in connection with the granting of stock options to Company officers, directors and executives; and

2. To assess the ability of the Company's Board of Directors to impartially consider a demand for action (including a request for permission to file a derivative lawsuit on the Company's behalf) related to the items described in [the] demand.[13]

Once again, however, Countrywide rejected LAMPERS' demand for access to its corporate books and records. Countrywide disputed whether LAMPERS had stated a credible basis from which a court could infer possible issues of corporate misc
onduct, notwithstanding LAMPERS' effort to elucidate the grounds for its suspicions in the second demand letter. More specifically, Countrywide asserted that no inference of wrongdoing could reasonably be drawn from the Corporate Library Study because Countrywide was not identified in the study as exhibiting "red flags" of possible option backdating.[14] Thus, having exhausted all means of obtain-ing the information it desires without resorting to litigation, LAMPERS brought this action in December 2006 seeking to enforce its right to inspect Countrywide's books and records.

B. *LAMPERS' Independent Analysis of Option Grants between 1997 and 2002 Causes It to Suspect Mischief in the Countrywide Boardroom*

LAMPERS' outside counsel engaged Richard Goldberg, Ph.D., an applied economist, in mid-August 2006 to perform an independent review of stock option grants for a set of companies, including Countrywide. The purpose of that review was to determine whether there was any evidence that "something was going on [at those companies] that needed to be investigated."[15] Based on the results of his analysis of certain option grants at Countrywide between 1997 and 2002, Dr. Goldberg found a statistically significant result suggesting that some type of option manipulation may have occurred with respect to the grants studied.

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[13] *Id.*
[14] JX 4.
[15] Tr. 32.

1. Overview of Dr. Goldberg's Methodology

After reading a report on option backdating in *The Wall Street Journal* in March 2006[16] and studying *The Journal*'s method of statistical analysis, Dr. Goldberg, along with one of his colleagues, developed a unique statistical methodology for testing the likelihood that option manipulation had occurred at a specific company (the "Goldberg Test").[17] By focusing exclusively on the short-term performance of a company's stock in the trading period immediately following an option grant date, the Goldberg Test purports to correct a possible strong bias in prior statistical method-ologies for detecting option backdating that tends to overstate the likelihood of backdating where an option was granted following a drop in a company's stock price.[18] According to Dr. Goldberg, his methodology is less likely than prior methodologies to raise red flags suggesting possible misconduct because it "gives [the company] the benefit of the doubt on a price drop"[19] prior to an option grant.

Dr. Goldberg's hypothesis is that if, in fact, a company is backdating its option grants, then one would expect to see a spike in the company's stock price in the trading period immediately following the option grant date that exceeds the anticipated increase in the stock price in a randomly selected trading period where no option had been granted. On any given trading day, a company's stock price essentially has an equal likelihood of increas-ing or decreasing.[20] Although a company may in fact randomly experience a stock price increase in the trading period immediately following an option grant on more than one occasion, if the company's stock price consistently increases substantially in almost every trading period immediately following an option grant, one might suspect that something other than random chance was causing such a result.

In order to test his hypothesis, Dr. Goldberg selected a T test, a basic tool of statistical analysis, to compare the mean of returns in the trading period immediately following an option grant date with the mean of returns in randomly selected trading periods following non-grant dates. A signifi-cant[21] T statistic in the Goldberg Test, therefore, would indicate that

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[16]Charles Forelle & James Bandler, *The Perfect Payday*, WALL ST. J., Mar. 18, 2006, at A1.

[17]Richard E. Goldberg & James A. Read, Jr., *Just Lucky? A Statistical Test for Option Backdating*, (The Brattle Group, Working Paper, Mar. 27, 2007), *available at* http://ssrn.com/abstract=977518. Dr. Goldberg's article has been submitted for publication in *The Journal of Applied Finance*, a peer review statistical journal in statistical finance. Tr. 26.

[18]*See, e.g.*, Charles Forelle, *How the Journal Analyzed Stock-Option Grants*, WALL ST. J., Mar. 18, 2006, at A5.

[19]Tr. 23.

[20]Tr. 24.

[21]In the field of statistical analysis, a significant effect is generally determined by a ninety-

the observed increase in the company's stock price in the trading period following the option grant was more likely than not due to something other than random chance, *i.e.* backdating, springloading, or some other unidentified factor.[22] After using the Goldberg Test to analyze certain Countrywide option grants, Dr. Goldberg found a statistically significant correlation suggesting the possibility of option manipulation at Countrywide. Accordingly, LAMPERS' contends that such a result constitutes a sufficiently credible basis from which the Court may infer possible mismanagement, waste or wrongdoing and allow it to access Countrywide's corporate books and records to investigate further possible corporate wrongdoing.

2. Dr. Goldberg's Selection of a Dataset for his Analysis

Dr. Goldberg was given almost complete discretion in selecting the dataset for his analysis of Countrywide's option grants; LAMPERS' only restriction was that Dr. Goldberg review options granted between 1997 and 2002.[23] During that time, Countrywide made sixteen option grants to named corporate executives, directors, or other employees. After reviewing Countrywide's stock option plans, Dr. Goldberg determined that his analysis would focus exclusively on the grants to named corporate executives. That decision was based on two observations. First, Dr. Goldberg noted that Countrywide's Option Plans afforded the outside directors a great deal of discretion as to both the timing and quantity of the options granted to the company's corporate executives. Second, the Option Plans essentially restricted the timing of option grants to outside directors to a fixed schedule and the quantity of options granted was determined by a formula related to the company's earnings.[24] Accordingly, Dr. Goldberg decided to exclude options granted to the outside directors from his dataset because the very limited discretion afforded to the Board in granting those options obviated much of the risk of manipulation. He was therefore left with a dataset that

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five percent confidence level. *See* Tr. 51, 209-10.

[22]The Goldberg Test does not distinguish between a statistically significant result caused by the practice of backdating or springloading; instead, a significant result from this test simply tells the user that something other than random chance may be at play in the observed, fortuitous timing of option grants. Accordingly, in the context of this discussion of the Goldberg Test, the term "backdating" refers to both the practice of backdating and springloading of stock option grants.

[23]According to Dr. Goldberg, the end date of 2002 was selected by the plaintiffs because the adoption of Sarbanes-Oxley reporting requirements in 2002 reduced the risk of option backdating after that point. Tr. 31. Dr. Goldberg did not know why the plaintiff requested that he begin his analysis in 1997; however, since LAMPERS first acquired stock in Countrywide in June 1997, it would not have standing to challenge option grants prior to that date. 8 *Del. C.* § 327. *See also Desimone*, 924 A.2d at 924-27; *Ryan*, 918 A.2d at 358-59.

[24]Tr. 33.

included twelve option grants to Countrywide corporate executives between 1997 and 2002. Dr. Goldberg then culled Countrywide's proxy statements for those years[25] to gather information about the selected option grants that would be relevant to his analysis.

Upon reviewing Countrywide's proxy statements, Dr. Goldberg next determined that he should exclude the April 7, 1997 option grant from his analysis because that particular grant was different from all the others. Generally, a stock option is granted as an incentive for performance and a form of compensation for corporate executives. The option granted on April 7, 1997, however, was only for a mere twenty-five shares of stock as part of a change in the company's internal dispute resolution policy.[26] Since the option granted on that date was not specifically intended as executive compensation, Dr. Goldberg determined that it should be excluded from his analysis. Consequently, he was left with a dataset of eleven option grants.

In preparing those eleven option grants for analysis, Dr. Goldberg looked at several pieces of information concerning the grant: (1) the closing price of Countrywide's stock on the grant date; (2) the average of Countrywide's high trade price and low trade price on the grant date; and (3) the option exercise price. Based on this raw data, Dr. Goldberg inferred that it was Countrywide's general practice to tie the option price to the average high-low trade price for its stock on the grant date.[27] He therefore decided that the appropriate metric for detecting possible backdating in this case would be an unnatural increase in Countrywide's average high-low trading price over the fifteen trading day period[28] following an option grant. With this information in hand, Dr. Goldberg was able to calculate the percentage increase in Countrywide's average high-low trade price in the fifteen day window.[29] Dr. Goldberg then utilized the Goldberg Test to

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[25]*See* JX 11 through JX 16.

[26]In exchange for agreeing to arbitrate disputes in certain circumstances, the company granted all employees either a floating vacation day or an option to purchase twenty-five shares of Countrywide Common Stock.

[27]Tr. 44.

[28]In his testimony, Dr. Goldberg did not explain the exact reasons for his selection of a fifteen day window in this case as opposed to some other term, such as a twenty day window as was used in *The Wall Street Journal* study. Tr. 47. Countrywide does not challenge the propriety of a fifteen-day window as such; thus, the Court is satisfied that fifteen days is an acceptable period of time over which to conduct the necessary analysis.

[29]Before performing his analysis, Dr. Goldberg converted the price increase data into its natural logarithm, which is a standard practice when performing a statistical analysis on price data. The natural logarithm of price apparently has "better statistical properties." Tr. 48. Dr. Goldberg explained that this practice is necessary because price datasets frequently include high price data points. When performing a statistical analysis, however, high price points can skew results toward finding an effect where, in fact, none exists. Thus, by converting stock price return data into their natural logarithm, Dr. Goldberg is able to dampen any bias in his raw data that may be caused by high stock price returns. As a result, he is able to perform a more conservative and reliable analysis. *See* Tr. 48-49.

perform a statistical analysis of the data he had collected. [30]

3. Dr. Goldberg's Analysis and Conclusions

At the outset, Dr. Goldberg made a few general observations about his dataset. First, he noted that the average fifteen day high-low log-price return for the eleven executive option grants between 1997 and 2002 was 10.9%. He then compared that return to the average fifteen day high-low log-price return for all trading days, both grant dates and non-grant dates, over the same six year period, which Dr. Goldberg calculated to be 0.6%. Thus, the average return for the eleven grant dates in question was more than ten times greater than the average return for the entire six year period. Moreover, according to Dr. Goldberg, the return for each of the eleven grant dates was always positive and significantly greater than the average return over the six year period. Even given the wide variability in Countrywide's stock price during this period, Dr. Goldberg observed that such a result would be "very unlikely" and akin to "flipping a coin and always seeing heads."[31] In order to be more precise in his conclusions about the observed pattern, however, Dr. Goldberg performed a statistical analysis of the fifteen day returns for the eleven option grants.

Dr. Goldberg analyzed the eleven option grants using the Goldberg Test he had developed. The test, in essence, determined the likelihood that the observed average return for option grants to corporate executives would be considerably more than ten times the expected average return during the 1997 to 2002 time period. Based on the results of that test, Dr. Goldberg was able to determine, at a 99.9 percent confidence level, that such a pattern of high returns due to random chance was extremely unlikely.[32] In other

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[30]The following table summarizes the data analyzed by Dr. Goldberg:

Option Grant Date	Stock Price [on Grant Date]		Option Exercise Price	15 Trading Days Later		15-Day Return AvgHiLo	
	Close	AvgHiLo		Date	AvgHiLo	Straight	Log-Price
6/2/1997	27.00	27.19	27.06	6/23/1997	32.44	19.3%	17.7%
6/1/1998	46.94	46.72	46.72	6/22/1998	50.63	8.4%	8.0%
6/1/1999	40.50	41.00	41.00	6/22/1999	43.53	6.2%	6.0%
12/27/1999	24.94	25.16	25.16	1/18/2000	26.66	6.0%	5.8%
2/28/2000	25.25	24.75	24.69	3/20/2000	28.34	14.5%	13.6%
3/9/2000	23.75	23.34	23.34	3/30/2000	26.94	15.4%	14.3%
6/28/2000	31.53	32.03	32.03	7/20/2000	35.59	11.1%	10.5%
5/31/2001	38.73	38.40	38.40	6/21/2001	43.40	13.0%	12.2%
6/1/2001	40.55	39.78	39.78	6/22/2001	44.95	13.0%	12.2%
2/12/2002	38.61	38.49	38.38	3/6/2002	44.03	14.4%	13.4%
3/19/2002	43.69	43.56	43.56	4/10/2002	46.35	6.4%	6.2%

[31]Tr. 50.
[32]Tr. 51-52.

words, there was only a 0.1 percent chance, or odds of 1 in 978, that the observed pattern of returns for the eleven option grants was due to random chance.[33]

In response to Countrywide's contention that it maintained a practice of granting stock options to corporate executives on the first trading day of June, Dr. Goldberg re-ran his statistical analysis looking only at the seven "off-schedule" grant dates in his set of eleven option grants.[34] Once again, Dr. Goldberg found a statistical correlation. Based on the results of this second analysis, Dr. Goldberg was able to determine, at a 99.5% confidence level,[35] that such a pattern of high returns following the off-schedule option grants in question was extremely unlikely. Thus, Dr. Goldberg calculated odds of 1 in 213 that the observed pattern of returns was due simply to random chance.[36]

Finally, because the Goldberg Test does not specifically differentiate between option backdating and springloading, Dr. Goldberg compared the observed average fifteen day returns for the eleven grant dates in question with the observed average fifteen day returns on the Standard & Poor's 500 Index for the same dates. His theory was that if the observed positive returns for the eleven option grants were correlated with positive movements in the broader market, then a theory of springloading probably would be refuted since no positive news announcement by Countrywide could directly cause a positive increase in the S&P 500. After performing his analysis, however, Dr. Goldberg was unable to find a statistically significant correlation between the performance of Countrywide's stock price and the performance of the S&P 500 over the same fifteen day return periods. Dr. Goldberg therefore determined that the observed increase in Countrywide's stock price probably was not driven by upward movements in the broader market, and, thus, in his opinion, springloading was still a possible explanation for the unnaturally high returns observed in the fifteen day trading period following the option grants in this case.[37]

Thus, based on his statistical methodology and various statistical analyses, Dr. Goldberg concluded that there was a statistically significant correlation between the option grants to Countrywide executives and the subsequent positive short-term performance of Countrywide's stock price that indicates that something other than random chance may have been

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[33]Tr. 52.

[34]*See* chart *supra* note 30. In this second analysis, Dr. Goldberg excluded the options granted on June 2, 1997, June 1, 1998, June 1, 1999, and June 1, 2001. He accepted that options regularly granted on a fixed date would not be backdated.

[35]The lower confidence level in this second test was due to the smaller sample size, but the result was still well above the standard ninety-five percent confidence level. Tr. 61.

[36]Tr. 60-61.

[37]Tr. 62-64.

driving the performance of the stock. Although Dr. Goldberg could not state precisely what was causing the high returns based on the results of his test alone, he opined that backdating and springloading would be two plausible explanations for the short-term performance of Countrywide's stock price observed in this case.

C. *Countrywide Undercuts LAMPERS' "Credible Basis"*

In response to LAMPERS' statistical evidence, Countrywide presented expert testimony from Frederick C. Dunbar, Ph.D., an economist and expert in the analysis of securities transactions, to rebut the testimony and conclusions drawn by Dr. Goldberg. Not surprisingly, Dr. Dunbar disagreed with Dr. Goldberg's analysis and conclusions, and he mounted a vigorous challenge to Dr. Goldberg's testimony. Countrywide's attack occurred on two fronts: (1) a critique of the methodology employed by Dr. Goldberg in selecting and analyzing his data; and (2) a presentation of affirmative evidence seeking to prove that springloading was not possible in this case and therefore could not constitute a credible basis to infer possible issues of corporate wrongdoing.

1. Dr. Dunbar's Critique of Dr. Goldberg's Analysis

Dr. Dunbar offered two relevant critiques of Dr. Goldberg's statistical analysis. First, Dr. Dunbar testified that, in his opinion, Dr. Goldberg "cherry-picked" the dataset he analyzed for trial. According to Dr. Dunbar, such an unsound protocol for selecting a dataset renders Dr. Goldberg's entire analysis inherently unreliable. Second, Dr. Dunbar offered a number of criticisms concerning the manner in which Dr. Goldberg tested for the possibility of backdating in this case. According to Dr. Dunbar, once he corrected the "errors" in Dr. Goldberg's analysis of the data, there was no statistically significant correlation suggesting the possibility of option backdating.

a. LAMPERS "Cherry-picked" its Dataset

Dr. Dunbar noted that the dataset analyzed by Dr. Goldberg was narrowed significantly from the time of LAMPERS' initial demand letter in October 2006 to the time of trial in April 2007. In Dr. Dunbar's view, this narrowing of LAMPERS' focus effectively eliminated all of the negative fifteen-day trading returns following option grant dates and amounted to "cherry-picking" a dataset to fit LAMPERS' suspicion that option backdating or springloading had occurred at Countrywide.

In LAMPERS' operative demand letter of October 24, 2006, it stated that one purpose of its investigation was "[t]o investigate potential wrongdoing, mismanagement, or breaches of fiduciary duties . . . in connection with the granting of stock options to Company officers, directors and executives."[38] Additionally, the October 24 demand letter relied upon the *Los Angeles Times* article, which in turn referenced the Corporate Library Study of option grants at Countrywide between 2003 and 2005, as a basis for suspecting possible misconduct. According to Dr. Dunbar, in preparing a statistical study, those parameters noted by LAMPERS in its demand letter should define the scope of a subsequent statistical analysis to determine the likelihood of option manipulation. Thus, in Dr. Dunbar's opinion, a proper statistical protocol based on the information requested in LAMPERS' October 24 demand letter should call for an analysis of all the options granted to Countrywide's officers, directors, and executives through the year 2005, the time period covered by the Corporate Library Study.

LAMPERS ultimately analyzed a dataset that included eleven option grants. According to Dr. Dunbar, of the nineteen option grants issued by Countrywide between 1997 and 2005, thirteen exhibited positive short-term trading gains and six exhibited negative returns. The net result of LAMPERS' data selection, however, was to eliminate the negative short-term returns from its analysis. Although that may not have been an intentional manipulation of the data, Dr. Dunbar criticized Dr. Goldberg for allegedly adjusting the protocol for selecting his data as he went along.[39] Thus, if LAMPERS' started out to investigate the possibility of option manipulation at Countrywide between 1997 and 2005, a proper statistical protocol would have been to test for the presence of option manipulation within all of the data available during that time period. Instead, Dr. Dunbar contends that LAMPERS fished around in the data until it was able to synchronize a dataset with its desired result—a statistical correlation suggesting the possibility of option manipulation.

Based on the allegedly loose protocol employed by LAMPERS and Dr. Goldberg for selecting their dataset, Dr. Dunbar opined that Dr. Goldberg's analysis may be "unreliable or possibly not relevant to the

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[38]JX 1.

[39]LAMPERS and Dr. Goldberg dispute Countrywide's allegations that they manipulated their dataset as they went along. Dr. Goldberg testified credibly that he selected his dataset and performed his analysis without input from LAMPERS or its counsel and before LAMPERS sent its initial demand letter to Countrywide in October 2006. According to Dr. Goldberg, the only changes he made to his dataset between his initial review and a subsequent review in preparing for trial were minor. First, he decided to exclude the April 1997 option granted as part of the change in Countrywide's internal dispute resolution policy, and, second, he determined that his metric for measuring the increase in Countrywide's stock price following the option grant should be the average high-low trade price, instead of the closing price. Tr. 44.

matter at hand."[40] In other words, another plausible explanation for the correlation observed by LAMPERS is simply that a bad statistical protocol produced the observed result in the absence of any actual wrongdoing by Countrywide.

b. Dr. Dunbar Disagrees with Dr. Goldberg's Treatment of the Data for the Purpose of Inferring Possible Option Backdating

Even with the dataset selected by Dr. Goldberg, Dr. Dunbar nevertheless disagreed with Dr. Goldberg's treatment of the data for the purpose of inferring the possibility of backdating in this case. Dr. Dunbar's critique in this regard was twofold. First, Dr. Dunbar suggested that Dr. Goldberg had been remiss in not comparing the mean of returns for the four "on-schedule" grants with the mean of returns for the seven "off-schedule" grants in his dataset. Second, Dr. Dunbar criticized Dr. Goldberg's use of a fifteen day window for measuring the gain for all option grants because several of the options in his dataset had been publicly disclosed before the close of Dr. Goldberg's fifteen day window.

Dr. Dunbar testified that one way to test LAMPERS' hypothesis of backdating would be to compare the returns for the four on-schedule grants with the returns for the seven off-schedule grants. Since backdating could not occur for an on-schedule grant, then logically one would expect the returns on the off-schedule grants to exceed the returns on the on-schedule grants if the company had engaged in the practice of backdating. When he ran this analysis, however, Dr. Dunbar found that the mean of returns for the on-schedule grants actually exceeded the mean of returns for the off-schedule grants. According to Dr. Dunbar, this result was a "statistical finding inconsistent with backdating."[41]

Both experts in this case agreed that once a company publicly discloses an option grant, it could no longer backdate the options. In LAMPERS' analysis, however, Dr. Goldberg did not consider whether Countrywide publicly disclosed option grants before the expiration of the fifteen day window through which he was calculating the percentage increase in the company's stock price following the option grant. Thus, according to Dr. Dunbar, part of the gain in Countrywide's stock price following certain option grants observed in LAMPERS' study could not possibly have been connected to option backdating because it occurred after Countrywide publicly disclosed the grant. When Dr. Dunbar corrected Dr. Goldberg's data for the off-schedule option grants to measure the gain in

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[40]Tr. 168.
[41]Tr. 222.

Countrywide's stock price either to the end of the fifteen day window or to the date the option grant was disclosed to the public, whichever was shorter, he was unable to detect a statistically significant correlation in the data.[42] Thus, based on his analysis of LAMPERS' data, Dr. Dunbar opined that backdating was not a plausible explanation for the observed high returns following option grants to Countrywide executives.

2. Dr. Dunbar's Event Study

In addition to critiquing LAMPERS' selection of the dataset used in its analysis, Dr. Dunbar criticized LAMPERS for not performing an event study to determine whether springloading was actually the causal reason for the correlation suggested by the Goldberg Test. Springloading requires the strategic release of information that is likely to drive up a company's stock price after an option grant. Thus, according to Dr. Dunbar, LAMPERS could have used readily available databases and statistical techniques to determine whether any statistically significant positive news was released into the market in the fifteen day window following the eleven option grants in Dr. Goldberg's dataset. After performing such a study, Dr. Dunbar concluded that there were no suspiciously timed news releases following the option grants that caused any statistically significant increases in Countrywide's stock price. Therefore, according to Dr. Dunbar, springloading could not be a plausible explanation for the high returns observed by LAMPERS in this case.

III. ANALYSIS

Section 220 of the Delaware General Corporation Law affords shareholders of Delaware corporations a broad right to inspect corporate books and records for *any* proper purpose reasonably related to their interest as shareholder. In order to be entitled to access corporate documents under the statute, however, the shareholder must establish (1) that it has complied with Section 220 respecting the form and manner of making demand for inspection of such documents; and (2) that the inspection such stockholder seeks is for a proper purpose.[43] The parties do not dispute that LAMPERS complied with the technical requirements of Section 220 in making a

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[42]Dr. Goldberg disagreed with Dr. Dunbar's treatment of the data in this manner. According to Dr. Goldberg, although it may be true that certain option grants were disclosed within a relatively short period of time, on average, Countrywide did not publicly disclose its option grants until forty days after the grant date. Tr. 82-83. Thus, by limiting his analysis period to fifteen days in all cases, Dr. Goldberg attempted to strike a reasonable balance for the purpose of studying option grants with a wide range of public disclosure dates. *See generally* Tr. 82-85.

[43]8 *Del. C.* § 220(c).

demand to inspect Countrywide's books and records in this case.[44] Instead, the dispute in this case focuses on whether LAMPERS has articulated a proper purpose for its requested inspection. More specifically, the parties disagree about whether LAMPERS has met the minimal burden imposed by *Seinfeld* to establish a credible basis from which the Court can infer possible issues of wrongdoing that would warrant further investigation.[45]

It is well settled under Delaware law that an investigation of corporate mismanagement, waste or wrongdoing is a proper purpose for a Section 220 inspection.[46] However, "[a] mere statement of a purpose to investigate possible general mismanagement, without more, will not entitle a shareholder to broad Section 220 inspection relief. There must be *some evidence* of possible mismanagement as would warrant further investigation of the matter."[47] Thus, while the burden on the shareholder in a Section 220 action is not "insubstantial", it is a far cry from requiring a shareholder to prove, by a preponderance of the evidence, that corporate mismanagement, waste or wrongdoing actually did occur.[48] Indeed, as our Supreme Court noted in its *Seinfeld* decision, "the 'credible basis' standard sets the lowest possible burden of proof. The only way to reduce the burden of proof further would be to eliminate any requirement that a stockholder show *some evidence* of possible wrongdoing."[49]

The Section 220 inspection is "an important part of the corporate governance landscape in Delaware"[50] and is now firmly entrenched as one of the "tools at hand" frequently employed by shareholders to gather information concerning the management of Delaware corporations. As this Court noted in *Freund v. Lucent Technologies*, "the Delaware Supreme

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[44]To the extent there is a dispute over this point, LAMPERS' October 24 demand letter complies with the technical requirements of 8 *Del. C.* § 220(b). The demand was in writing, under oath, directed to Countrywide's principal place of business, and purports to state a proper purpose for the inspection. In addition, LAMPERS filed this action after the expiration of the five day response period provided to the corporation by 8 *Del. C.* § 220(c).

[45]*Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 123 (Del. 2006) (citing *Sec. First Corp. v. U.S. Die Casting and Dev. Co.*, 687 A.2d 563, 567-69 (Del. 1997)).

[46]*See, e.g.*, *Sec. First Corp.*, 687 A.2d at 567 (citing *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 681 A.2d 1026, 1031 (Del. 1996)); *Dobler v. Montgomery Cellular Holding Co.*, 2001 WL 1334182, at *3 (Del. Ch. Oct. 19, 2001).

[47]*Seinfeld*, 909 A.2d at 122 (emphasis in original).

[48]Different formulations of a Section 220 plaintiff's burden have been proposed. At various times, our courts have required shareholders to show a credible basis for inferring "that waste or mismanagement *may have occurred*," *Thomas & Betts Corp.*, 681 A.2d at 1031, that "*probable* wrongdoing" has occurred, *Sec. First Corp.*, 687A.2d at 567, that "there are *legitimate issues* of [corporate] wrongdoing," *Id.* at 568, or "*possible* mismanagement as would warrant further investigation of the matter." *Helmsman Mgmt. Serv., Inc. v. A&S Consultants, Inc.*, 525 A.2d 160, 166 (Del. Ch. 1987). These efforts consistently reflect a recognition of the minimal burden imposed on a shareholder in a Section 220 case.

[49]*Seinfeld*, 909 A.2d at 123.

[50]*Sec. First Corp.*, 687 A.2d at 571.

Court has made clear that the public policy of this State is to encourage stockholders to utilize Section 220 before filing a derivative action . . . in order to meet the heightened pleading requirements . . . applicable to such actions."[51]

In light of that public policy and the prominent role Section 220 now plays in the "corporate governance landscape," where a shareholder presents some credible evidence to warrant further inquiry, even if the only evidence presented is a plausible statistical correlation, the court should permit a carefully circumscribed inspection into the areas of suspected corporate malfeasance. Accordingly, under the minimal evidentiary burden articulated in *Seinfeld*, the Court concludes that a shareholder in a Section 220 action need only demonstrate, by a preponderance of the evidence—logic, testimony, plausible statistics, or otherwise—that there is possible corporate malfeasance that warrants further investigation.

A. *LAMPERS Presented Some Credible Evidence of Possible Wrongdoing at Trial*

The statistical analysis performed by LAMPERS' expert, Dr. Goldberg, coupled with his credible testimony at trial, is some evidence of possible wrongdoing at Countrywide—at least enough evidence to warrant further limited inquiry into the matter. Dr. Goldberg is a well-credentialed expert in economics and has an established record of conducting statistical analyses of data. He testified that he carefully studied the methodology employed by *The Wall Street Journal* for analyzing the practice of option backdating before he developed his own test for detecting the possibility of option manipulation at a particular company. Moreover, the Goldberg Test offers nothing radical in terms of its underlying statistical methodology, which is based on the tried and true statistical T test for testing the difference in means between two populations of data. Although Dr. Dunbar testified that he disagreed with some of the protocols employed by Dr. Goldberg in selecting his dataset and performing his analysis, there is no evidence before the Court that the work Dr. Goldberg did in developing the Goldberg Test renders it "junk science" and, thus, by its nature, unreliable.

Turning then to the actual analysis performed by Dr. Goldberg, the Court is persuaded by his testimony that the protocols he employed were appropriate and sufficient to draw a reasonable inference of possible `wrongdoing that would warrant further investigation into the matter. Countrywide certainly presented credible evidence at trial, through Dr. Dunbar's expert testimony, undercutting Dr. Goldberg's analysis and the

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[51] 2003 WL 139766, at *4 (Del. Ch. 2003).

inferences that might reasonably be drawn from that analysis. Indeed, LAMPERS is far from conclusively establishing that wrongdoing has in fact occurred at Countrywide. Countrywide's allegations that Dr. Goldberg "cherry-picked" the data for his analysis and employed improper statistical protocols for analyzing the data in this case, however, cannot prevail in light of Dr. Goldberg's credible trial testimony.

Dr. Goldberg testified that LAMPERS requested an analysis of options granted at Countrywide between 1997 and 2002. Beyond that instruction, LAMPERS had nothing to do with the protocols or parameters used in Dr. Goldberg's analysis. Dr. Goldberg then reviewed the option plans in place at Countrywide during the time period in question and determined that he would look at options granted to corporate executives because the Countrywide Board had discretion in granting those options. Given the terms of Countrywide's stock option plans, Dr. Goldberg made a reasonable assumption in deciding that he might have a greater likelihood of finding manipulation in the discretionary option grants to executives as opposed to the more fixed schedule prescribed for directors. Thus, although a broader analysis of all options granted at Countrywide may have yielded a more robust conclusion one way or the other whether there is a statistical likelihood that option manipulation is occurring at Countrywide, there is no fatal flaw in Dr. Goldberg's analysis simply because his dataset is limited in scope to options granted to corporate executives and limited temporally to the 1997 to 2002 time period.

Dr. Dunbar also criticized Dr. Goldberg's use of a fifteen day window for measuring the gain in Countrywide's stock price for every option grant he studied because some of those options were publicly disclosed before the close of those fifteen day windows. Both experts agreed that after an option grant is publicly disclosed, there is no longer a risk of option backdating. Dr. Goldberg testified, however, that his use of a fifteen day window for all the option grants was a matter of convenience and consistency because, in some instances, Countrywide did not publicly disclose option grants until long after the close of the fifteen day window. In at least one of those instances, the gain observed in Countrywide's stock price between the grant date and the date of disclosure was substantially greater than the gain measured and analyzed by Dr. Goldberg for the same grant at the close of the fifteen day window.[52] In light of Dr. Goldberg's testimony, the Court is not convinced that, for the limited inquiry of a 220

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[52]*See* March 19, 2002 Option Grant. The regulatory filing disclosing this grant did not occur until August 9, 2002. Countrywide's Average Hi-Lo on March 19 was $43.56. Fifteen trading days later, the date used by Dr. Goldberg, the Average Hi-Lo was $46.35. Thus, the unadjusted return calculated by Dr. Goldberg was 6.4%. PX 2. If one looks to the date of disclosure, however, Countrywide's Average Hi-Lo on August 9, 2002, was $53.15. JX 7. Thus, the unadjusted return from the date of the grant to the date of disclosure is 22%.

proceeding, his use of a fifteen day window for all option grants renders his analysis unreliable.

In sum, Dr. Dunbar's testimony undercuts the testimony and analysis of LAMPERS' expert and suggests that there are other ways, perhaps even better ways, by which Dr. Goldberg could have gone about preparing and analyzing his data. The Court is not convinced, however, that the way in which Dr. Goldberg did in fact go about his analysis in this case is so fundamentally flawed that it must be rejected. Dr. Goldberg's testimony may be unpersuasive on the ultimate question of whether Countrywide has in fact engaged in manipulation of its option grants, but on the whole, it is sufficient to justify the methodology he employed and his conclusion that something other than random chance may be responsible for producing the observed pattern of positive returns in Countrywide stock following the executive option grants at issue in this case. That plausible conclusion is sufficient, and all that is required, to warrant further limited inquiry into Countrywide's books and records under Section 220.

B. *The Event Study Offered by Countrywide Goes to the Ultimate Issue of Springloading and is therefore not Probative of the Issues Presented in this Proceeding*

In addition to critiquing Dr. Goldberg's study, Dr. Dunbar performed an event study to determine independently whether springloading had in fact occurred in this case. According to Dr. Dunbar, an event study is a better method of testing for springloading of option grants, and based on the results of that study, he concludes that springloading is not a plausible explanation for the pattern of returns observed in this case. That evidence does not go to the issue of whether the analysis performed by Dr. Goldberg provides a credible basis for the Court to infer possible issues of wrongdoing; instead, it is different evidence that springloading has not in fact occurred. Thus, Countrywide seeks to defend against LAMPERS' allegation that it has a credible basis to infer possible springloading of option grants by proving that in fact no springloading ever occurred in this case.

This Court has rejected such a defense in Section 220 proceedings,[53] however, because to accept it would "turn on its head both Section 220 and the case law upholding a books and records inspection for the purpose of investigating mismanagement."[54] In essence, by raising such a defense, Countrywide seeks to litigate the ultimate issue in a possible future

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[53]*See Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512 (Del. Ch. Apr. 28, 2004). *Accord Khanna v. Covad Commc'ns Group, Inc.*, 2004 WL 187274 (Del. Ch. Jan. 23, 2004).

[54]*Marmon*, 2004 WL 936512, at *6.

derivative suit that might eventually be filed by LAMPERS. This is neither the time nor the procedural setting to address that issue.[55] A plaintiff in a Section 220 action cannot be, and is not, required to prove by a preponderance of the evidence that wrongdoing of some sort did in fact occur. To do so would completely undermine the purpose of Section 220 proceedings, which is to provide shareholders the access needed to make that determination in the first instance.

Countrywide asserts in its post-trial brief that this Court has encouraged defendants to introduce affirmative evidence in Section 220 proceedings.[56] While that may be true, the scope of the affirmative rebuttal evidence must be limited to attacking the sufficiency of the evidence presented by the plaintiff to establish its credible basis to infer possible issues of wrongdoing. In this case, Countrywide presented expert testimony from Dr. Dunbar that in fact went to the credibility of the methods employed by Dr. Goldberg in selecting his dataset and performing his statistical analysis. That evidence, although ultimately not persuasive in this case, is relevant to the inquiry in the Section 220 proceeding because it helps the Court to determine whether the plaintiff has articulated a credible basis to infer possible issues of corporate wrongdoing. At the other end of the spectrum, however, is the event study conducted by Dr. Dunbar which purports to show that springloading could not in fact have occurred in this case. That is a different question entirely and the province of an as yet un-filed (and, possibly, never) derivative lawsuit arising from whatever evidence of wrongdoing LAMPERS may uncover to support such an action as a result of accessing Countrywide's corporate books and records through this action. Accordingly, the Court finds the event study and testimony of Dr. Dunbar concerning his conclusions about the likelihood that spring-loading is a legitimate issue in this case of little value to assessing the reliability of the mechanics and conclusions of Dr. Goldberg's analysis, and, therefore, it is unpersuasive with respect to any of the issues at hand in this case.

Even if the Court accepted Dr. Dunbar's event study as proper evidence in this case, the same result attains. The Goldberg Test only looks for a statistically significant correlation between the timing of a company's option grants and the subsequent short-term performance of its stock price to test for the possibility of option manipulation. Beyond that, the Goldberg Test offers no affirmative conclusions as to whether the cause of that

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[55] *Khanna*, 2004 WL 187274, at *6 ("A Section 220 action is not the proper forum for litigating a breach of fiduciary duty case.").

[56] Defendant Countrywide Financial Corp.'s Post-Tr. Br., at 6-8 (citing *Haywood v. Ambase Corp.*, 2005 WL 2130614 (Del. Ch. Aug. 22, 2005); *Magid v. Acceptance Ins. Cos., Inc.*, 2001 WL 149717 (Del. Ch. Nov. 15, 2001)).

correlation is backdating or springloading; it simply says that either theory *could* be a plausible explanation for the observed correlation in the data. Thus, even if Dr. Dunbar's event study would defeat an inference of springloading, it nonetheless fails to undermine the Goldberg Test because the Court is still left with a plausible alternative theory of backdating.

C. *Scope of the Books and Records Inspection*[57]

Once a plaintiff has established its right to inspect a corporation's books and records, "it is the responsibility of the trial court to tailor the inspection to the stockholder's stated purpose."[58] To that end, the plaintiff bears the burden of proving that each category of books and records sought is essential to the stated purpose of its inspection.[59]

LAMPERS has stated two proper purposes for its investigation. One is to investigate potential wrongdoing, mismanagement, or breaches of fiduciary duties by members of Countrywide's Board of Directors in connection with the granting of stock options. At trial, however, LAMPERS only presented evidence of suspected wrongdoing with respect to option grants to corporate executives. Therefore, the Court concludes that LAMPERS no longer seeks information regarding option grants to directors, and, accordingly, the scope of LAMPERS' inspection will be limited to books and records relating to option grants to corporate executives. LAMPERS' other stated purpose is to assess the ability of the Countrywide Board to impartially consider a demand for action related to the items described in its October 24, 2006 demand letter.

The Court now reviews each category of documents requested by LAMPERS in turn to determine whether the documents sought are essential to LAMPERS' stated purposes for inspection and to what extent LAMPERS shall be permitted to inspect Countrywide's books and records.

i. Any documents made available or produced by Countrywide or its board of directors to any governmental, investigative or regulatory body, including the SEC, the NYSE or the Department of Justice, in connection with any formal or informal investigation into Countrywide's stock

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[57]The Court notes that, in the Pretrial Order, Countrywide requested that the Court require LAMPERS to maintain any documents provided in connection with this action as confidential. Countrywide neglected to articulate any legitimate corporate interests requiring such an order either at trial or in its post-trial brief. As such, the Court has no basis to exercise its discretion in this regard and will not impose a confidentiality order on the documents required to be provided to LAMPERS in this case.

[58]*Sec. First Corp.*, 687 A.2d at 569-70.

[59]*Thomas & Betts Corp.*, 681 A.2d at 1035. *See also Khanna*, 2004 WL 187274, at *8.

option grants.

ii. Any documents, including, but not limited to, minutes, notes, presentations, slides, appendices or other materials provided to the board of directors and/or any standing or special committee thereof (including the Audit or Compensation Committees) regarding:

a. The actual or potential backdating or springloading of stock options granted to Countrywide officers or executives;

b. Any internally authorized or third party investigations into the company's stock option grants.

iii. Any document concerning any Company policies, controls or protocols regarding the monitoring, oversight, timing, accounting, and documentation of the Company's stock option grants to its executives or directors (including the creation, modification, or amendment of any such policies).

Countrywide has not specifically challenged the scope the documents sought in these three requests. In any event, the Court concludes that they are narrowly tailored to achieve the stated purpose of LAMPERS' investigation. The documents sought in these three requests go to the heart of LAMPERS' stated purpose of investigating possible wrongdoing with respect to the granting of stock options to Countrywide corporate executives. As noted above, however, Countrywide is only required to provide relevant documents under this category concerning option grants to corporate executives, not directors.

iv. All minutes, presentations, notes, letters, memoranda or other documents reflecting the reasons for the resignation of Stanford Kurland as President and Chief Operating Officer of Countrywide Home Loans, Inc., including any board-level discussion or consideration of Mr. Kurland's resignation.

Countrywide has challenged the propriety of this request, and the Court agrees that this request represents nothing more than the proverbial "fishing expedition" on LAMPERS' part. When asked at trial the purpose for which LAMPERS had requested these documents, Roche, LAMPERS' general counsel, responded, "Well, it seemed a little strange that [Stanford Kurland] would resign after receiving [LAMPERS' October 3, 2006 demand letter] and have such a large number of options — option grants on

his behalf."[60] Countrywide, however, filed a Form 8-K with the United States Securities and Exchange Commission on September 8, 2006 disclosing Mr. Kurland's resignation as President and Chief Operating Officer at Countrywide effective September 7, 2006, almost a month before LAMPERS' initial demand letter in this case.[61] Roche's testimony concerning the "suspicious" timing of Mr. Kurland's resignation is nothing more than unsubstantiated speculation and is insufficient to compel inspection of these documents.

v. Documents summarizing or reflecting any business or social relationships between any members of Countrywide's board of directors, on the one hand, and any of its senior officers, executive managing directors or senior managing directors, on the other hand.

Countrywide has not specifically challenged LAMPERS' request for this category of documents. The Court finds that the request is relevant to LAMPERS' proper stated purpose of assessing the Board's ability to impartially consider any demand for action LAMPERS might make as a result of its investigation. In addition, the request is narrowly tailored, and, accordingly, LAMPERS will be permitted to inspect this category of documents.

vi. All communications between Countrywide's board of directors, on the one hand, and any other person or entity, on the other, regarding any of the matters listed in Demands No. 1 through 5, above.

LAMPERS will be permitted to inspect communications regarding demands one, two, three, and five because it has stated a proper purpose and narrow scope for the investigation of such documents.[62] LAMPERS will not be permitted to inspect communications regarding demand number four, however, because it failed to state a proper purpose for that request.

IV. CONCLUSION

The Court is left with a number of plausible inferences based on the testimony and evidence presented in this case and no conclusive answers. Perhaps there is more to LAMPERS' statistical correlation than meets the

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[60]Tr. 114.
[61]JX 145.
[62]No privilege that might limit the scope of inspection has been asserted.

eye. Perhaps there is less. Such is the nature of statistics.

The evidence in this case presents a close call. The Court is far from convinced on the basis of this record that any wrongdoing actually did occur at Countrywide with respect to the granting of executive stock options. More importantly for the purposes of this proceeding, however, the Court is not convinced, in light of all the evidence, that the analysis and methodology employed by LAMPERS' expert are so dubious that they have not at least raised a possible issue of corporate misconduct that warrants further inquiry. LAMPERS has made an adequate showing of a "credible basis" from which the Court can infer possible corporate misconduct that would justify imposing upon Countrywide the burden of complying with an order issued under Section 220, and therefore, LAMPERS will have limited access to Countrywide's books and records as described herein for the purpose of investigating its concerns.

IT IS SO ORDERED.

THE ENDURING LEGACY OF *SMITH V. VAN GORKOM*

BY BERNARD S. SHARFMAN*

ABSTRACT

Smith v. Van Gorkom (Van Gorkom) *is possibly the most famous corporate law case ever decided by the Delaware Supreme Court. The enduring legacy of* Van Gorkom *is the understanding that corporate directors should not be held financially liable for corporate board decisions that lack due care. Of course, it was not the holding of* Van Gorkom *that established this, but the chain of events that occurred in its wake.*

The challenge for teachers of Van Gorkom *is to explain why shareholders were correct in approving exculpation clauses, even as our thinking about corporate law evolves and corporate scandals (Enron, Tyco, WorldCom, etc.) continue to influence our perspective on the correct level of corporate accountability. As this article demonstrates, applying the innovative approaches taken by legal scholars such as Michael P. Dooley, who introduced Kenneth Arrow's understanding of the value of centralized authority into the study of corporate law, and Stephen M. Bainbridge, who has so aptly applied Professor Dooley's work in the development of his director primacy model, and Margaret M. Blair and Lynn A. Stout, who introduced the concept of the board of directors as a "mediating hierarchy," gives* Van Gorkom *new and greater meaning and reaffirms the correctness of insulating directors from duty of care liability.*

The basic premise underlying this article is that the real value of the corporate form is its hierarchical nature as reflected in the centralized authority of the corporate board. This value is manifested by the corporate board's ability to (1) efficiently filter information in its decision-making process and (2) act as a mediating hierarchy. Such organizational efficiencies create a strong presumption that the laws of corporate governance should not interfere with the corporate board's decision-making process.

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*Bernard Sharfman, J.D., Georgetown University Law Center (2000). For questions or comments, please contact Mr. Sharfman at bernardsharfman@gmail.com. The opinions expressed in this article are solely the author's and are not to be taken as representative of the opinions of any former, current, or future employer. This article is dedicated to Mr. Sharfman's wife, Susan Thea David, and his daughter, Amy David Sharfman, for without their love and encouragement this article would never have been completed. Mr. Sharfman would like to thank Professors Michael D. Klausner, Lynn A. Stout, Lawrence A. Hamermesh, and D. Gordon Smith for their helpful comments and insights.