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NO PEEKING: ADDRESSING PRETEXTUAL INSPECTION DEMANDS BY COMPETITOR-AFFILIATED SHAREHOLDERS

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ABSTRACT

This article exposes how Delaware private companies are vulnerable to pretextual inspections under the guise of valuation by shareholders who are affiliated with competitors of the companies. The Delaware Court of Chancery's 2020 decision in *Woods v. Sahara Enterprises, Inc.*, which deviated from established law by switching the initial burden of proof of the shareholder's motive to the target company, exacerbated this vulnerability. This article argues for reversing that decision and proposes changes in multiple areas of law to help companies fend off prying competitors who abuse statutory shareholder inspection rights for unfair advantages in competition.

I. INTRODUCTION

More than 60% of all Fortune 500 companies incorporate in Delaware, in part for its stable and specialized caselaw.[1] A shareholder of a Delaware corporation may view the corporation's nonpublic books and records by contacting the corporation to demand access. If the corporation refuses to satisfy all or part of this demand, she may access the information by filing a successful lawsuit under Delaware's shareholder inspection statute, Delaware General Corporation Law ("DGCL") Section 220. The statute provides that "[a]ny stockholder . . . shall . . . have the right during the usual hours for business to inspect for any proper purpose . . . [t]he corporation's stock ledger, a list of its stockholders, and its other books and records."

A shareholder needs to show a proper purpose for the inspection, which includes any purpose related to her interest as a corporation shareholder. For example, a shareholder can demand the corporation's shareholder ledger to communicate with other shareholders in preparation for a proxy fight. Alternatively, she can demand board meeting minutes or financial records to value her shares or investigate mismanagement, the two most common reasons for an inspection.

A shareholder who is employed by or cross-invested in a competitor company can demand an inspection as a pretext to access the corporation's proprietary information, providing a business advantage for the competitor. For an investigative inspection, the shareholder must show that the inspection is not frivolous under a heightened burden of proof: a credible basis for suspecting managerial misconduct. This requires extrinsic evidence of wrongdoing beyond lackluster

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[1] Charlotte Morabito, *Here's Why More Than 60% Of Fortune 500 Companies Are Incorporated in Delaware*, CNBC (Mar. 13, 2023, 8:00 AM), https://www.cnbc.com/2023/03/13/why-more-than-60percent-of-fortune-500-companies-incorporated-in-delaware.html.

performance by the corporation, disagreements with management, or bare suspicions. For a valuational inspection, however, the burden of proof is lower: a bona fide (or good faith) need to value the shares at the time of the request. Delaware courts do not require much evidence to find that a shareholder satisfied this burden. Private corporations face a higher risk of pretextual valuational inspections because the scarcity of public information about them means shareholders can often persuasively argue they need an inspection to value their shares.

This paper addresses the following real-world scenario: A senior researcher ("SR") worked for five years at Startup A, Inc., a private Delaware company that uses nanotechnology to develop new medical imaging devices. During that time, SR accumulated 0.5% of the company's stock by exercising stock options. Startup B, Inc., a competitor, uses nanotechnology to make airport security imaging devices. Startup B has hired SR by offering him a higher salary and lucrative stock options. Startup A suspects that Startup B hired SR because it plans to expand into the medical imaging business but has no direct evidence to substantiate that suspicion. SR submits an inspection demand to Startup A requesting its financial statements and tax returns for the past three years with a stated purpose of valuing Startup A and SR's shares. SR claims he will sell his shares if the price is right but has not taken any concrete steps to identify buyers. Should Startup A be required to open its proprietary books and records to a known competitor?

II. DELAWARE LAW ON INSPECTIONS BY COMPETITOR-SHAREHOLDERS

A. Competitor Affiliation Does Not Preclude an Inspection

Under Delaware law, a shareholder's affiliation with a competitor does not automatically prevent him from demanding an inspection. In *SafeCard Services, Inc. v. Credit Card Service Corp.*,[2] a competitor-shareholder sought to inspect the corporation's financial records to value its shares and investigate waste and mismanagement related to a tender offer. The court rejected the notion that a competitor-shareholder cannot show a proper purpose for an inspection. Although the court agreed that "allegations of improper motive . . . and irreparable harm to [the] business . . . are relevant in determining whether [the shareholder's] alleged purposes are genuine, and whether the resultant harm . . . warrants restricting [the shareholder's] inspection rights," the court found that a competitor-shareholder's demand for an inspection is not intrinsically "adverse to the best interests" of the corporation.[3]

Similarly, in *E.L. Bruce Co. v. State*,[4] shareholders affiliated with the corporation's direct competitor demanded to inspect the stock ledger to wage a proxy fight or buy additional shares. The Delaware Supreme Court held that inspecting the stock ledger was "obviously proper" and that status as "a competitor . . . does not of itself defeat the stockholders' statutory right of inspection."[5]

B. The Need to Value Shares Must Be Genuine

[2] No. 6426, 1984 WL 8265 (Del. Ch. Sept. 5, 1984).
[3] *Id.* at *4.
[4] 144 A.2d 533 (Del. 1958).
[5] *Id.* at 534.

While competitor affiliation alone does not preclude an inspection for valuation purposes, a shareholder must show a genuine need to value her shares. The outcome of an inspection suit is often determined by which party bears the burden of proof and which evidence demonstrates genuineness.

1. A Recent Shift on Who Bears the Initial Burden

Before 2020, Delaware courts—concerned that a valuation purpose for an inspection could disguise an improper motive—required shareholders to provide a reason for the valuation. In *Helmsman Management Services, Inc. v. A & S Consultants, Inc.*,[6] the court stated it was "not sufficient for [the shareholder] merely to assert that it would like to value its . . . stock. Without a showing of a present need for such a valuation, a mere statement of that purpose, though valid in law, might not be bona fide in fact."[7] Decades later, the court stated that asserting the valuation purpose requires "a particular need or reason for the valuation."[8] Indeed, the court held that a shareholder who fails to identify any reason why he needs to value his shares has not justified an inspection for the purpose of valuation.

Then, in 2020, the Delaware Court of Chancery inexplicably shifted the initial burden of proof from the shareholder to the target company for the inspection. In *Woods v. Sahara Enterprises, Inc.*,[9] the corporation was a private investment fund with layers of investment advisors that underperformed market indices over a one-year, three-year, five-year, and ten-year period. The shareholder demanded to inspect the corporation's books and records to: (1) obtain the names and addresses of other shareholders to communicate; (2) value her shares; and (3) investigate whether self-dealing by management was causing the corporation's underperformance. The corporation argued that a shareholder must demonstrate why she needs to value her shares,[10] that a "mere incantation of an accepted 'valuation' purpose . . . is [not] sufficient."[11]

The *Woods* court acknowledged that valuation is a long-recognized purpose for an inspection, "particularly where the corporation is privately held, . . . [b]ecause they do not receive the mandated, periodic disclosures associated with a publicly held corporation."[12] The court rejected the corporation's argument, stating that "Delaware law does not require a shareholder to establish both a purpose for seeking an inspection and an end to which the fruits of inspection will be put."[13] The court further noted that "[t]here is no requirement that [a shareholder] must, in addition [to stating a valuation purpose], have taken concrete steps to sell her shares."[14] The company bears the initial burden to show that the valuation is a pretext for some improper purpose. If the company fails to satisfy this burden, the inspection proceeds apace. However, if the company

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[6] 525 A.2d 160 (Del. Ch. 1987).
[7] *Id.* at 165.
[8] Mehta v. Kaazing Corp., No. 2017-0087, 2017 WL 4334150, *5 (Del. Ch. 1987).
[9] 238 A.3d 879 (Del. Ch. 2020).
[10] For instance, a shareholder may argue she plans to sell her shares, buy out other shareholders, apply for credit, or do estate planning.
[11] *Woods*, 238 A.3d at 891.
[12] *Id.* at 890 (quoting Thomas & Betts Corp. v. Leviton Mfg. Co., 685 A.2d 702, 713 (Del. Ch. 1995)).
[13] *Id.* at 891.
[14] *Id.*

satisfies this burden, the shareholder must explain her need to value the shares. The court then decides whether the shareholder's explanation is credible.

The court acknowledged that a target company's initial burden of proof is "fact intensive and difficult to establish."[15] The lack of a ready market or pending inquiries for the shares does not satisfy the burden. Caselaw has yet to clarify whether an inspecting shareholder's affiliation with a competitor helps the company satisfy its burden. Delaware courts have repeatedly ruled that competitor affiliation does not bar an inspection, though, so that factor is not likely to be sufficient on its own.

This shifting of the initial burden of proof to the target company is inconsistent with other areas of the law. Typically, an *actor* must prove his subjective mental state. For example, the Fair Housing Act prohibits a landlord from discriminating based on race, color, or national origin. The landlord must prove that his refusal to rent to the plaintiff was based on a legitimate economic or safety concern, not discrimination.[16] Most states have statutes prohibiting retaliatory eviction by a landlord after his tenant exercises a statutory right against him. They presume a retaliatory motive if the eviction occurs too soon after the tenant asserted his rights, and the landlord bears the burden to prove the eviction was not retaliatory.[17] In labor law, an employer bears the burden to show that an adverse employment decision against her employee was motivated by a nondiscriminatory reason.[18] To maintain conformity with other areas of law, when the motive of a competitor-shareholder demanding access to corporate records for valuation purposes is challenged as pretextual, the shareholder should be required to demonstrate the genuineness of his need for a valuation. *Woods*' shifting of the initial burden is inconsistent with precedent and defies logic.

2. The Low Burden of Proof for the Inspecting Shareholder

Even when a target company shows that the competitor-shareholder's demand for an inspection is likely pretextual, Delaware courts have set a low bar for the shareholder to rebut that allegation.

Helmsman[19] involved a shareholder who was also a customer and a business partner of the target company. The shareholder paid $1.1 million to the company over three years to license its computer software system. When auditors determined the company may be overbilling, the shareholder hired an accounting firm to inspect the company's records. The company refused the inspection request, so the shareholder filed suit under Section 220, with stated purposes including (1) valuing its interest; (2) monitoring the company's condition; and (3) learning why the company had not paid dividends.

The Court of Chancery acknowledged the shareholder's hesitancy to sell its shares and lack of marketing efforts but found them insufficient to show the shareholder's stated need to value its

[15] *Id.*
[16] 93 AM. JUR. 3D *Proof of Facts* § 415 (2023) (Proof of Housing Discrimination Against a Prospective Tenant on Account of Race or National Origin).
[17] *See* 99 AM. JUR. *Trials* § 289 (2023) (Retaliatory Eviction Claims).
[18] 42 U.S.C. § 2000e-2 (Unlawful Employment Practices).
[19] Helmsman Mgmt. Servs. v. A & S Consultants, Inc., 525 A.2d 160 (Del. Ch. 1987).

shares was pretextual. The court noted that "there may be situations where a shareholder . . . needs to value his stock to enable him to decide whether to sell."[20] Since the company had a right of first refusal on the shares and the market for the shares was limited, the court concluded that the shareholder had shown a valid need for an inspection for valuation purposes.

Still, the company argued that the shareholder's valuation purpose was a "smokescreen" for its actual purpose: gathering "evidence to support a potential . . . contract claim against [the company]."[21] Indeed, the shareholder had paid $25,000 to its accounting firm to perform the inspection but only owned $50,000 worth of shares of the company. The shareholder's significant accounting fees, the company argued, only made sense if the inspection was intended to facilitate the shareholder's lawsuit to recover some of the $1.1 million from the licensing agreement, which is not a valid purpose for an inspection. Although this argument was compelling, the court concluded that the inspection was intended to further the shareholder's interest as *both* a creditor and a shareholder. Without explanation, the court concluded that the "primary thrust" of the shareholder's inspection was to value its shares.[22]

In *Radwick Pty., Ltd. v. Medical, Inc.*,[23] Radwick, the subsidiary of an Australian holding company, held shares of Medical, a privately held Delaware corporation. Medical began making private placements of shares that excluded Radwick, which made Radwick concerned about its shares being diluted. Radwick's concerns grew on learning that Medical was planning to set up a major research facility in Australia without telling Radwick. Eventually, Radwick demanded to inspect Medical's records under Section 220 with stated purposes of (1) valuing its shares and (2) communicating with other shareholders about the *possible* purchase or sale of shares of Medical.

Medical argued that Radwick was using the valuation purpose as a pretext to gather information about the company's Australian investment and that sharing information about pending transactions would jeopardize negotiations. The court agreed that "Radwick [was] interested in finding out as much as it [could] about the Western Australian transaction . . . because Radwick [was] curious about Medical's invasion of Radwick's home turf."[24] Still, the court held that Radwick's valuation purpose was genuine. Though Radwick showed no definitive plan to sell its shares, the court stated that "the fact that Radwick is holding open these options is only a reflection of the business realities of any possible transaction where the party is not forced to accept the deal regardless of its terms."[25] As *Radwick* illustrates, Delaware courts have tended toward a credulous approach to evaluating a competitor-shareholder's stated valuation purpose for an inspection.

III. THE LIMITED OPTIONS FOR PROTECTING PROPRIETARY INFORMATION

A. Confidentiality Agreements

[20] *Id.* at 165.
[21] *Id.* at 166.
[22] *Id.* at 167.
[23] No. 7610, 1984 WL 8264 (Del. Ch. Nov. 7, 1984).
[24] *Id.* at *3.
[25] *Id.*

Delaware courts can impose reasonable confidentiality restrictions or require parties to negotiate a confidentiality agreement as a precondition to a shareholder inspection. The target company must show the court that the requested restrictions are necessary. Practitioners recommend the company "explain why [the] information may be highly sensitive" and "articulate its specific concerns based on the specific information and the specific harms [that use of the information] may cause."[26] Confidentiality agreements should generally be time-limited, as the Delaware Supreme Court has stated that indefinite confidentiality "should be the exception and not the rule" and that a shareholder "need not show exigent circumstances" for a court to impose a time limit on confidentiality.[27]

A confidentiality agreement can restrict the sphere of entities to which the signatory shareholder may disclose nonpublic information. Such an agreement could differentiate treatment by the degree of competition with the target company. For example, an agreement could define a non-competitor, level-one competitor, or level-two competitor, permitting the shareholder to disclose nonpublic information to any representatives of a non-competitor, to any non-management representatives of a level-one competitor, and only to the independent financial advisors of a level-two competitor. In *Schoon v. Troy Corp.*,[28] the Court of Chancery held that a provision prohibiting financial advisors from disclosing information that forms the basis of their valuations to a level-two competitor is unreasonable.

A confidentiality agreement may specify who determines the competitor status of a third party and by what method. A pro-company provision would empower the company to make the determination "in good faith by the company based on products or by any previous intellectual property infringement." A more objective provision would base the determination on the extent of overlap in the companies' respective business operations. Both types of provisions have appeared in sample agreements.

Confidentiality agreements often contain a liquidated damages provision imposing penalties on shareholders who breach the terms. The *Schoon* court warned against exorbitant penalties that would have a chilling effect on the marketability of the shareholder's shares.

However, even elaborate confidentiality agreements are ineffective at protecting a target company's proprietary information when the inspecting shareholder is affiliated with a competitor. The competitor can use the knowledge obtained through an inspection to advance its own interests, and effectively enforcing confidentiality is nearly impossible.

B. Ex-Ante Limitations on Inspection Rights Through Private Ordering

1. Restrictions in the Certificate of Incorporation or Bylaws

[26] Gail Weinstein et al., *Section 220 Decisions Amplify Stockholders' Rights to Inspect Books and Records*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 3, 2022), https://corpgov.law.harvard.edu/2022/10/03/section-220-decisions-amplify-stockholders-rights-to-inspect-books-and-records.
[27] Tiger v. Boast Apparel, Inc., 214 A.3d 933, 939 (Del. 2019).
[28] No. Civ.A. 1677-N, 2006 WL 1851481 (Del. Ch. June 27, 2006).

Delaware courts have enforced contractual restrictions on shareholder inspections only when they are explicitly negotiated and unequivocally stated. Restrictions in a corporate charter or bylaws have been found unenforceable.[29] Even before the enactment of Section 220, the Delaware Supreme Court invalidated the following corporate charter provision limiting shareholder inspection rights by giving the board of directors absolute authority:

> To determine from time to time whether, and, if allowed, under what conditions and regulations, the accounts and books of the corporation shall be open to the inspection of the stockholders, and the stockholders' rights in this respect are and shall be restricted or limited accordingly, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute or authorized by the board of directors, or by a resolution of the stockholders.[30]

The court held that Delaware law was not intended "to give the corporation the power to prevent any inspection or examination of the company's books," only the power to "reasonably limit and regulate" inspection rights.[31]

The Court of Chancery invalidated provisions in one corporation's certificate that barred sharing financial information with shareholders holding "less than three percent of the 'then-registrable securities'" or "less than two million dollars of . . . preferred stock."[32] Though these limitations were facially reasonable, the court held that corporate directors could not "rely upon a certificate provision prohibiting disclosure to avoid a shareholder's inspection right conferred by statute" because "[a] charter provision that conflicts with a statute is void."[33] The court had previously voided a similar restriction in another corporation's certificate.[34]

2. Restrictions in Shareholder Agreements

When a shareholder agreement limits inspections in contradiction of the statutory inspection right, this creates tension between the statutory mandate and the shareholder-corporation contractual relationship. On one hand, "a shareholder agreement cannot be used to override a statutory requirement" like the inspection right.[35] On the other hand, freedom of contract requires that freely negotiated agreements be enforced unless they contradict a strong public policy.[36] Delaware courts resolve this tension by insisting that any restriction on shareholder inspection rights be "clearly and affirmatively expressed" and reasonable in scope.[37]

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[29] *See* State v. Penn-Beaver Oil Co., 143 A. 257 (Del. 1926).
[30] *Id.* at 86.
[31] *Id.* at 87.
[32] Marmon v. Arbinet-Thexchange, Inc., No. Civ.A. 20092, 2004 WL 936512, at *1 (Del. Ch. Apr. 28, 2004).
[33] *Id.* at *5, *5 n.12.
[34] Loew's Theatres, Inc. v. Com. Credit Co., 243 A.2d 78 (Del. Ch. 1968).
[35] Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 936 (2021).
[36] *See* ev3, Inc. v. Lesh, 114 A.3d 527, 529 n.3 (Del. 2014).
[37] Kortum v. Webasto Sunroofs, Inc., 769 A.2d 113, 125 (Del. Ch. 2000); *see also* Schoon v. Troy Corp., 2006 WL 1851481, at *2 (Del. Ch. June 27, 2006).

a. Narrow Interpretation

Delaware courts tend to interpret restrictive covenants narrowly, invalidating them for technical shortfalls and disregarding the contractual parties' intentions. In *Juul Labs, Inc. v. Grove*,[38] Grove was a former employee and small shareholder of Juul, a privately held Delaware corporation based in California. Grove demanded to inspect Juul's books and records under California law, which "grants inspection rights to any stockholder in a corporation with its principal executive office in California," regardless of the state of incorporation.[39] In response, Juul sued Grove in the Delaware Court of Chancery, arguing that Grove waived his inspection rights in his agreements with Juul.

A grant agreement between Grove and Juul included the following provision, captioned "WAIVER OF STATUTORY INFORMATION RIGHTS":

> *Optionee* [Grove] *hereby unconditionally and irrevocably waives the Inspection Rights*, whether such Inspection Rights would be exercised or pursued directly or indirectly pursuant to Section 220 or otherwise, and covenants and agrees never to directly or indirectly commence . . . any claim, action, cause of action, or other proceeding to pursue or exercise the Inspection Rights.[40]

An exercise agreement between Grove and Juul contained similar language, reiterating Grove's waiver of his inspection rights. To avoid ambiguity, the waiver provision in each agreement specified the waiver to apply to the right "to inspect for any proper purpose, . . . the Company's stock ledger, a list of its stockholders, and its other books and records, and the books and records of subsidiaries of the Company, if any, . . . in the manner provided in Section 220 of the General Corporation Law of Delaware."[41] Grove had also signed investor agreements with Juul containing similar waivers.

These waiver provisions could hardly memorialize Grove's desire to waive his statutory inspection rights related to Juul more unequivocally. However, the Court of Chancery refused to enforce the provisions due to various technicalities. Grove made his inspection demand under California law, not Section 220, so the court stated that it need not address whether Grove had "validly waived his inspection rights." Perhaps due to careless drafting, the provisions in the investor agreements specified that they only applied to "holders of the Shares listed on Exhibit A," but Grove's name did not appear on Exhibit A.[42] Ignoring the parties' apparent intention to waive statutory inspection rights, the court concluded that "the waiver provisions . . . do not apply to Grove."[43] Still, it is noteworthy that the court did not reject the provisions outright for violation of public policy.

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[38] 238 A.3d 904 (Del. Ch. 2020).
[39] *Id.* at 907.
[40] *Id.* at 909.
[41] *Id.*
[42] *Id.* at 912.
[43] *Id.*

In *Quantum Technology Partners IV, L.P. v. Ploom, Inc.*,[44] the shareholder agreement limited inspection rights to "major shareholders" owning at least three million shares of the company. The shareholder held less than that amount but nonetheless sued to exercise its inspection rights under Section 220. The agreement stated that "the elimination of [shareholder] Quantum's rights . . . shall not constitute a waiver of Quantum's right as a stockholder to pursue inspection of books and records under Section 220."[45] The court ordered the company to share its records with the shareholder, holding that the shareholder had not "clearly and affirmatively" waived its *statutory* inspection rights despite the unambiguous contractual intent to limit inspections to "major shareholders." Apparently, the parties intended to limit inspections to major shareholders without *otherwise* affecting shareholders' Section 220 rights, yet the court fixated on a technical drafting error, ignoring the indisputable intention of the parties.

b. The Uncertain Validity of Categorical Waivers

Uncertainty lingers over whether an outright waiver of inspection rights through a shareholder agreement is enforceable. On one hand, the court in *State v. Penn-Beaver Oil Co.* opined that Delaware law was not intended "to give the corporation the power to prevent any inspection or examination of the company's books," only the power to "reasonably limit and regulate" inspection rights.[46] On the other hand, the court in *Juul Labs* invalidated a categorical waiver of inspection rights for a drafting error, not for overbreadth.

Where Delaware courts have enforced contractual arrangements on shareholder inspection rights, these arrangements have tended to expand these rights, not limit them. In *Murfey v. WHC Ventures, LLC*,[47] two limited partners demanded to inspect their Delaware limited partnership's books and records under Delaware Code Section 17-305, Delaware's inspection statute for partnerships with language analogous to Section 220. The limited partnership argued that the partnership agreements included an implied restriction that only "necessary and essential" information be shared, though no such language appeared in the agreements. In a divided opinion, the Delaware Supreme Court rejected this argument on grounds that "courts cannot rewrite contracts."[48]

Categorical waivers of statutory rights have been upheld, though, with regard to shareholder appraisal rights in a corporate merger.[49] There, the court emphasized the fact that the shareholder challenging the waiver's validity was sophisticated and represented by counsel. When the shareholder argued that enforcing a waiver of a statutory right is against public policy, the court responded that appraisal rights—intended to ensure shareholders receive fair compensation when involuntarily exiting a corporation—are not fundamental to corporate governance. In contrast, shareholder inspection rights are widely regarded as central to effective corporate governance. Moreover, small shareholders are often employees of the corporation who acquired their shares by exercising stock options. They are asked to "take or leave" the shareholder agreement without

[44] C.A. No. 9054, 2014 WL 2156622 (Del. Ch. May 14, 2014).
[45] *Id.* at *6 n.49.
[46] 143 A. 257, 259 (Del. 1926).
[47] 236 A.3d 337 (Del. 2020).
[48] *Id.* at 355.
[49] *See* Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199 (Del. 2021).

negotiating terms and are seldom represented by counsel. Thus, even if a categorical waiver of inspection rights is not invalidated on policy grounds, the court determines its enforceability case-by-case, considering the shareholder's sophistication and the circumstances surrounding the shareholder agreement's execution. Consequently, a Delaware company can hardly predict ex-ante whether a carefully drafted agreement will shield its proprietary information from a prying competitor-shareholder.

IV. How should the law change to better protect Proprietary Information from Competitors

Even when a private corporation in Delaware follows best practices to safeguard its nonpublic information from competitors, the state's current legal landscape on shareholder inspection rights poses a significant vulnerability, enabling competitors to explore pretextual inspections. To promote fair market competition, it is imperative for the law to change and prevent competitors from leveraging inspections to claim an unfair business advantage. The following changes are warranted:

1. Reverse the decision in *Woods*, which places an undue evidentiary burden on the corporation to prove the shareholder's motive, deviating from established precedents and inviting pretextual inspections. The court should instead impose the initial burden on the shareholder to support her claim that a valuation is needed.

2. Although shareholders generally need not take concrete steps toward completing the transactions prompting the need for a valuation, the law should treat a competitor-shareholder differently by requiring him to show *some* actions to demonstrate his genuineness. This exception is merited due to a corporation's heightened vulnerability to pretextual inspections by competitors.

3. The court should interpret a contractual waiver of inspection rights signed by a competitor-shareholder with the plight of the corporation in mind. In this limited instance, the court should deviate from its pro-shareholder tendency, which has caused contracting parties' clearly intended waivers to be invalidated for trivial technical errors.

4. When an opportunity arises, the court should uphold the validity of a voluntary contractual waiver that bars shareholders from inspecting corporate records for the duration of their affiliation with competitors of the corporation. Legitimate shareholder inspections are central to corporate governance, but protecting the proprietary information of a corporation from a competitor's abuse of the statutory inspection right is just as vital to fair competition. A voluntary waiver with a limited duration strikes the proper balance between these two competing concerns.

V. Conclusion

The balance between shareholder inspection rights and corporate privacy is a crucial issue in corporate governance. Shareholders should have reasonable access to information, but not at the expense of compromising the company's competitive edge or secrets. The current law fails to

protect companies, especially private ones, from spurious inspections disguised as valuation exercises. This article suggests ways to reform the law and prevent intrusive inspections by rival shareholders.