict which would mandate a finding of preemption and the Delaware statute presents no obstacle to the objectives of federal law. The mere fact that state law acts upon a product of federal law—the NOBO [Non-Objecting Beneficial Owners] list is insufficient to trigger preemption." *Shamrock Assocs.*, 517 A.2d at 662; *see also* Mite Corp. v. Heli-Coil Corp., 256 A.2d 855, 856 (Del. Ch. 1969) ("[A]s to the absence of approval by the SEC, this is irrelevant in a § 220 proceeding.").

136. Stevelman Kahn, *supra* note 63, at 524.

while federal securities law is focused on capital markets, state corporate law is focused on the behavior of the board and management.[137] Second, federal securities law is more focused on specific disclosure rules, whereas state corporate law is more focused on standards-based common law. [138] In the words of one commentator, "[b]eyond the disclosures specifically and systematically prescribed by these federal statutes [the Securities Act of 1933 and the Securities and Exchange Act of 1934] and regulations lies an abyss of potential liability in connection with corporate disclosures and nondisclosures."[139]

Confronting the question of federalism—more specifically how the state duty of disclosure might relate to the federal duty of disclosure—would force courts to confront how state law would differ. For instance, consider the "materiality" doctrine. As discussed in Part II above, the Delaware courts have essentially adopted the definition of "materiality" from federal common law.[140] As former Delaware Supreme Court Justice Jack Jacobs notes, "A classic, although perhaps not complete, definition of the fiduciary duty of disclosure under Delaware law is that corporate directors are required to disclose all material information within their control when they seek stockholder action."[141] This may all be fine as far as it goes, but at least in the context of recent jurisprudence in the context of bank valuations in mergers and acquisitions (M&A), the Delaware courts seem to be gravitating toward a "fair summary"

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137. *See, e.g.*, *id.* at 513 ("Fiduciary law has a distinctive contribution to make in the regulation of managers' participation in disclosure. In contrast to the securities laws' preoccupation with the integrity of 'the market,' corporate fiduciary law has focused on supporting the integrity of corporate managers as it affects their official behavior.").

138. *See, e.g.*, *id.* at 514 ("This standards-based, more intuitive heuristic for managers' participation in the disclosure process supplies an important counter balance and complement to federal law's regulation of the precise timing and required topics of corporate disclosure."); *see also id.* at 513 ("Corporate fiduciary law should operate, optimally, as a supplement to such alternative, rules-based systems in reinforcing 'the big picture' in regard to shareholders' rightful expectations of candor, honesty, and diligence in managers' administration over disclosure.").

139. John H. Matheson, *Corporate Disclosure Obligations and the Parameters of Rule 10b-5:* Basic Inc. v. Levinson *and Beyond*, 14 J. CORP. L. 1, 2 (1988). A former Commissioner of the SEC has suggested that recent securities reform has gone too far:

> Some of these requirements [in Dodd-Frank] unashamedly interfere in corporate governance matters traditionally and appropriately left to the states. Others masquerade as disclosure, but are in reality attempts to affect substantive behavior through disclosure regulation. This mandated intrusion into corporate governance will impose substantial compliance costs on companies, along with a one-size-fits-all approach that will likely result in a one-size-fits-none model instead. This stands in stark contrast with the flexibility traditionally achieved through private ordering under more open-ended state legal regimes.

Daniel M. Gallagher, Comm'r, SEC, Remarks at the 26th Annual Corporate Law Institute at the Tulane University Law School: Federal Preemption of State Corporate Governance (Mar. 27, 2014), https://www.sec.gov/news/speech/2014-spch032714dmg.html.

140. *See supra* note 52 and accompanying text. For cases espousing the materiality standard, see generally, Skeen v. Jo-Ann Stores, Inc., 750 A.2d 1170, 1173 (Del. 2000); McMullin v. Beran, 765 A.2d 910, 925 (Del. 2000).

141. Jacobs, *supra* note 71, at 395.

standard that might be more stringent than materiality.[142] Along these lines, might Delaware try someday to differentiate the scope of its disclosures from federal law?

In a similar vein, consider that:

> An action for a breach of fiduciary duty arising out of disclosure violations in connection with a request for stockholder action does not include the elements of reliance, causation, and actual quantifiable monetary damages. Instead, such actions require the challenged disclosure to have a connection to the request for shareholder action. The essential inquiry in such an action is whether the alleged omission or misrepresentation is material.[143]

By contrast, when the duty of disclosure applies in contexts not requiring shareholder action, reliance becomes a key element of the cause of action.[144] Should Delaware's jurisprudence adopt the "fraud-on-the market" presumption developed by the U.S. Supreme Court in the context of securities fraud actions?[145] Should it espouse doctrines less protective of plaintiffs? More protective?

A reinvigorated duty of disclosure might throw into question the scope of the so-called Delaware "carve-out" under the 1998 Securities Litigation Uniform Standards Act (SLUSA). The "carve-out" preserves state law class actions when there is a request for shareholder action regarding an issuer buying back its shares, a tender offer, or a merger.[146] Yet to the extent *Brincat* is taken

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142. As then Vice Chancellor, now Chief Justice, Strine articulates it:

> In my view, it is time that this ambivalence be resolved in favor of a firm statement that *stockholders are entitled to a fair summary of the substantive work performed by the investment bankers* upon whose advice the recommendations of their board as to how to vote on a merger or tender rely. I agree that our law should not encourage needless prolixity, but that concern cannot reasonably apply to investment bankers' analyses, which usually address the most important issue to stockholders—the sufficiency of the consideration being offered to them for their shares in a merger or tender offer. Moreover, courts must be candid in acknowledging that the disclosure of the banker's "fairness opinion" alone and without more, provides stockholders with nothing other than a conclusion, qualified by a gauze of protective language designed to insulate the banker from liability.

In re Pure Res., Inc., S'holders Litig., 808 A.2d 421, 449 (Del. Ch. 2002) (emphasis added). *See generally* Brittany M. Giusini, Note, Pure Resources*' "Fair Summary" Standard: Disclosures Away from Obtaining Clarity in the M&A Context*, 38 DEL. J. CORP. L. 595 (2013) (offering a three-tiered approach to solve the problems resulting from *Pure Resources*: (1) disclosure of substantive work performed by investment bankers should be judged by the "materiality" standard set out in *Skeen*; (2) once a disclosure claim is initiated, boards should present courts with sufficient facts to show why the information sought by shareholders was not material; and (3) if the board acts in bad faith and fails to disclose, heightened equitable damages attach).

143. Malone v. Brincat, 722 A.2d 5, 12 (Del. 1998) (footnote omitted).

144. *See, e.g.*, Walsh, *supra* note 126, at 338 ("One of the difficulties encountered by shareholders who bring duty to disclose claims based on the mere sale or retention of shares, when shareholder action is not implicated, is the need to prove reliance. And if reliance is proved it must be done on an individual basis, making the assertion of class claims difficult, and without class actions such litigation is not practical.").

145. *See* Basic Inc. v. Levinson, 485 U.S. 224, 241–42 (1988).

146. More specifically, the statute preserves class action litigation under state law when there is a request with regard to

> (i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

seriously,[147] the "carve-out" may be unduly narrow. As Professor Jennifer O'Hare observes:

> The same facts that give rise to a claim for breach of fiduciary duty of disclosure often also give rise to a claim under the anti-fraud provisions of the federal securities laws. For example, assume that a company is making a self-tender for its outstanding common stock. After the tender offer has been completed, it is discovered that the company's tender offer materials contained material misstatements or omissions. Because the company's communications were materially false, a shareholder could bring an action for breach of fiduciary duty of disclosure. In addition, because the misleading tender offer materials constituted a material misrepresentation in connection with the purchase and sale of a security, the shareholder could also potentially bring an action under Rule 10b-5 of the federal securities laws.[148]

As such:

> Following *Brincat*, the Delaware carve-out no longer reflects Delaware's law of fiduciary duty of disclosure. Because the Delaware carve-out only applies to actions for breach of fiduciary duty of disclosure when shareholder action has been requested, the Uniform Act does not preserve state actions involving misleading market communications. In other words, certain state law actions based on breach of the fiduciary duty of disclosure are preempted by the Uniform Act.[149]

The "carve-out" was presumably designed for a pre-*Brincat* world and does not necessarily reflect recent jurisprudence.[150] To the extent that the state duty of disclosure is an after-thought, this state of affairs doesn't matter. Yet to the extent it is invigorated, then it could give Delaware space to push for an expansion of its "carve-out."

> (ii) any recommendation, position, or other communication with respect to the sales of securities of an issuer that—
>
> > (I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and
> >
> > (II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

15 U.S.C § 77p(d) (2012).

147. *See supra* notes 131–132 and accompanying text.

148. Jennifer O'Hare, *Director Communications and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws*, 70 U. CIN. L. REV. 475, 494 (2002).

149. *Id.* at 508. O'Hare suggests that "Congress should amend the Delaware carve-out to preserve all actions based on the fiduciary duty of disclosure, whether shareholder action has been requested or not." *Id.* at 526.

150. As SEC Chairman Levitt testified with regard to a House bill that did not include the "carve-out":

> H.R. 1689, as currently drafted, could preempt important state corporate law claims, most notably claims made pursuant to the "fiduciary duty of disclosure." *The fiduciary duty of disclosure imposes on directors and others the duty to speak truthfully when addressing shareholders with respect to certain corporate matters*. . . . In addition, when the stockholder action involves the purchase or sale of a security (e.g., corporate programs to repurchase their own shares and tender offers), the bill likely would have the effect of eliminating state causes of action arising out of such transactions.

Concerning H.R. 1689, The "Securities Litigation Uniform Standards Act of 1997," Before the H. Subcomm. on Fin. & Hazardous Materials, 105th Cong. 9 (1998) (testimony of Arthur Levitt, Chairman, SEC) (emphasis added).

CONCLUSION

While disclosure is far from a panacea,[151] continued refusal to engage in an invigorated duty of disclosure will regrettably take corporate law down the path of decreased shareholder protections and toward a specialized form of contract law. The duties of care and loyalty are well-worn and there is little that will likely happen, save for the duty of loyalty's inexorable march toward BJR as a standard of review in the wake of cases such as *In re CNX Gas Corp. Shareholders Litigation*,[152] *Kahn v. M & F Worldwide Corp.*,[153] *Lyondell Chemical Co. v. Ryan*,[154] and *C&J Energy Services, Inc. v. City of Miami General Employees'*.[155] The duty of good faith, post-*Disney*, is too fragile to be of much use. As Justice Walsh has candidly noted, "[a]s our current experience indicates, our theory of fiduciary responsibility has not been adequate to prevent abuse."[156] A counterpoint to all of this could be a reinvigorated duty of disclosure. But our current conceptualization of the duty of disclosure is too scattershot.[157] We need to rethink it—and, in the process, recognize that the duty of disclosure may actually explain a lot of what is actually going on in corporate law today. So while many jurists might consider the duty of disclosure as dead, in many ways it should be as relevant as ever.

151. *See, e.g.*, OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 191 (2014) ("But disclosure cannot be the key to such new designs. . . . 'While disclosure alone is unlikely to help, there's another option'—defaults." (quoting Michael S. Barr et al., Opinion, *A One-Size-Fits-All Solution*, N.Y. TIMES (Dec. 26, 2007), https://www.nytimes.com/2007/12/26/opinion/26barr.html)).

152. C.A. No. 5377-VCL, 2010 WL 2291842 (Del. Ch. May 25, 2010).

153. 88 A.3d 635 (Del. 2014), *overruled by* Flood v. Synutra Int'l, Inc., 193 A.3d 754 (Del. 2018).

154. 970 A.2d 235 (Del. 2009).

155. 107 A.3d 1049 (Del. 2014).

156. Walsh, *supra* note 126, at 340.

157. *Cf.* Joan MacLeod Heminway, *Martha's (and Steve's) Good Faith: An Officer's Duty of Loyalty at the Intersection of Good Faith and Candor* 7 (Univ. of Tenn. Knoxville Coll. of L., Research Paper No. 71, 2009), http://ssrn.com/abstract=1440919 (noting our "inherently reactive" disclosure doctrines).