IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBERT L. KING,	)	
	)	
Plaintiff,	)	C.A. No. 7770-VCP
	)	
v.	)	
	)	
DAG SPE MANAGING MEMBER, INC., a Delaware corporation,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: September 18, 2013
Decided: December 23, 2013

Elizabeth Wilburn Joyce, Esq., Joanne P. Pinckney, Esq., PINCKNEY, HARRIS & WEIDINGER, LLC, Wilmington, Delaware; *Attorneys for Plaintiff*.

Bernard G. Conaway, Esq., Wilmington, Delaware; *Attorney for Defendant.*

PARSONS, Vice Chancellor.

This is a books and records action. The matter is before me on the defendant's motion to dismiss the complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim. The plaintiff, a non-stockholder, former member of the defendant's board of directors, seeks to inspect the defendant's books and records, under 8 *Del. C.* § 220(d) and the common law, to investigate generally whether mismanagement or breaches of fiduciary duties occurred during the period of his directorship. The plaintiff asserts no other claims against the defendant.

This Memorandum Opinion reflects my ruling on the defendant's motion to dismiss. For the reasons that follow, I grant the motion.

I. BACKGROUND[1]

A. The Parties

Plaintiff, Robert L. King, is a resident of the District of Columbia ("D.C." or the "District"). King was named as an initial director of Defendant, DAG SPE Managing Member, Inc. ("DAG" or the "Company"). King never owned stock in the Company. He is a retired twenty-five-year D.C. government employee and now serves as an Advisory Neighborhood Commissioner for Advisory Neighborhood Commission

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[1] Unless otherwise noted, the facts recited herein are drawn from the well-pled allegations of the plaintiff's First Amended Verified Complaint to Compel Inspection of Books and Records (the "Amended Complaint") and the documents attached to it, and are presumed true for the purposes of the defendant's motion to dismiss.

("ANC") 5A in the District.[2] In his capacity as an ANC Commissioner, King is the longest serving elected official in the District.

DAG is a Delaware corporation with its principal place of business located in Washington, D.C. DAG and its affiliates[3] own, operate, or supply over 200 Shell and Exxon branded retail gas stations, convenience stores, and car washes in D.C. and in the boroughs of Manhattan, Queens, and the Bronx, in New York. The Company's sole stockholders are Eyob Mamo, Tamrat Mamo, and Gerald Schaeffer. Those three individuals, along with King, were named as initial directors of DAG. Eyob Mamo is President and Tamrat Mamo is Vice President and Secretary of the Company.[4]

King and Eyob Mamo have been acquaintances for over twenty-five years. On at least one occasion, Eyob Mamo has sought King's assistance in King's capacity as an ANC Commissioner in seeking to construct a gas station in ANC 5A's jurisdiction.

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[2] ANCs advise the District's City Council, Mayor, and executive agencies and government, as to all policy decisions, including planning, streets, recreation, health, safety, and sanitation, that may affect the area within a particular ANC's jurisdiction. DAG or its affiliates operate at least four Shell brand service stations in ANC 5A's jurisdiction.

[3] King alleges that DAG serves as managing member to a number of its affiliates.

[4] I refer occasionally to the litigants by their first names solely to avoid confusion.

B. Facts

1. The Certificate of Incorporation

On December 15, 2000, DAG was incorporated in the State of Delaware on filing a Certificate of Incorporation (the "Certificate") with the Delaware Secretary of State. The Certificate lists King as an initial director of DAG.

At its inception, DAG existed to: (1) serve as the independent and managing member of DAG Petroleum Suppliers, LLC ("DAG Petroleum"); (2) execute and deliver the limited liability company agreement of DAG Petroleum; (3) execute and deliver, on behalf of DAG Petroleum, certain loan and related documents that involved FFCA Acquisition Corporation ("FFCA") as lender (the "Loan Documents"); and (4) take such actions as necessary to permit DAG Petroleum to achieve its limited purpose of owning, leasing, refinancing, selling, conveying, financing, mortgaging, and otherwise disposing of certain real estate and equipment pursuant to the Loan Documents.[5] In addition, the Certificate required unanimous written consent of all the directors to take certain enumerated corporate actions so long as any indebtedness remained outstanding under the Loan Documents.[6] Relatedly, the Certificate required the Company to maintain at least two independent directors, and, if one of those directorships became vacant, to

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[5] Am. Compl. Ex. A, Art. III (the "Original Purpose Section").

[6] *Id.* Art. IV.

refrain from taking any action requiring unanimous director consent until a successor independent director was elected.[7]

Twice DAG has corrected or amended its Certificate. On December 21, 2000, DAG caused a Certificate of Correction to be filed with the Secretary of State. This document changed the entity for which DAG served as managing member and the entity subject to the Loan Documents to DAG Realty, LLC, reduced the required number of independent directors to one, and specifically named King as that independent director. Then, on December 18, 2003, DAG caused a Certificate of Amendment to be filed with the Secretary of State, which deleted the entire Original Purpose Section and replaced it with much broader language without enumerated purposes. DAG has not amended its Certificate to remove King's name as independent director.

DAG's charter also has lapsed twice for failure to file annual reports or for non-payment of taxes payable to Delaware. On March 21, 2003, and on April 16, 2010, DAG caused Certificates of Renewal and Revival to be filed with the Secretary of State. Each document contains a provision indicating that it was filed by authority of the duly elected directors of DAG in accordance with Delaware law.[8]

King alleges that he had no knowledge of DAG or that he was a director of it until March 28, 2003.

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7 *Id.*

8 *Id.* Exs. C, E.

2. Eyob Mamo reaches out to King

King claims that Eyob Mamo and he discussed only once the existence of DAG and King's involvement with the corporation. On or about March 28, 2003, Eyob Mamo notified King that he intended to name King as a director of DAG and requested King's signature, in the capacity of a DAG director, to sell property to Howard University. Thereafter, King received by facsimile a document entitled "Action by Unanimous Written Consent of the Directors of [DAG]," dated March 28, 2003 (the "Written Consent").[9] The Written Consent authorized the sale of certain real estate, the acquisition of another property, both in D.C., and the borrowing of funds from Harbor Bank of Maryland in connection with the acquisition. The Written Consent also reflected the DAG Board's approval of a realty contract and a commitment letter related to the piece of real estate being acquired. King executed the Written Consent and sent it to Eyob Mamo's counsel.[10]

3. King makes demand for books and records

In spring 2011, King came across the Written Consent while clearing out documents that he had brought home from his office. King also found in his records a second document similarly titled, dated April 1, 2003.[11] This second document allegedly was part of a facsimile transmission on April 17, 2003, and purports to authorize the

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9 *Id.* Ex. F.

10 King alleges that, had he been aware that he was named a director of DAG even earlier, he would not have executed the Written Consent. Am. Compl. ¶ 26.

11 *Id.* Ex. G.

borrowing of funds from Harbor Bank of Maryland, secured by property in D.C. Although the document appears to have been executed by all four DAG directors, including King, King denies having signed the document.

After rediscovering the Written Consent in 2011, King directed his counsel to investigate DAG's filings with the Secretary of State and the D.C. Recorder of Deeds. This investigation revealed to King—allegedly for the first time—that he was an independent director of DAG as early as December 2000 and that DAG had financed at least fourteen properties through FFCA in 2000.

On or about April 20, 2011, counsel for Eyob Mamo informed King that, on December 18, 2003, DAG's stockholders removed and replaced King as DAG's independent director by unanimous written consent.[12] Then, on April 23, 2012, King made written demand on DAG for books and records under 8 *Del. C.* § 220(d) relating to the corporation's actions taken while King was an independent director of DAG (the "Demand"). King's stated purpose was for, among other things, determining whether King's signature was forged on any documents and investigating whether currently he is liable personally for actions taken while he was director. Specifically, King demanded

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[12] On June 19, 2012, DAG produced to King a document entitled "Unanimous Written Consent of the Board of Directors" and dated December 18, 2003 (the "Removal Document"), which also purports to reflect the "unanimous written consent of the shareholders" and declares the removal and replacement of King as the independent director. Am. Compl. Ex. I. King has reserved the right to challenge the Removal Document. He avers, however, that, without having access to DAG's bylaws, he cannot ascertain, for example, whether the Removal Document is valid under Delaware law.

eight categories of documents either created during or relevant to his directorship, *i.e.*, from approximately December 2000 to December 2003, including copies of: (1) documents evidencing corporate action; (2) documents purportedly executed by King in his capacity as DAG's independent director; (3) minutes of any meetings of DAG's Board of Directors (the "Board") that took place during King's directorship; (4) all correspondence, including notices of any meetings of the Board, that were sent to or received from King; (5) DAG's financial statements; (6) all agreements entered into by DAG; (7) a list of all of DAG's officers, directors, and stockholders; and (8) any analyses and reports by experts including those that would be relevant to documents purportedly executed by King.[13]

C. Procedural History

King filed his Verified Complaint to Compel Inspection of Books and Records on August 9, 2012. The Company moved to dismiss the complaint pursuant to 12(b)(6) on September 5, 2012.

On October 24, 2012, King filed the Amended Complaint. Then, on January 22, 2013, the Company filed its Motion to Dismiss the Amended Complaint Pursuant to Delaware Court of Chancery Rule 12(b)(6) (the "Motion to Dismiss").

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[13] *Id*. Ex. H.

In the Amended Complaint, King seeks an order compelling the Company to produce the documents set forth in the Demand. He seeks that relief under 8 *Del. C.* § 220(d) or, alternatively, as a matter of common law.[14]

D. Parties' Contentions

DAG argues that King lacks standing to inspect DAG's books and records under Section 220(d) because he is not a director. In support, DAG cites *Jacobson v. Dryson Acceptance Corp.*[15] for the proposition that, as a threshold rule, once a director properly is removed from office, that director loses standing to pursue a claim for books and records under Section 220(d).[16] Applying that reasoning, DAG contends that the Court should dismiss Count I of the Amended Complaint because King has not challenged the validity of the Removal Document. In addition, DAG asserts that any common law inspection rights that historically directors may have possessed were codified in Section 220(d), when it first was adopted in 1981.[17] According to DAG, therefore, King cannot enforce any such common law right independent of Section 220(d).[18]

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14 *Id*. ¶¶ 39–48 (respectively, "Count I" and "Count II").

15 2002 WL 75473, at *1 (Del. Ch. Jan. 9, 2002).

16 *Id.* at *4 (citing *Everett v. Transnation Dev. Corp*., 267 A.2d 627, 630 (Del. Ch. 1970)).

17 Mot. to Dismiss 10 (citing *Seinfeld v. Verizon Commc'ns Inc.,* 909 A.2d 117, 119 (Del. 2006)).

18 DAG argues alternatively that, to the extent King can assert any common law inspection rights, they are the province of the Delaware Superior Court. *Id.* at 11–12 & n.6. DAG also notes that, to the extent other jurisdictions have permitted former directors access to books and records, the directors in those cases were

Even assuming King has standing, DAG further argues that he has not stated a proper purpose pursuant to Section 220(d). Specifically, DAG notes that King seeks to inspect DAG's books and records "to determine whether any purported, unspecified improprieties have occurred,"[19] but he has not alleged any mismanagement or breach of fiduciary duty, during the relevant period. Thus, DAG argues that King only seeks to "rummage through the corporation's drawers."[20]

King advances several counterarguments. He first contends that DAG's conduct, *i.e.*, holding him out as a director from 2000 to 2003, "trad[ing] on his name without disclosing to him the substance of the transactions[] or affording him the opportunity to exercise his fiduciary duties[,]" and then removing him as director without deleting his name from the Certificate, itself has conferred standing on King "to assert his statutory and common law rights."[21] Invoking this Court's equity jurisdiction, King asserts that the Court should not now permit DAG to stand on procedure to deny King's Demand.

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under threat of being, or were accused of acting unlawfully or of improperly failing to act while they were directors. *Id.* There are no such allegations in this case.

[19] *Id.* at 15 (internal quotations omitted). DAG also suggests that, in any event, legal claims related to corporate actions taken while King was a director probably would be time-barred.

[20] *Id.* at 14.

[21] Pl.'s Answering Br. 14.

Second, King avers that, under the *Moore Business Forms, Inc.*[22] line of cases, he has the same information rights as the other DAG directors and that a Section 220(d) action is a proper vehicle to enforce those rights.[23] In addition, King asserts that he possesses information rights independent of Section 220(d) because several of this Court's previous decisions have held that access to a corporation's books and records is a corollary right to a director's fiduciary duties or otherwise is permitted to directors even outside the Section 220(d) context. Thus, King contends that he is entitled to essentially all of DAG's corporate records related to the period from 2000 until 2003 that were shared with other DAG directors.

Third, regarding his purpose, King asserts that inspecting books and records to ascertain "compliance with his fiduciary obligations to the corporation and its stockholders and the Company's compliance with its charter documents" is proper under Section 220(d). King also resists any narrowing of his request for books and records on the ground that he never has been privy to DAG's dealings.

Finally, King contends that whether some potential claims relating to the 2000 to 2003 period are stale is irrelevant because a books and records investigation still may uncover actionable claims related to his assertion that loan documents executed during or

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22 *Moore Bus. Forms v. Cordant Hldgs. Corp.*, 1996 WL 307444, at *1 (Del. Ch. June 4, 1996).

23 Pl.'s Answering Br. 15 (citing *Hall v. Search Capital Gp., Inc.*, 1996 WL 696921, at *2 (Del. Ch. Nov. 15, 1996)).

after King's tenure inaccurately or improperly may have referenced his position within DAG or required his approval.

II. ANALYSIS

A. Standard of Review

This is a motion to dismiss under Court of Chancery Rule 12(b)(6). As recently reaffirmed by the Delaware Supreme Court,[24] "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[25] That is, when considering such a motion, a court must:

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[26]

This "reasonable conceivability" standard asks whether there is a "possibility" of recovery.[27] If the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the

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[24] *See Winshall v. Viacom Int'l, Inc.*, 2013 WL 5526290, at *4 n.12 (Del. Oct. 7, 2013).

[25] *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

[26] *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

[27] *Id.* at 537 & n.13.

motion to dismiss.[28] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[29] Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.[30]

Generally, the Court will consider only the pleadings on a motion to dismiss under Rule 12(b)(6). "A judge may consider documents outside of the pleadings only when: (1) the document is integral to a plaintiff's claim and incorporated in the complaint or (2) the document is not being relied upon to prove the truth of its contents."[31]

The question presented here is whether and to what extent a non-stockholder, former director is entitled to inspection rights under either 8 *Del. C.* § 220(d) or the common law that would enable him to access corporate documents that he could have accessed while he was a director.

B. King Does Not State a Claim Under Section 220(d)

In Delaware, a director's right to inspect corporate books and records is fundamental in view of the imposition of fiduciary duties.[32] Under Section 220(d):

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28 *Id.* at 536.

29 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

30 *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation).

31 *Allen v. Encore Energy P'rs*, 72 A.3d 93, 96 n.2 (Del. 2013).

32 *Holdgreiwe v. Nostalgia Network, Inc.*, 19 Del. J. Corp. L. 326, 331 (Del. Ch. 1993).

> Any director shall have the right to examine the corporation's stock ledger, a list of its stockholders and its other books and records for a purpose reasonably related to the director's position as a director.

A director's inspection rights are broad but not absolute,[33] and whether the Court will enforce them requires a two-part inquiry.[34] First, the individual seeking inspection must make out a *prima facie* case. He does so by showing that he is a director of the target corporation and that he demanded inspection and was refused.[35] Second, the director must seek inspection for a proper purpose, though the corporation bears the burden to show that the director's purpose is improper.[36]

Here, I find that King adequately has pled that he made demand to inspect certain of DAG's books and records and that DAG refused. It is not clear, however, that King is

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33 *Milstein v. DEC Ins. Brokerage Corp.*, C.A. Nos. 17586 and 17587, at 3 (Del. Ch. Feb. 1, 2000) (TRANSCRIPT); *Holdgreiwe*, 19 Del. J. Corp. L. at 332.

34 *See Holdgreiwe*, 19 Del. J. Corp. L. at 332 (noting that, because the plaintiff undisputedly was a director who had made demand to inspect books and records, the only issue remaining related to the plaintiff's purpose in seeking inspection).

35 *Henshaw v. Am. Cement Corp.*, 252 A.2d 125, 129 (Del. Ch. 1969). *Cf. Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 144 (Del. 2012) (stating that, before the corporation need entertain the proper purpose inquiry, a stockholder suing to enforce inspection rights under Section 220 first must establish, among other things, that the stockholder is, in fact, a stockholder).

36 8 *Del. C.* § 220(d). *See also Kortum v. Webasto Sunroofs Inc.*, 769 A.2d 113, 118 (Del. Ch. 2000) (citing *Intrieri v. Avatex*, 1998 WL 326608, at *1 (Del. Ch. June 12, 1998)). In addition, Section 220(d) provides that the Court may "prescribe any limitations or conditions with reference to the inspection . . . as the Court may deem just and proper."

a "director" as required in Section 220(d). DAG contends that, because he ceased to be a director in 2003, King lacks standing to assert any inspection rights under the statute.

As an initial matter, I conclude that DAG's position is correct based on the express language of Section 220(d). Under the statute, "[a]ny director shall have the right to examine the corporation's . . . books and records . . . ."[37] The meaning of this statute is plain and unambiguous: only current directors have inspection rights under Section 220(d). In *Scattered Corp. v. Chicago Stock Exchange, Inc.*,[38] this Court addressed a similar issue regarding Section 220(c). There, a member of a nonstock corporation sued the company to enforce its inspection rights under Section 220(c), which has roughly the same language in terms of a stockholder as Section 220(d) has regarding a director.[39] After concluding that the Delaware General Assembly applied the word "stockholder" purposefully and thereby meant to exclude other classes of plaintiffs, such as "members of a nonstock corporation," the Court in the *Scattered Corp.* case dismissed the action on the basis that it did not have subject matter jurisdiction of the case because of Section 220(c)'s "exclusive jurisdiction" clause.[40] Analogous to Section 220(c), Section 220(d)

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37 8 *Del. C.* § 220(d).

38 671 A.2d 874 (Del. Ch. 1994).

39 *Id.* at 875.

40 *Id.* at 877–80; 8 *Del. C.* § 220(c) ("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."). In *Scattered Corp.*, the Court refused to expand the phrase "person seeking inspection" to mean something other than a

omits any reference to non-directors and contains a similar jurisdictional clause, with the only difference being that it replaces "person seeking inspection" with "director."[41]

In addition, once a director of a Delaware corporation properly is removed from office, that individual's right to inspect books and records of the corporation involved under Section 220(d) ends.[42] As King has noted, other states have conferred limited books and records inspection rights on former directors.[43] For example, in New York, "a former director may [] have a qualified right to inspect [] books and records covering a period of his directorship whenever . . . he can make a proper showing . . . that such

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"stockholder" and therefore dismissed the case as not falling within the statute. 671 A.2d at 877–80.

41 8 *Del. C.* § 220(d). On this basis, I reject King's argument that this Court should bless his demand on the grounds that, in equity, DAG should not be able to name him a director surreptitiously, execute numerous transactions without his knowledge, and then prevent his investigation, on procedural grounds, after he was removed as a director. The Court cannot invoke principles of equity to grant King inspection rights within the meaning of Section 220(d) when the statute plainly and unambiguously indicates that he does not possess such rights. To do so would risk turning the statute on its head, and this Court is without authority to "rewrite clear statutory provisions under the guise of 'interpretation.'" *Scattered Corp.*, 671 A.2d at 879.

42 *See Jacobson v. Dryson Acceptance Corp.*, 2002 WL 75473, at *4 (Del. Ch. Jan. 9, 2002) ("[The plaintiff] was removed as a director of [the company] at a meeting on May 21, 1999, and, as a result, lost his standing to pursue his claim under Section 220(d)."") (citing *Everett v. Transnation Dev. Corp.*, 267 A.2d 627, 630 (Del. Ch. 1970)). *Cf. State ex rel. Farber v. Seiberling Rubber Co.*, 168 A.2d 310, 312 (Del. Super. 1961) ("Once [a director] ceases to perform his corporate duties, his right to inspect the books of the corporation should immediately end.").

43 *See* 5A Carol A. Jones, *Fletcher Cyclopedia of the Law of Corporations* §2235, at 367 (perm. ed., rev. vol. 2012).

inspection is necessary to protect his personal responsibility interest. . . ."[44] In such cases, the former director must make a substantial showing that he "has been or may reasonably be charged with malfeasance or nonfeasance during his incumbency."[45] Having carefully reviewed the case law cited by the parties, however, I find nothing that suggests Delaware has adopted such a broad reading of Section 220(d). I also note that if the General Assembly intended to confer Section 220(d) inspection rights on former directors, it could have done so in the statute, but it did not.

Here, King is not a current director of DAG, nor does he purport to be. Furthermore, even if Delaware recognized some form of a former director's right to inspect similar to New York, King does not allege that he has been or reasonably could be accused of malfeasance or nonfeasance during his directorship. Thus, I conclude that King has failed to state a claim in Count I upon which relief can be granted under Section 220(d) because he has no standing to pursue this action.[46]

C. King Does Not State a Claim That He Possesses Inspection Rights Derived From a Source Other Than Section 220(d)

King asserts that, even if he cannot satisfy Section 220(d), he possesses inspection rights that exist independent of Section 220(d), including those based on the director's

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44 *People ex. rel. Spitzer v. Greenberg*, 50 A.D.3d 195, 199 (N.Y. App. Div. 2008) (citing *In re Cohen v. Cocoline Prods.*, 127 N.E.2d 906 (N.Y. 1955)).

45 *In re Murphy v. Fiduciary Counsel*, 40 A.D.2d 668, 669 (N.Y. App. Div. 1972) (citing *In re Cohen*, 127 N.E.2d 906).

46 I therefore need not reach the issue of whether DAG has demonstrated that King seeks to inspect its books and records for an improper purpose.

right of equal access to board information. I find this aspect of King's argument unpersuasive for at least two reasons.

First, Section 220(d) at least arguably preempts a director's common law right to inspect corporate books and records. As the relevant authorities demonstrate, Delaware courts enforced this right at common law only until 1981, when the General Assembly enacted 8 *Del. C.* § 220(d).[47] If Section 220(d) preempts this field, King would not be able to state a claim for any inspection rights based solely on his status as a former director. In the circumstances of this case, however, I need not decide the preemption issue.

Even if Section 220(d) did not preempt the director's common law inspection right, the cases on which King relies do not support affording it to him in this instance. For example, King asserts that, under *Moore Business Forms, Inc. v. Cordant Holdings Corp.*[48] and its progeny, he possesses a right of equal access to board information

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47 *See* 2 David A. Drexler et al., *Delaware Corporation Law and Practice* § 27.02, at 27-2 and § 27.05, at 27-20 (2012) ("The pre-1967 case law [regarding common law inspection rights] is thus of limited relevance to the current practice, shedding light only upon the issue of what may or may not be an acceptable purpose under the present statute. . . . In essence, the amendments [to Section 220] engraft the existing case law upon the new statutory remedy."); 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 4.9, at 4-29 (3d ed. 1998) (citing 8 *Del. C.* § 220(d), *as amended by* 63 Del. Laws ch. 25, § 9 (1981)) ("A director has a right to inspect the stock ledger, stocklist, and other books and records. This right had been based on common law principles until 1981, when it was made statutory.") (footnote omitted); 1 Edward P. Welch et al., *Folk on the Delaware General Corporation Law* § 220.2.5, at GCL-VII-187 (5th ed. 2006) (same).

48 1996 WL 307444, at *1 (Del. Ch. June 4, 1996).

comparable to that of DAG's other directors.[49] But, this argument lacks merit because generally Delaware courts apply the equal access rule in the context of an action under 8 *Del. C.* § 225 or some other litigation asserting a colorable legal claim against the company, and usually to invalidate a corporate defendant's assertion of attorney-client privilege over documents that the former director plaintiff seeks.[50] The key distinction is that, unlike in this case, the former directors in the cited cases were pursuing or defending substantive claims and, as litigants in that context, had the right to pursue discovery under the applicable court rules.

An exception is this Court's decision in *Hall v. Search Capital Group, Inc.*, where the Court held that a Section 220 proceeding is a "proper vehicle to vindicate a director's right of equal access to Board information."[51] The circumstances of that case, however, are distinguishable in that the plaintiffs seeking to inspect certain corporate documents were current directors of the company involved.[52] King presumably could have enforced

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49 *Id.* at *4–6.

50 *See, e.g.*, *Moore*, 1996 WL 307444, at *4–6; *Kirby v. Kirby*, 1987 WL 14862, at *7 (Del. Ch. July 29, 1987) (also finding irrelevant whether a director in a Section 225 action can enforce his inspection rights under Section 220(d) because such an individual is "seeking discovery in support of a colorable claim and [is] entitled to documents unless they are protected from disclosure by a valid claim of privilege."). *See also Newmarkets P'rs, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A.*, 258 F.R.D. 95, 105 (S.D.N.Y. 2009) (holding that a partnership cannot assert offensively the attorney-client privilege over partnership documents to prevent a former partner's discovery of them in litigation).

51 1996 WL 696921, at *2 (Del. Ch. Nov. 15, 1996).

52 *Id.* at *1.

similar rights when he was a sitting director. Because King does not allege that he is a current director, he owes no fiduciary duties to DAG. He also has not challenged his removal in or around December 2003 under Section 225[53] or otherwise, and is not pursuing a legal claim against the company in which the corporate documents that he seeks potentially would be relevant. Thus, King has failed to allege any basis for applying the equal access rule in this action.

King also relies on this Court's decision in *McGowan v. Empress Entertainment, Inc.*[54] for the proposition that this Court has granted Section 220 relief to former directors. There, the plaintiff director, while he was a director, had made demand to inspect certain books and records, which the corporation promised to produce.[55] Before such documents were produced in full, however, the company was dissolved. Shortly thereafter, the director commenced suit under Section 220(d) to compel the production he requested. The company opposed the now former director's suit, but, during litigation, it chose to settle by producing all the documents that he sought. His demand, therefore, became moot on settlement, and the sole issue before the court was whether the plaintiff

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53 In a challenge to a director's or an officer's removal brought under Section 225(a), this Court may order "the production of any books, papers and records of the corporation relating to the issue [of whether an individual has the right to hold the office of director or officer]." Thus, even if King challenged the validity of the Removal Document, it is questionable whether he could discover documents beyond those relating to his election and removal, which is much narrower than the scope of his Demand.

54 791 A.2d 1 (Del. Ch. 2000).

55 *Id.* at 3.

was entitled to attorneys' fees.[56] In concluding that he was, the court found that the company had acted in bad faith to deprive the director of his valid Section 220 rights, forcing him to file a suit that it then opposed.[57] The company argued that it properly had opposed the suit because, as a *former* director, the plaintiff had no standing to pursue the action under Section 220.[58] The court expressly did not reach this issue because it found the company estopped from advancing its standing argument for two reasons: first, it had settled the Section 220 claim, and, second, its own inequitable conduct (*i.e.*, its failure to honor the promise to produce that it made before the company was dissolved) caused the circumstances that enabled the company to argue against the plaintiff's standing.[59] The latter point is most informative in this case because, contrary to King's position, the court in *McGowan* seemed to accept the premise that, after the plaintiff ceased to be a director, *i.e.*, once he became a "former" director, he lost standing to compel a books and records inspection.[60]

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56 *Id.* at 3–4.

57 *Id.* at 4–8.

58 *Id.* at 5–6.

59 *Id.* at 6.

60 King also argues that, based on DAG's own inequitable conduct, DAG should be estopped from refusing his demand. On this issue, I find the circumstances of this case distinguishable from *McGowan* on at least two grounds. First, the *McGowan* court did not grant Section 220 relief; indeed, it acknowledged that, as a former director, the plaintiff probably could not seek such relief. *Id.* at 6 ("[The company's promises] induced McGowan to stay his hand until after the dissolution that (arguably) deprived him of standing to sue."). Second, King has not alleged that DAG acted inequitably in removing him, *i.e.*, he does not

In summary, King erroneously conflates a director's right to access corporate books and records under Section 220(d) with a director's or former director's right to discovery of corporate documents when he personally is involved in litigation either as a plaintiff or a defendant. The two procedures are separate and distinct.[61] I therefore conclude that King does not possess "books and records inspection rights" independent of Section 220(d), and that, to the extent he might seek the same documents in discovery, no such issue exists in this action. That is, King has not asserted a cause of action against DAG aside from one seeking a declaration of his *inspection* rights under Section 220(d) or otherwise, and there is no allegation that any claim has been asserted against King based on his purported service as a director of DAG.

III. CONCLUSION

For the reasons stated, I grant Defendant's motion to dismiss the Amended Complaint.

IT IS SO ORDERED.

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challenge the validity of the Removal Document. Thus, King has not alleged that DAG inequitably caused him to lose his inspection rights.

[61] *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997).