SKIMMING FROM THE 2%: THE STATUS OF GEORGIA'S RESRICTIONS ON SHAREHOLDER ACCESS TO CORPORATE INFORMATION

TABLE OF CONTENTS

I. INTRODUCTION

Sometime during the dot-com boom of the late 1990s, Sarah Shares, a Georgia resident, sold her start-up online advertising business for a healthy sum. Relishing the flavor of rapid success, she sought to invest her newly realized capital in other promising start-ups.

Irrigation Obligation Corp. approached Sarah seeking investors. The corporation wanted to get a foothold in the hydraulic infrastructure industry after receiving a patent on a new piping liner that extended pipe life by 100% while simultaneously acting as a fissure sealant. It vowed to supply and install one foot of farm irrigation piping in underdeveloped countries for every fifty feet of piping sold. The corporation also projected large gains because of their superior quality piping material and the current state of dilapidation of most urban and rural hydraulic infrastructure. After having satisfied herself of all necessary inquiries, and, having been drawn in particularly by the corporation's humanitarian commitment, Sarah invested ten million dollars in Irrigation Obligation Corp. and received a 5% ownership in the corporation.

Over the course of the decade, Irrigation Obligation Corp.'s profits soared as it established itself as a major hydraulic infrastructure player. The irrigation projects it undertook in underdeveloped countries also had received positive attention and benefited the corporate name. Sarah's original $10 million investment was worth $40 million by 2011, although her ownership had been cut to roughly 1.5% of all outstanding shares.

By 2011 the original board of directors with whom Sarah had negotiated her original investment had nearly all been phased out. Many of the new board members wanted to cut back the amount of work the corporation carried out in underdeveloped countries. At the upcoming election for directors, Sarah was aware that the nominees selected by the board were sympathetic to changing the corporate direction and also would establish a majority on the board supporting change.

Sarah feared that the board would abandon or cut back substantially on the humanitarian work that had attracted her to invest in the first place. Because she had been with the

corporation since its inception and still believed that its value would continue to increase, Sarah wanted to analyze the corporation's books and records before selling her shares to determine whether reducing the humanitarian aspect of the business was financially justifiable. She also wanted to examine the list of shareholders to get a better understanding of how they might react to the corporation's potential change in direction.

Sarah filed a request for the corporate records detailing her concerns and rather benign reasons for desiring access. Despite owning forty million dollars of the corporation, Sarah was denied access to the corporate records by the board of directors because she did not own at least 2% of the corporation's outstanding shares. Sarah petitioned a Georgia court to grant her injunctive relief requiring the corporation to grant her access to the corporate books and records. The court denied her petition.

Steve Stockton worked in sales for Irrigation Obligation Corp. for ten years and retired in 2011. Through the course of his employment, Steve had received modest stock options that he had exercised in anticipation of further gains. His overall ownership percentage in Irrigation Obligation Corp. remains negligible and represents a few thousand dollars of investment. His ownership in Irrigation Obligation Corp. is his only footprint in the stock market.

In the fiscal quarters following Steve's retirement, Irrigation Obligation Corp. posted massive and unprecedented profits. At first, Steve was thrilled with the profits and rising value of his shares. But as the exorbitant profit announcements continued, Steve grew more and more suspicious. As an employee in sales, Steve had known the five-year projected sales plan, the nature of the market, and all key current and potential customers. He could not make sense of the corporation's quarterly earnings.

In order to quell his growing skepticism, Steve requested from the corporation access to its basic books and records. In the request, Steve was able to describe with detail his concerns and his reasons for requesting the records. The board of directors denied his request because he did not own at least 2% of the outstanding shares of the corporation. Steve petitioned a court in Georgia, his state of residence, to issue an injunction requiring the corporation to grant him access. While a decision was pending, evidence of corporate mismanagement within Irrigation Obligation

Corp. had leaked to the press, resulting in the rapid decline of the corporation's share value. Sarah Shares and Steve Stockton lost most of the value of their holdings.

While Sarah and Steve are themselves only characters of fiction, the harsh treatment they received in the face of Georgia's arbitrary statute on shareholder inspection rights is all too real. Their polarity is intended to capture the capriciousness of a statute that, as interpreted in 2011 by the Georgia Court of Appeals in *Mannato v. SunTrust Banks, Inc.*,[1] blindly blocks a fundamental right of ownership for shareholders as different as Sarah and Steve—and many in between.

Edward Mannato is one of those shareholders in between. In 2008, he sought to inspect and copy the corporate records of SunTrust Banks, Inc. (SunTrust) because he suspected that a number of officers and directors had breached their fiduciary duty in light of the housing market collapse.[2] SunTrust denied him access to the records in part because he owned less than 2% of the outstanding shares.[3] Mannato filed suit seeking to enjoin SunTrust from denying him access, but the trial court dismissed the complaint because he did not have the requisite share ownership under O.C.G.A § 14-2-1602(e).[4] This provision reads that shareholders' right of inspection "may be limited by a corporation's articles of incorporation or bylaws for shareholders owning 2[%] or less of the shares outstanding."[5]

Mannato appealed the decision to the Georgia Court of Appeals, arguing that although O.C.G.A. § 14-2-1602(e) allows corporations to deny access of records to shareholders with less than 2% share ownership, the statute does not abrogate his common law right to inspect the corporate books and records for a proper purpose.[6] In a matter of first impression in Georgia,[7] the court found that the

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[1] 708 S.E.2d 611 (Ga. Ct. App. 2011).

[2] *Id.* at 612.

[3] *Id.*

[4] *Id.*

[5] O.C.G.A. § 14-2-1602(e) (Supp. 2011).

[6] *See Mannato*, 708 S.E.2d at 612 (asserting that Georgia common law provides all shareholders this right).

[7] *Id.* at 611. Georgia courts had ruled on shareholders' rights to inspect corporate records under common law before any statutory restrictions had been implemented. *See, e.g.*, G.S. & M. Co. v. Dixon, 138 S.E.2d 662, 665 (Ga. 1964) ("In this State, the right of

codification of shareholder inspection rights abrogated all common law rights to the same and affirmed the dismissal of Mannato's claim.[8]

The *Mannato* decision represents a meaningful change to one of the most important self-regulating tools available to corporations. Shareholder inspection rights remain essential for shareholders deciding whether to instigate derivative lawsuits on behalf of the corporation.[9] Shareholders who file derivative suits rely heavily on information gathered from their inspection rights in proceeding to even the initial stages of litigation because courts generally impose limited discovery rules in derivative actions.[10]

Beyond its use as a self-regulating tool, the right of shareholders to inspect corporate records stems from their rights as owners to examine the management of their property.[11] Courts historically have been wary when restricting this inherent property right.[12] In fact, at least one state supreme court has hinted that arbitrary statutory restrictions on shareholders' rights to inspect corporate records may be unconstitutional.[13]

Although the state of incorporation is generally how courts determine choice of law, courts give unique consideration to shareholder inspection rights because they are not considered a

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inspection stems from the common law.").

[8] *Mannato*, 708 S.E.2d at 612–13 ("[T]he General Assembly intended to supercede any common law rights of inspection with the passage of O.C.G.A. § 14-2-1602(e).").

[9] *See* Browning Jeffries, *Shareholder Access to Corporate Books and Records: The Abrogation Debate*, 59 DRAKE L. REV. 1087, 1088–91 (2011) (discussing the significance of shareholder inspection rights to derivative lawsuits in light of *King v. VeriFone Holdings, Inc.*, 994 A.2d 354 (Del. Ch. 2010), *rev'd*, 12 A.3d 1140 (Del. 2010)).

[10] *Id.*

[11] *See G.S. & M. Co.*, 138 S.E.2d at 665 ("[A]s owners, [shareholders] have the right to inform themselves as to the management of their property . . . .").

[12] *See, e.g.*, Dines v. Harris, 291 P. 1024, 1028 (Colo. 1930) ("The statutes should be liberally construed in favor of stockholders, and their rights should be zealously guarded . . . ." (citing Barnert v. Multnomah Lumber & Box Co., 247 P. 155, 157 (Or. 1926))); Parsons v. Jefferson-Pilot Corp., 426 S.E.2d 685, 688 (N.C. 1993) ("[A] shareholder's right to inspect a corporation's books and records is only the right to examine what is his own.").

[13] *See* Miles v. Bank of Heflin, 328 So. 2d 281, 287 (Ala. 1975) ("[T]he right of a stockholder . . . to inspect the books and records of the corporation in which he owns an interest . . . is hardly dependent upon legislative expression. Indeed, any effort to statutorily limit such [a] right by arbitrarily excluding certain books and records from the scope of full inspection would raise serious constitutional questions.").

matter of internal affairs.[14] Courts in shareholder inspection cases "often apply the law of the forum state."[15] Thus, each state's shareholder inspection laws affect the amount of access its citizens will have when seeking to inspect the records of any corporation—regardless of state of incorporation—in which its citizens are invested.

Because inspection rights represent a basic right of shareholder ownership and are an essential built-in corporate self-regulating tool, any decision that strips this right from an arbitrarily determined group of shareholders should be closely examined. Indeed, this Note argues that the decision of the Georgia Court of Appeals in *Mannato* abrogating all common law rights to inspect corporate records was incorrect. Contrary to this court's holding, rendering section 14-2-1602(f) as a savings clause for the common law right of inspection *does not* render section 14-2-1602(e) superfluous. In fact, the language and history of the statute and the history of Georgia's shareholder inspection rights support the conclusion that section 14-2-1602(f) in fact preserves shareholders' common law rights of inspection for proper purpose. Thus, *Mannato* should be reversed or overruled.

Further, even if *Mannato* stands by default, the Georgia General Assembly should repeal the provision restricting access to shareholders who own more than 2% of the corporation's outstanding shares. The provision is unnecessary in that its goals are more effectively accomplished through existing legal means. Finally, policy demands that Georgia relieve its citizens from this arbitrary and harmful provision.

Part II of this Note traces the development of the shareholder right of inspection from its inception to its modern statutory formulations. Part II also examines more closely the history and current shareholder right of inspection promulgations in the Model Business Corporation Act (MBCA) and the Georgia Business Corporation Code. From there Part III of this Note introduces the effects of the *Mannato* decision and argues that the Georgia Court of Appeals erred in abrogating Georgia's common law right of

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[14] Mark Kotlarsky, Recent Decision, Caspary v. La. Land & Exploration Co.*: The Common Law Right to Inspect Corporate Records For Proper Purpose*, 43 MD. L. REV. 572, 591 (1984).

[15] *Id.*

inspection. Because the court erred, this Note recommends that the decision be overruled or rejected. Part III then proceeds to argue that, if *Mannato*'s authority persists, the Georgia legislature should remedy the effects of *Mannato* by removing from O.C.G.A. § 14-2-1602 the provision enabling corporations to deny access to shareholders owning less than 2% of the corporation's outstanding shares.

II. BACKGROUND

A. SHAREHOLDER INSPECTION RIGHTS AT COMMON LAW

The right of shareholders to inspect a corporation's books and records developed during the eighteenth century[16] as the corporate form itself underwent transformations.[17] The corporation, long viewed as a trustee for its members as beneficiaries,[18] became seen instead as a body owned in part by each of its individual shareholders.[19]

After gaining ownership interests, shareholders accrued certain rights that followed in time, including the rights to share in any surplus, hold directors accountable, and examine the corporation's books and records.[20] The shareholder's right to examine a corporation's books and records was based off a theory of corporate ownership and articulated in *Rex v. Fraternity of Hostman*.[21] In

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[16] *See* C.A. COOKE, CORPORATION, TRUST AND COMPANY: AN ESSAY IN LEGAL HISTORY 76 (1951) ("[S]hareholders in the eighteenth century . . . were entitled to see the books of the corporation . . . .").

[17] *See id.* at 69–71 (discussing the move from the corporation itself as a trustee to the modern view of a corporation owned by individual members). The transformation of corporate form during this period has been attributed to the modernizing effects of the Industrial Revolution. *See* Randall S. Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 337 (1996) (recognizing that courts began to allow shareholders to inspect corporate records in order to protect their property interests).

[18] *See* Child v. Hudson's Bay Co., (1723) 24 Eng. Rep. 702 (Ch.); 2 P. Wms. 207, 208–09 ("[T]he legal interest of all the stock is in the company, who are trustees for the several members . . . .").

[19] *See* COOKE, *supra* note 16, at 69 ("[E]ach shareholder . . . has a fractional part in the ownership of the business of the corporation.").

[20] *See id.* at 75–76 (describing the rights that shareholders gained during the eighteenth century).

[21] (1744) 93 Eng. Rep. 1144 (K.B.); 2 Strange 1223.

Rex, the court found that shareholders, possessing a property interest in the corporation, had the right to inspect the books and records, those books and records being the corporation's common property.[22]

The common law right to inspect a corporation's books and records has been refined to allow shareholders access to corporate records only at a proper time and place and when they have a proper purpose for inspecting the records.[23] States vary slightly on how their courts have interpreted proper purpose. For example, Delaware has defined proper purpose as meaning a "purpose germane to the petitioner's interest or status as a stockholder."[24] Illinois has used the term to limit requests that are not "honest" or made in "good faith."[25] Generally, a shareholder's right to access books and records can be enforced judicially through a mandamus at law, an injunction in equity, or discovery.[26]

B. STATUTORY INSPECTION RIGHTS

As corporations grew larger in size and number during the nineteenth century, individual shareholders became less involved in corporate management and less able to access corporate inside information.[27] Shareholders still needed to receive information

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[22] 2 Strange 1223.

[23] *See* Guthrie v. Harkness, 199 U.S. 148, 153 (1905) ("[T]he decisive weight of American authority recognizes the common law right of the shareholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member."); S. Acceptance Corp. v. Nally, 150 S.E.2d 653, 654 (Ga. 1966) (noting that Georgia requires a shareholder to have a proper purpose and to inspect at a reasonable time); *see also* 18A AM. JUR. 2D *Corporations* §§ 299–301 (2004) (discussing the common law requirement of proper purpose).

[24] Shaw v. Agri-Mark, Inc., 663 A.2d 464, 467 (Del. 1995).

[25] Weigel v. O'Connor, 373 N.E.2d 421, 426 (Ill. App. Ct. 1978) (citing Sawers v. Am. Phenolic Corp., 89 N.E.2d 374 (Ill. 1950)).

[26] *See* Thomas, *supra* note 17, at 338 (listing the various common law methods courts may use to ensure a corporation allows a shareholder to access its books and records). The mandamus action was the most widely used and effective method for compelling compliance from a corporation. Jeffries, *supra* note 9, at 1100–03; C. Thomas Attix, Jr., Note, *Rights of Equitable Owners of Corporate Shares*, 99 U. PA. L. REV. 999, 1000 (1951). Jeffries also speculates that the common law proper purpose requirement likely arose out of the use of the mandamus action, which requires a showing that a specific interest is at stake. Jeffries, *supra*, at 1001.

[27] *See* Thomas, *supra* note 17, at 338 (noting the growing complexity of corporations and dispersion of shareholders during the 1800s).

from the corporations in which they were invested,[28] and states considered two solutions: (1) requiring corporations to publish periodic reports and (2) statutorily guaranteeing a shareholder's inspection rights.[29] Most of the states that addressed this issue instituted the second option.[30] Courts interpreted the statutory guarantees of inspection rights in many states to give shareholders an absolute right to examine a corporation's books and no longer required the common law showing of proper purpose.[31] In addition to these "unfettered" rights of inspection,[32] many state statutes also included punitive provisions aimed at deterring directors from denying shareholders access to corporate records regardless of the shareholders' purpose for inspection.[33]

The absolute right of shareholders to access corporate records, incentivized in some states by additional punitive measures, exposed corporations to the potential for abuse by shareholders.[34] These abuses included "a very considerable amount of blackmail"[35] and the purchase of stock by competitors for the purposes of gaining unfair access to the corporation's information.[36] The proliferation of these abuses called for a return to the common law proper purpose test, a return which occurred statutorily in a number of states during the 1930s.[37] Some states reacted even more aggressively to

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[28] *See* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780–1970, at 89 (1970) ("[T]he ordinary stockholder had more need of reliable information about its affairs and more difficulty in getting it without positive help from the law.").

[29] *Id.*

[30] *See id.* at 89–90 ("[S]tates failed to impose effective reporting requirements in their corporation laws."). Professor J. Willard Hurst believes this choice was an error: "effective inspection of the books might call for precisely that sophistication in the company's affairs which stockholders lacked and could not readily supply." *Id.* at 89.

[31] *See* Wiley B. Rutledge, Jr., *Significant Trends in Modern Incorporation Statutes*, 22 WASH. U. L.Q. 305, 331 (1937) ("The limitations of the common law rule were found generally too restrictive, and we witnessed the growth of the so-called absolute right of the shareholder to examine the books of account and the records of the company.").

[32] Thomas, *supra* note 17, at 339.

[33] *See* Rutledge, *supra* note 31, at 331 (describing the effects such punitive provisions had on corporations).

[34] *See* Thomas, *supra* note 17, at 339 ("[A]n unfettered right to inspect books and records led to unfortunate consequences.").

[35] Rutledge, *supra* note 31, at 331.

[36] Thomas, *supra* note 17, at 339.

[37] *See* Rutledge, *supra* note 31, at 331 & n.116 (drawing the conclusion of a "general

the abuses by restricting shareholders' inspection rights beyond the extent of the common law's proper purpose test.[38] These restrictions, for example, often required shareholders to own stock for a certain period of time or own a certain percentage of a corporation's outstanding stock in order to qualify for a right of inspection.[39] Today, every state statutorily restricts to some extent shareholders' rights to inspect corporate records.[40]

C. SHAREHOLDER INSPECTION RIGHTS UNDER THE MBCA

1. Early Versions of the MBCA. Following the inclusion of a shareholder right of inspection in state statutes across the country, the American Bar Association (ABA) in 1950 determined that such an inspection right should be statutorily guaranteed and included it amongst the provisions of the then recently established MBCA.[41] Ray Garrett, the Chairman of the Committee on Corporate Laws (the Committee) under the ABA,[42] in a preface to the 1950 revision, spoke on behalf of the Committee when he said that they desired strengthened shareholder rights and clarified definitions of those rights.[43] The Committee hoped to achieve this end by preserving the right of shareholders to examine corporations' books and records.[44]

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return" to the common law rule based on statutory changes made in various states).

[38] Thomas, *supra* note 17, at 339–40.

[39] *Id.*; *see, e.g.*, LA. GEN. STAT. § 1118 (1932) (allowing access to shareholders who have owned at least 2% of outstanding shares for six months); 1931 Mich. Pub. Acts 584 (allowing access to shareholders who own at least 2% of the outstanding stock for three months); 1933 N.Y. Laws 1326–27 (allowing access to shareholders who have owned stock for six months or own at least 5% of the outstanding stock).

[40] Thomas, *supra* note 17, at 340. The extent of the restrictions vary from state to state. Alabama, for example, limits access to corporate records to those shareholders who, in addition to a proper purpose, have owned shares for 180 days or who own 5% of the outstanding stock. ALA. CODE § 10A-2-16.02 (LexisNexis 2010). Delaware's limitations, on the other hand, only require that the shareholder assert a proper purpose. DEL. CODE ANN. tit. 8, § 220(b) (Supp. 2010).

[41] *See* Ray Garrett, *Preface to 1950 Revision* of MODEL BUS. CORP. ACT, at iv, vii (1950) (describing the provisions included in the revision). The MBCA was first published in 1946, although the version was considered incomplete, and was revised in 1950. *Preface to 1953 Revision* of MODEL BUS. CORP. ACT, at xi, xi (1953).

[42] *See Foreword* to MODEL BUS. CORP. ACT (1950) (listing the committee members).

[43] Garrett, *supra* note 41, at vi.

[44] *Id.* at vii.

Following the lead of the corporate state statutes addressing inspection rights from the previous two decades, the MBCA's inclusion of the inspection right also came with conditions.[45] Section 46 of the 1950 revision provided that shareholders who had held shares for at least six months or who held at least 5% of the outstanding shares would be entitled to inspect the corporation's books and records for a proper purpose.[46]

This early version of the MBCA thus imposed two distinct conditions on shareholders seeking record inspection: (1) a time of ownership or share of ownership condition and (2) the common law proper purpose condition.[47] In addition to these conditions, the 1950 version also included a punitive provision like the ones adopted when legislatures sought to give shareholders an absolute right to corporate books and records.[48] The provision provided that an officer or agent who refused to allow a shareholder with proper purpose to access the books and records would be liable for 10% of the value of shares owned by the requesting shareholder.[49]

Notably, the MBCA also provided that nothing within section 46 would

> impair the power of any court of competent jurisdiction, upon proof by a shareholder of proper purpose, irrespective of the period of time during which such shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation.[50]

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[45] *See id.* (describing the addition of conditions on shareholder access).

[46] MODEL BUS. CORP. ACT § 46 (1950).

[47] *Id.*

[48] *Id.*; *see also* Rutledge, *supra* note 31, at 331 (noting the combination of courts' interpretation of a right to inspect as absolute with legislatures' punitive provisions against unyielding officers and directors).

[49] MODEL BUS. CORP. ACT § 46 (1950).

[50] *Id.*

This "savings clause" acts to preserve the common law right of inspection for proper purposes for all shareholders.[51] The purpose of the clause was to differentiate the remedies available for shareholders.[52] Shareholders who met the conditions of ownership were entitled to receive 10% of their total share value from unyielding officers, whereas those shareholders who did not meet the conditions of ownership could not claim this remedy but could still petition a court for access to records under a common law theory.[53]

In the preface to the 1950 revision, Garrett provides a glimpse into the drafting of this provision by mentioning the "serious division of opinion" within the Committee concerning the rights of shareholders, specifically the right to inspect corporate records.[54] After noting the division, Garrett reminds his readers that the MBCA "reflect[s] the decision of a majority of the members" at the time.[55]

2. The MBCA Today. In 2008, the Committee amended the MBCA's position on shareholders' right to inspect corporate records.[56] Having maintained ownership conditions on inspection rights since 1950, the Committee decided that such restrictions were no longer necessary.[57] At present, the Model Code grants automatic access to shareholders who request a corporation's basic records.[58] Such records include the articles of incorporation, the bylaws, resolutions creating different classes of shares, shareholder meeting minutes, written communication to shareholders, the list of current directors, and the most recent

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[51] Jeffries, *supra* note 9, at 1105.

[52] *Id.*

[53] *See id.* at 1105–06 (describing the Committee's commentaries regarding the shareholder right of inspection).

[54] *See* Garrett, *supra* note 41, at vii (acknowledging that some Committee members "would have imposed more stringent conditions and less penalties on the right of examination of corporate records").

[55] *Id.*

[56] *See* Jeffries, *supra* note 9, at 1107–08 (discussing the amendments made to the MBCA's shareholder inspection provisions).

[57] *Id.*

[58] *See* MODEL BUS. CORP. ACT § 16.02(a) (2008) (allowing shareholders to examine basic corporate records contained in section 16.01(e)).

annual report delivered to the respective secretary of state.[59] If a shareholder requests more sensitive corporate documents, however, section 16.02(c) of the MBCA requires shareholders to clear a higher hurdle. A shareholder may inspect and copy minutes from board of directors meetings, records of action from committees acting on behalf of the board, accounting records, records of action taken by shareholders or the board of directors without a meeting, and records of shareholders only if: "(1) the shareholder's demand is made in good faith and for a proper purpose; (2) the shareholder describes with reasonable particularity the shareholder's purpose and the records the shareholder desires to inspect; and (3) the records are directly connected with the shareholder's purpose."[60]

Although this provision relating to access of sensitive corporate records is more restrictive than the provision relating to general corporate records, the MBCA returns to the common law proper purpose test and only requires that shareholders plead such proper purpose with particularity.[61] The Committee continued using the proper purpose test because it was a well-established common law principle that courts were familiar with.[62] Also, the Committee liberalized shareholder access to any type of corporate records by removing entirely the size and time of ownership requirements characteristic of the MBCA's earliest editions.[63] The Committee concluded that those types of restrictions on

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[59] *Id.* § 16.01(e).

[60] *Id.* § 16.02(d).

[61] *Id.* § 16.02.

[62] *See id.* § 16.02 cmt. 3 ("[T]he Model Act continues to use [proper purpose] because it is traditional and well understood language defining the scope of the shareholder's right of inspection and its use ensures that the very substantial case law that has developed under it will continue to be applicable under the revised Act.").

[63] *Compare* MODEL BUS. CORP. ACT § 46 (1953) (restricting shareholders who own less than 5% of the outstanding shares or have not yet owned the shares for six months from examining the corporate records), *with* MODEL BUS. CORP. ACT § 16.02 (2008) (removing restrictions based on amount or length of ownership). The removal of the ownership-based restrictions liberalizes shareholder access compared to the earlier MBCA approach, which included such restrictions. *See* Jeffries, *supra* note 9, at 1107–08 (arguing that the recently revised MBCA is more restrictive of access to more sensitive corporate documents because it requires shareholders to plead their proper purpose with particularity). *But see* MODEL BUS. CORP. ACT § 16.02 cmt. 3 (2008) (describing the restriction as an "attempt[ ] to require more meaningful statements of purpose, if feasible").

shareholder access "do not necessarily or even probably ensure that inspection requests are made for proper purposes."[64]

In revising the MBCA, the Committee also removed the punitive provision because it failed to achieve its designed purpose.[65] The Committee decided to retain a version of the savings clause in the recently revised version of the MBCA by providing that section 16.02 does not affect "the power of a court, independently of this Act, to compel the production of corporate records for examination."[66] The official comments to the section make it clear that a shareholder's right of inspection is an inherent and independent right.[67] The comments also clarify that section 16.02 "is not a substitute for or in derogation of rights of inspection that may exist . . . as a 'common law' right of inspection, if any is found to exist by a court, to examine corporate records."[68]

D. SHAREHOLDER INSPECTION RIGHTS IN GEORGIA

In 1988, the Georgia General Assembly made extensive revisions to the Georgia Business Corporation Code (the Georgia Code).[69] The revisions were intended to bring Georgia's business code up to date with developments in corporate law across the country and also to "create a more attractive environment for business."[70]

The previous Georgia Code, which had remained unchanged for twenty years, had been largely based off of the MBCA.[71] When the ABA published a revised MBCA in 1984 to reflect recent

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[64] MODEL BUS. CORP. ACT § 16.02 history (2008).

[65] *See id.* ("The penalty approach was rejected in part because of courts' reluctance to impose penalties on officers or agents for actions taken on behalf of their principal and in part because concern for personal responsibility for large penalties may cause officers or agents to ignore their responsibilities to their principals.").

[66] *Id.* § 16.02(e)(2).

[67] *Id.* § 16.02 cmt. 4.

[68] *Id.*

[69] *See* K. Barfield, *Revised Georgia Business Corporation Code, Selected 1988 Georgia Legislation*, 5 GA. ST. U. L. REV. 285, 285 (1988) (discussing the effects that HB 1272 had on Georgia's corporate statutes, codified in O.C.G.A. §§ 14-2-101 to -1706).

[70] *See id.* (determining the legislature's intent in making revisions based on a telephone interview with then Georgia Representative Tommy Chambless).

[71] *Id.* at 286.

developments,[72] the General Assembly shortly thereafter decided it was time to update the Georgia code as well.[73] Georgia favored using the MBCA as a guide for its own corporate statutes because of the MBCA's "significant improvements in organization, language, and concepts" as compared to the then-existing Georgia Code.[74] The large number of states that had adopted revised codes similar to the Model Act influenced Georgia in drawing from the MBCA.[75] The Georgia legislature believed that the case law that would develop throughout the country based on MBCA-influenced corporate statutes could be used to help Georgia courts interpret similarly worded provisions.[76]

Georgia's position on shareholder inspection rights drew heated debate in the General Assembly.[77] Indeed, it was "[o]ne of the most controversial aspects" of the proposed revisions to the Georgia Code.[78] At the time of the debate, the existing Georgia Code, like the 1950 MBCA, allowed shareholders access to corporate books and records as long as they were shareholders of record for at least six months or held 5% of the corporation's outstanding shares and had a proper purpose for inspection.[79] The existing provision also contained verbatim the savings clause found in the original MBCA.[80] The comments note that the savings clause was intended to allow courts to "order inspection by

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[72] *Introduction* to MODEL BUS. CORP. ACT, at xii (2008). Although the introduction uses the phrase "complete revision," the language of the sections pertinent to this Note (those regarding shareholders' right of inspection) remained unchanged. *See id.* at xiv–xxxiv (listing changes made to MBCA after 1984).

[73] *See* Barfield, *supra* note 69, at 286 (describing how the Georgia Code Committee was charged with making "recommendations in light of the publication of the Revised Model Act").

[74] *Id.* (citation omitted) (internal quotation marks omitted).

[75] *Id.*

[76] *See id.* (noting this as a goal based on an interview with then-Georgia State Senator Edward Hine, Jr.).

[77] *Id.* at 297.

[78] *Id.*

[79] O.C.G.A. § 14-2-122(b) (1982).

[80] *Id.* § 14-2-122(e). For the relevant language, see *supra* note 51 and accompanying text. *See also* O.C.G.A. § 14-2-122 cmt. (1984) (making it clear that Georgia intended to follow the MBCA).

a shareholder who meets neither the six-month test nor the 5[%] test" if the shareholder shows a proper purpose.[81]

The 1988 revisions to the Georgia Code removed the restrictions barring inspection by shareholders who owned less than 5% of a corporation's shares or had owned the shares for less than six months.[82] In its place, the state imposed a restriction on all shareholders owning less than 2% of a corporation's shares, regardless of the length of time the shareholders owned their shares.[83] The legislature placed the provision immediately after language that appears to broadly grant the right of inspection to all shareholders: "The right of inspection granted by this Code section may not be abolished or limited by a corporation's articles of incorporation or bylaws."[84] This statement is mitigated immediately by language that allows corporations to include the restriction against shareholders with less than 2% ownership in their articles of incorporation or bylaws.[85]

In addition to the 2% restriction, the Georgia Code strengthened its proper purpose test by requiring that requests be made in good faith and pleaded with "reasonable particularity."[86] The Revision Committee included the pleading restraint in order to "require more meaningful statements of purpose."[87]

The adoption of the pleading restraint and the steadfast 2% restriction was lobbied for by corporations, led by the American Family Life Assurance Company (AFLAC), who believed that these stricter provisions were necessary to stop the harassment shareholders with small ownership interests impose on corporations.[88]

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[81] O.C.G.A. § 14-2-122 cmt. (1982).

[82] *See* O.C.G.A. § 14-2-1602(d) (Supp. 2011) (listing the requirements a shareholder must meet in order to receive inspection rights).

[83] *Id.* § 14-2-1602(d)–(e).

[84] *Id.* § 14-2-1602(e).

[85] *Id.*

[86] *Id.* § 14-2-1602(d).

[87] Barfield, *supra* note 69, at 298–99.

[88] *See id.* (discussing efforts led by corporations over the previous thirty years to influence the revision of shareholder access to information in Georgia, and more generally, across the country). In addition to citing harassment from minority shareholders, the companies pushing for the revision also argued, less fervently, that the provisions were needed to protect against "corporate raiders." *Id.* at 299.

As mentioned above, the revision to shareholders' rights to corporate information was one of the most debated points of the Georgia Code revision.[89] Opponents argued that a restriction against owners of a corporation is a "serious[ ]" measure and asked that it be reconsidered.[90] Those who supported the provision, including vocal proponent then-Senator Roy Barnes, believed that the "restriction was necessary for Georgia to remain a probusiness state."[91] Before the bill was passed, the Senate Judiciary Committee discussed changing the 2% ownership to a 4% ownership requirement, but the proposal was denied for fear that any revision would delay the effective date of the corporate code.[92]

Since renovating the statutory inspection rights in 1988, the General Assembly adopted the same bifurcated approach as in the current MBCA, which grants automatic access to certain books and requires a heightened pleading requirement for others.[93] However, unlike the MBCA version that removed all ownership restrictions,[94] Georgia still allows corporations to block access to shareholders owning less than 2% of the corporation's outstanding shares.[95] Importantly, the revised shareholder right to inspection maintains the savings clause language from the existing codifications.[96]

III. ANALYSIS

A. O.C.G.A. § 14-2-1602 DOES NOT ABROGATE GEORGIA'S COMMON LAW RIGHT OF INSPECTION

1. The Mannato *Decision.* In finding that Georgia's common law right to inspect corporate records had been abrogated by

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[89] *Id.* at 299–300. Some of this debate was admittedly benign in nature, centering around confusion over the provision's wording (as originally drafted, the provision would have restricted access of corporate books and records to shareholders owning 2% of the outstanding shares). *Id.*

[90] *Id.* at 300.

[91] *Id.*

[92] *Id.* at 300–01.

[93] *See* 2004 Ga. Laws 521; MODEL BUS. CORP. ACT § 16.02 (2008).

[94] MODEL BUS. CORP. ACT § 16.02 (2008).

[95] O.C.G.A. § 14-2-1602(e) (Supp. 2011).

[96] *See supra* note 80 (Georgia's former savings clause); O.C.G.A. § 14-2-1602(f) (Supp. 2011) (Georgia's current savings clause).

O.C.G.A. § 14-2-1602(e), the Georgia Court of Appeals relied on the interpretation of the provision that follows, O.C.G.A. § 14-2-1602(f).[97] Other courts recognize this language as a common law savings clause.[98] This latter section states that section 14-2-1602 generally does not affect "[t]he power of a court, independently of this chapter, to compel the production of corporate records for examination."[99] The Georgia Court of Appeals, however, declared that this provision was "not an express savings clause of any common law rights of inspection by [2%] or less shareholders" and that construing it as such would render section 14-2-1602(e) meaningless.[100] For the court, section 14-2-1602(f) speaks instead to the courts' power to compel inspection during discovery in corporate veil piercing cases, shareholder derivative suits, criminal cases, or administrative investigations of tax and insurance commissioners.[101]

2. Where the Mannato *Decision Leaves Georgia Relative to Other States.* By abrogating common law inspection rights, Georgia brings itself alongside a number of other states that have decided the issue. The majority of states have found that the common law right of inspection survives codification.[102] Thus, Georgia now joins the minority on this issue.[103]

The states in the minority relied on the same primary reason that Georgia did to find for abrogation: finding that a common law right to inspect corporate records exists alongside and independent of the statutory codification of that right would render the statute

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[97] *See* Mannato v. SunTrust Banks, Inc., 708 S.E.2d 611, 612–13 (Ga. Ct. App. 2011) (basing the decision of abrogation in part on the plain language of section 14-2-1602(e) and examining the effects different constructions of § 14-2-1602(f) have on the meaning of the statute).

[98] *See supra* Part II.B (discussing how both the original and most recent MBCA legislation, which served as a guide for many state corporation statutes, include language expressly intended to preserve the common law right of inspection for all shareholders); *see also* Parsons v. Jefferson-Pilot Corp., 426 S.E.2d 685, 689 (N.C. 1993) (holding that the North Carolina statute, which has the exact same statutory language as codified in O.C.G.A. § 14-2-1602(f), acted as a savings clause to preserve a common law shareholder right of inspection).

[99] O.C.G.A. § 14-2-1602(f).

[100] *Mannato*, 708 S.E.2d at 613.

[101] *Id.*

[102] *See* Jeffries, *supra* note 9, at 1113–14 (describing the majority position).

[103] *See id.* at 1125–26 (describing the minority position).

meaningless.[104] In interpreting Maryland's corporation code, the Fourth Circuit expressed a fear of rendering the statute meaningless: the shareholder's "contention, if successful, would in effect deprive the . . . statute of its efficacy."[105] Notably, in finding that the statute abrogated the common law, the court pointed out that the Maryland statute did not contain the savings clause language that was typically included in most MBCA-based statutes.[106] Furthermore, the court did not decide whether the statute abrogated the common law rights of inspection under all circumstances, such as for suspicion of corporate fraud,[107] because the shareholder in *Caspary* was only seeking to inspect the records in order to initiate an effective proxy fight.[108]

The Illinois Appellate Court also believed that leaving the common law intact would render the statutory inspection right meaningless.[109] Unlike Maryland, Illinois did have language resembling a savings clause.[110] The court found, however, that construing the language as preserving the common law would mean "that the Legislature, having solemnly prescribed certain requirements, in the same section repealed them."[111] This would contradict the general rule of statutory interpretation that a statute should not be construed so that it negatives another part of the statute.[112]

The United States District Court for the Eastern District of Pennsylvania applied what it believed to be the law for

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[104] *See id.*

[105] Caspary v. La. Land & Exploration Co., 707 F.2d 785, 792 (4th Cir. 1983).

[106] *Id.* at 789.

[107] *Id. at* 793.

[108] *Id.* at 787, 793 ("It may well be that a short duration stockholder with less than 5% of the stock nevertheless might be held to have a right to inspect stock books and other documents . . . if he could demonstrate looting of the corporate assets by the incumbent directors or other serious malfeasance. Here, however, the charge is no more than arguably poor management . . . .").

[109] *See* Neiman v. Templeton, Kenly & Co., 13 N.E.2d 290, 292–93 (Ill. App. Ct. 1938) (holding that common law inspection rights in Illinois were abrogated by the state's corporate record inspection statute).

[110] *See id.* at 292 (citing the statutory provision stating that: " '[n]othing herein contained shall impair the power of any court . . . to compel . . . the production' for examination of the books of the corporation.").

[111] *Id.*

[112] *Id.*

Pennsylvania, Kentucky, and Georgia on an issue of shareholder inspection rights.[113] The court found that the statutes in all three states abrogated the common law right of inspection.[114] Moreover, the court found it "inconceivable that the Georgia, Kentucky, or Pennsylvania Supreme Court would subvert the well-ordered statutory schemes . . . by recognizing the continued existence of such a common law right."[115] The court brushed the savings clause language of both Kentucky and Georgia aside by proclaiming it a reminder of the court's duty to determine if they should "enforce some vestigial common law right of a shareholder."[116]

The majority of jurisdictions ruling on this decision have found that the common law and statutory rights to inspect corporate records exist independently.[117] In so finding, the courts relied on the express savings clause language found in their statutes and their interpretation of these statutes. In deciding whether a shareholder had a right to inspect a corporation's records under the common law in addition to a right under state statute,[118] the Supreme Court of North Carolina found that the statute did not abrogate the common law right because it was preserved by the express savings clause.[119] The court favorably cited a commentator who stated that the "statutory rights are nonexclusive because the present Act expressly provides that they do not affect the power of a court, independent of the Act, to compel the production of corporate records for examination."[120] Like many codifications of the inspection right, including Georgia's, North Carolina's inspection statute is based on MBCA

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[113] *See* Perilstein v. United Glass Corp., 213 F.R.D. 252, 255 (E.D. Pa. 2003) (predicting that the courts in these three states would dismiss the action).

[114] *Id.* at 256.

[115] *Id.*

[116] *Id.*

[117] *See* Jeffries, *supra* note 9, at 1113–14 (describing the majority position).

[118] The shareholder sought a right to inspect the corporate records under the common law because the common law granted him access to a broader range of corporate records than did the statutory right. Parsons v. Jefferson-Pilot Corp., 426 S.E.2d 685, 688 (N.C. 1993).

[119] *Id.* at 689.

[120] *Id.* (quoting RUSSELL M. ROBINSON, ROBINSON ON NORTH CAROLINA CORPORATION LAW § 10.1, at 174 (4th ed. 1990)).

§ 16.02(e).[121] The court gave considerable weight to the official comments following the statute stating that the section "is an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist . . . as a 'common law' right of inspection . . . ."[122]

The Arizona Court of Appeals also reasoned that the common law right of inspection exists independently of the statutory right of inspection by relying on rules of statutory interpretation.[123] In Arizona, "statutes are not deemed to repeal the common law by implication unless the legislative intent to do so is clearly manifested. Where a right exists at common law . . . such statutory remedy is merely cumulative to the common law remedy unless it explicitly provides that it shall be exclusive."[124] Because there was no explicit statement of exclusivity in the Arizona inspection statute, the court found that both common law and statutory rights existed independently.[125] Implication, the court held, was insufficient to supplant common law.[126] In providing further justification for its decision, the court asks:

> Can anything be plainer than the fact that the owner of property has a clear right to inspect his own property? When the owner of property selects an agent or agents to care for and manage his property, how can that act be held to clothe the agent with power to . . . prevent the owner from even looking at his own property . . . ?[127]

More recently, in 2002 the Missouri Court of Appeals also found that the state's statutory inspection rights do not abrogate any

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[121] *Id.* at 688.

[122] *Id.* at 689 (alteration in original) (quoting N.C. GEN. STAT. § 55-16-02 official cmt. 4 (1990)). Notably, North Carolina adopted the official comments of the inspection statute verbatim from the MBCA official comments. *Compare* MODEL BUS. CORP. ACT § 16.02 cmt. 4 (2008), *with* N.C. GEN. STAT. § 55-16-02 official cmt. 4 (2011).

[123] Tucson Gas & Electric Co. v. Schantz, 428 P.2d 686, 690 (Ariz. Ct. App. 1967).

[124] *Id.* (citations omitted).

[125] *Id.*

[126] *Id.*

[127] *Id.* at 688 (quoting William Coale Dev. Co. v. Kennedy, 170 N.E. 434 (Ohio 1930)) (internal quotation marks omitted).

rights of inspection that exist at common law.[128] Like Arizona, Missouri relied on rules of statutory interpretation.[129] In Missouri, for a statute to replace the common law, the intent to do so must be made clear, either through express statements or necessary implication.[130] Necessary implication exists where the statutory remedy "fully comprehends and envelopes [sic] the remedies provided by common law."[131] Because the statutory inspection right differed in some respects from the common law right,[132] and because there was no statutory language "superceding [sic] or displacing" the common law,[133] the court held that the statute did not preempt common law.[134]

3. Finding a Separate Common Law Right to Inspect Corporate Books and Records in Georgia Does Not Render the Statutory Right of Inspection Superfluous. The Georgia Court of Appeals in *Mannato*—like the other minority cases finding that the shareholder inspection statutes abrogated the common law right of inspection[135]—feared rendering the statutory right of inspection meaningless by allowing for an independent common law right.[136] The court found that allowing the common law right "would render [section 14-2-1602(e)] meaningless, a result precluded by our rules of statutory construction."[137] The Georgia Court of Appeals, however, perhaps in trepidation of negating a statutory provision, failed to even consider whether allowing the common law to operate independently would in fact negate the statutory provision.[138] Because the statute establishes meaningful procedural differences distinct from those that exist through the

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[128] Missouri *ex rel.* Brown v. III Inv., Inc., 80 S.W.3d 855, 860 (Mo. Ct. App. 2002).

[129] *See id.* at 859–60 (discussing Missouri law on abrogation).

[130] *Id.*

[131] *Id.* at 860 (citation omitted) (internal quotation marks omitted).

[132] The differences between the Missouri common law and statutory rights to inspect relate to which books a shareholder may request. The statute limits the types of books a shareholder may inspect, while the common law has no such limitation so long as the shareholder can show proper purpose. *Id.*

[133] *Id.*

[134] *Id.* at 861.

[135] *See supra* notes 104–16 and accompanying text.

[136] Mannato v. SunTrust Banks, Inc., 708 S.E.2d 611, 613 (Ga. Ct. App. 2011).

[137] *Id.*

[138] *See id.* (stating twice in conclusory fashion that allowing the common law right to inspect would render the statute meaningless).

common law right,[139] clearly the independent existence of both rights would not render the statute meaningless.

Under circumstances where both rights exist, a shareholder owning 2% or less of a corporation's outstanding shares would be subject to a more rigorous and costly process in seeking to inspect corporate records than would a shareholder owning more than 2% of the outstanding shares. A shareholder owning more than 2% of the corporation, pursuant to section 14-2-1602, may request to inspect a corporation's books and records by notifying the corporation at least five days before he wishes to inspect the books and records.[140] Depending on what books and records he requests, the shareholder's request might also require a proper purpose pleaded with particularity.[141] Thus, the statute provides a shareholder owning more than 2% of the outstanding shares an expedited process for inspecting the corporate records.[142]

Compare this process with the process a shareholder owning 2% or less of the outstanding shares has to endure to exercise his inspection rights. If the shareholder sends notification to the corporation that he would like to examine the books and records, the corporation may deny the shareholder this right without even considering the shareholder's purpose for inspection.[143] The corporation expends no time and incurs little cost denying the shareholder's request to inspect the records. If the shareholder has yet to be deterred by the process and still wishes to inspect the records, his only option is to petition a court to issue a writ of mandamus or an injunction under the common law right of

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[139] *See supra* notes 82–87 and accompanying text.

[140] O.C.G.A. § 14-2-1602(b), (c) (Supp. 2011).

[141] *Compare* § 14-2-1602(b) (requiring only five day notification for inspection of the articles of incorporation, bylaws, shareholder and director resolutions, shareholder meeting minutes, communications to shareholders, list of directors and officers, and most recent annual registration), *with id.* § 14-2-1602(c) (requiring requests for accounting records, shareholder records, and minutes from board of director's meetings be made five days before inspection and be pleaded with particularity).

[142] The Delaware Supreme Court, considering the effect of the codification of shareholder inspection rights on the common law, stated that the Delaware legislature "sought to replace the formalized and burdensome mandamus procedure." Shaw v. Agri-Mark, Inc., 663 A.2d 464, 468 (Del. 1995).

[143] *See* O.C.G.A. § 14-2-1602(e) (Supp. 2011) (allowing corporations to limit the rights of shareholders owning less than 2% of the outstanding shares in the articles of incorporation or by-laws).

inspection.[144] In petitioning a court, the shareholder must state a proper purpose regardless of the books and records he seeks to inspect.[145] The costs and other inhibiting factors associated with petitioning a court may deter the shareholder from even filing a petition.[146] If a writ of mandamus or injunction is finally issued, the shareholder will have experienced a delay much greater than the five day delay a qualified shareholder may experience.[147] Additionally, a corporation may still appeal the court's decision to grant an injunction or issue a writ of mandamus, extending the delay even further.[148]

A system that preserves both the common law and statutory rights to inspect corporate records thus does not render the statute meaningless; the statute instead allows corporations to shift the expense and hassle of common law procedures regarding inspection to shareholders who own less than 2%. Having the two rights exist simultaneously also promotes the statute's intended purpose of restricting the access of shareholders who own 2% or less because those shareholders can be facially denied access by corporations and may be deterred in the face of court costs. As such, the Georgia Court of Appeals erred when it declared that allowing the common law to exist independently would render the statute meaningless because the court failed to examine the procedural significance of the statute in comparison with the common law.

4. The Court Misapplied Georgia's Rules of Statutory Construction. The Georgia Court of Appeals also misapplied Georgia's abrogation law and established rules of statutory

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[144] *See supra* note 26 and accompanying text.

[145] *See supra* notes 23–24 and accompanying text.

[146] *See* David M. Trubek et al., *The Cost of Ordinary Litigation*, 31 UCLA L. REV. 72, 74–76 (1983) (comparing the cost of litigation to an investment and noting that rising court costs act as a barrier to some potential litigants).

[147] *See* O.C.G.A. § 9-6-27(a) (2007) (establishing the time frame for when a court must hear an application for mandamus); Bruce v. Wallis, 556 S.E.2d 124, 127 (Ga. 2001) (finding that there should be greater deliberation in mandatory injunction hearings because the remedy is extraordinary).

[148] *See* Green v. Waddleton, 654 S.E.2d 204, 206 (Ga. Ct. App. 2007) (describing the standard of review applied to appeals of injunctions); Grindle v. Chastain, 493 S.E.2d 714, 717 (Ga. Ct. App. 1997) (describing the steps necessary to appeal a mandatory injunction before the appeal becomes moot).

interpretation. Georgia resembles the states discussed above that found that the statutory and common law rights to inspect exist independently because of Georgia's savings clause provision and similar law surrounding abrogation. Like Missouri's abrogation law that requires either express statutory language or necessary implication to supplant common law,[149] Georgia too has held that "[s]tatutes are not understood to effect a change in the common law beyond that which is clearly indicated by express terms or by necessary implication."[150] Georgia's statutory right to inspect records includes no express provision that supplants the common law.[151] In fact, the express language in the savings clause, as discussed further below, appears to protect the common law right of inspection.[152]

Does the statute, then, abrogate the common law by necessary implication? Georgia has not yet defined necessary implication in conjunction with abrogation, but the meaning given by states that use a necessary implication test is that statutes will be found to abrogate the common law when it becomes unworkable to find otherwise—i.e., when the statute completely subsumes the common law in its entirety.[153] As this Note has established, finding that the statutory and common law rights exist simultaneously because of the procedural differences between the two does not create an unworkable framework.[154] One right

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[149] *See* Missouri *ex rel.* Brown v. III Inv., Inc., 80 S.W.3d 855, 860 (Mo. Ct. App. 2002) ("[U]nless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid." (quoting *In re* Estate of Parker, 25 S.W.3d 611, 614 (Mo. Ct. App. 2000) (internal quotation marks omitted))).

[150] Nalley v. Baldwin, 583 S.E.2d 544, 546 (Ga. Ct. App. 2003) (citation omitted).

[151] O.C.G.A. § 14-2-1602 (Supp. 2011).

[152] *See infra* notes 156–65 and accompanying text.

[153] *See, e.g.*, Cavadi v. DeYeso, 941 N.E.2d 23, 34–36 (Mass. 2011) (finding that a state statute did not necessarily imply common law abrogation because the statute did not cover the whole subject of the common law and because abrogation was not required by the statutory provisions); Dahlin v. Kroening, 796 N.W.2d 503, 505–06 (Minn. 2011) (determining whether the statute rendered the common law "inoperative" when applying the "necessary implication" analysis); *Brown*, 80 S.W.3d at 860 (finding "necessary implication" to mean that the "statutory remedy fully comprehends and envelopes [sic] the remedies provided by common law" (citation omitted) (internal quotation marks omitted)); The Country Vinter, Inc. v. Louis Latour, Inc., 634 S.E.2d 745, 751 (Va. 2006) (finding necessary implication only when the statute "directly and irreconcilably oppose[s]" the common law (citation omitted)).

[154] *See supra* Part III.A.*3*.

provides an expedited procedure for inspecting the books and records for shareholders who own more than 2% of the outstanding shares of the corporation, while the other provides a more burdensome avenue for all shareholders. Further, Georgia courts are mandated by law to construe statutes so that they harmonize, if possible, with existing law.[155] Here, because such harmony between the statutes and common law is achievable, the Georgia Court of Appeals should have found, as a matter of law, that the statutory provisions did not abrogate a shareholder's common law right of inspection. Because the court did not, it erred.

5. The Court Misinterpreted the Language of O.C.G.A. § 14-2-1602(f). The Georgia Court of Appeals erred by finding that section 14-2-1602 abrogated the common law right of inspection, not only because there was no express statutory provision doing so or necessary implication of abrogation, but also because the statute *expressly preserves* the common law right of inspection in its savings clause. The savings clause states, in pertinent part, that section 14-2-1602 does not affect "[t]he power of a court, independently of this chapter, to compel the production of corporate records for examination."[156]

The *Mannato* court offered three explanations as to why the above provision does not preserve the common law. First, the court declared, in highly conclusory fashion, that the clause simply "is not an express savings clause of any common law rights of inspection."[157] Second, the court reiterated that finding the provision to be a savings clause would render O.C.G.A. § 14-2-1602 meaningless.[158] Third, the court found that the provision speaks instead to the ability of a court to "authorize . . . production or discovery of corporate records and books in pending lawsuits involving issues such as piercing the corporate veil, shareholder derivative suits, criminal cases, or administrative investigations by tax and insurance commissioners."[159]

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[155] *See* Nalley v. Baldwin, 583 S.E.2d 544, 546 (Ga. Ct. App. 2003) (describing the court's "mandate to reconcile new legislation with the common law" and stating that all statutes are "to be construed in connection and in harmony with the existing law" (citation omitted)).

[156] O.C.G.A. § 14-2-1602(f) (Supp. 2011).

[157] Mannato v. SunTrust Banks, Inc., 708 S.E.2d 611, 613 (Ga. Ct. App. 2011).

[158] *Id.*

[159] *Id.*

Because the first reason merely begs the question and the second is dealt with above,[160] only the third reason remains to uphold the court's opinion that section 14-2-1602(f) does not preserve the common law. The third reason, though, fails to stand up to closer scrutiny. In Georgia, courts "must follow the plain meaning of the statutory language, and absent evidence to the contrary, 'words should be assigned their ordinary, logical, and common meaning.' "[161] By declaring that the statutory provision in actuality speaks to the court's power to order production in specific forms of litigation and not to the court's power to compel production of books and records at common law, the *Mannato* court places limitations on the provision that are neither found nor implied in the actual language. Had the General Assembly intended to place these limitations on the provision, it could have expressly stated which code provisions were to remain unaffected by the statute. Instead, the legislature stated that the provisions of section 14-2-1602 do not affect the power of the court to compel the production of corporate records.[162] Courts have long wielded the power to compel corporations to produce their books and records for inspection by shareholders through the use of the writ of mandamus.[163] The language of section 14-2-1602(f)(2), which has no express limitations, preserves the court's power to compel production of corporate records on the behalf of shareholders through the common law.

Moreover, evidence exists that this was the intent of the General Assembly. The official comments adopted by the Georgia legislature regarding section 14-2-1602(f) follow verbatim the official comments set forth by the MBCA in its equivalent provision. The MBCA comment (and subsequently the Georgia comment) states that the entire section is an

> independent right of inspection that is not a substitute for or in derogation of rights of inspection that may

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[160] *See supra* Part III.A.*3*.

[161] City of LaGrange v. Ga. Pub. Serv. Comm'n, 675 S.E.2d 525, 621 (Ga. Ct. App. 2009) (footnote omitted) (quoting Pine Pointe Housing v. Bd. of Tax Assessors, 605 S.E.2d 443, 445 n.9 (Ga. Ct. App. 2004)).

[162] O.C.G.A. § 14-2-1602(f)(2) (Supp. 2011).

[163] *See supra* note 26 and accompanying text.

> exist . . . as a "common law" right of inspection, if any is found to exist by a court, to examine corporate records. [This section] simply preserves whatever independent right of inspection exists under these sources . . . .[164]

Of course, such a common law right existed in Georgia before the promulgation of the most recent statutory inspection right.[165] That the Georgia legislature adopted this provision is further evidence that it intended to uphold the common law's independent right of inspection. Naturally, official comments in Georgia "do not control 'the interpretation to be given to provisions' of statutes."[166] The official comment certainly should not control, but it does not support the *Mannato* court's artificial imposition of limitations on section 14-2-1602(f).

B. THE GEORGIA LEGISLATURE SHOULD REMOVE THE STATUTORY PROVISION AGAINST 2% SHAREHOLDERS

If Georgia courts continue to apply the erroneous assertion of abrogation from *Mannato*, the Georgia General Assembly should remove the restriction that now places an absolute bar for inspection on all shareholders owning less than 2% of a corporation's outstanding shares. Other legal means can more effectively accomplish the intended benefits of restricting access to shareholders owning less than 2% of the shares. Also, because the *Mannato* court held that there no longer existed a common law right to inspect, Georgia has removed a basic property right that has existed since the rise of the modern corporation from a substantial number of its citizens. Additionally, the legislature, for weighty policy considerations, should revise the provision so that it no longer restricts access based on ownership percentage.

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[164] O.C.G.A. § 14-2-1602 cmt. (2003); MODEL BUS. CORP. ACT § 16.02 cmt. 4 (2008).

[165] *See, e.g.*, Master Mortg. Corp. v. Craven, 193 S.E.2d 567, 569–70 (Ga. Ct. App. 1972) (holding that the common law right of inspection in Georgia existed simultaneously to and independent of the statutory right of inspection).

[166] Mannato v. SunTrust Bank, Inc., 708 S.E.2d 611, 613 (Ga. Ct. App. 2011) (quoting Serv. Corp. Int'l v. H.M. Patterson & Son, Inc., 434 S.E.2d 455 (Ga. 1993)).

1. The Existing Proper Purpose and Particularity Requirements More Effectively Combat Shareholder Harassment. Provisions like the one in Georgia that restrict shareholders owning less than a certain percentage of shares from accessing the corporate books and records have been adopted as a means of protecting corporations from potential abuse.[167] In Georgia, corporations like AFLAC pushed for the adoption of a restriction on shareholders owning less than 2% of the outstanding shares in order to "stop the 'harassment' of corporations by shareholders with small interests."[168] Then-Senator Barnes, during debate on the provision, cited the concern that a person could, without this provision, purchase one share of stock for the purpose of harassing a corporation or gaining access to its records.[169]

The goals of restricting harassing shareholders from accessing the corporate records, however, are more effectively accomplished through the requirement that all requests for important corporate records be made for a proper purpose and pleaded with particularity. The earliest version of the MBCA, which restricted shareholders based on amount of ownership or length of ownership, noted that the "most significant" condition imposed upon shareholders intended to prevent abuse was the condition of proper purpose.[170] Proper purpose itself arose from the common law as a means of fettering shareholders' rights to access corporate records.[171] Since then, proper purpose has become a well-defined term in every state that uses it.[172] If the corporation deems the purpose to be improper, it can deny a requesting shareholder access to the corporate records.[173] The case law establishing the

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[167] *See* Jeffries, *supra* note 9, at 1088–91 (asserting that legislatures balance managerial authority with managerial accountability when creating statutory rights of inspection); Thomas, *supra* note 17, at 334 (noting that inspection rights are intended to recognize that corporations have an "interest to be free from harassment by dissident investors").

[168] Barfield, *supra* note 69, at 298–99.

[169] *Id.* at 300.

[170] Ray Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 BUS. LAW., Nov. 1950, at x.

[171] *See supra* notes 23–26 and accompanying text.

[172] *See supra* notes 23–26 and accompanying text.

[173] *See* O.C.G.A. § 14-2-1604(a) (2003) (stating that a corporation cannot deny a shareholder access to its books and records if the shareholder's request complies with O.C.G.A. § 14-2-1602).

boundaries of proper purpose aids corporations in their determination of whether or not the purpose is proper. In Georgia, proper purpose means that the request is made in good faith, not to gratify curiosity, and not for speculating or vexatious purposes.[174] The purpose must be "germane to [a person's] interest as a stockholder, proper and lawful in character, and not inimical to the interests of the corporation itself."[175] In addition, the Georgia shareholder right of inspection statute also provides another safeguard to prevent shareholder abuse by requiring persons to plead requests with reasonable particularity.[176]

In Georgia, the dual requirements of proper purpose and reasonable particularity provide sufficient safeguards against corporate harassment. The two requirements work hand in hand: a shareholder seeking to inspect the records for a legitimate reason is more likely able to plead with sufficient particularity the purpose of his request and what books or records are needed for inspection. Those who purchase shares to harass a corporation are less likely to plead with particularity. Even if they could make a request with sufficient particularity, their purpose would not be proper.[177]

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[174] Master Mortg. Corp. v. Craven, 193 S.E.2d 567, 569 (Ga. Ct. App. 1972).

[175] *Id.* at 570 (citation omitted) (internal quotation marks omitted). It is important to note that, although *Mannato* determined that the common law right of inspection was abrogated by the statute, the terminology within the statute itself, when using common law terminology, should be construed in Georgia as it would have been at common law. *See* Bailey v. Kunz, 706 S.E.2d 98, 100 (Ga. Ct. App. 2011) ("[E]ffect[s] of a statute are to be determined in connection . . . with the common law . . . ." (quoting Summerlin v. Ga. Pines Cmty. Serv. Bd., 690 S.E.2d 401 (Ga. 2010))).

[176] O.C.G.A. § 14-2-1602(d)(2) (Supp. 2011).

[177] Unless, of course, they resorted to fabrication, thereby incurring the potential liabilities that follow under other legal theories. For example, a shareholder who has acted in bad faith petitioning a court to compel access to corporate books and records may be liable for the opposing party's costs and attorney fees. *See, e.g.*, Moses v. Pennebaker, 719 S.E.2d 521, 529 (Ga. Ct. App. 2011) (upholding an award of attorney fees after finding the opposing party had acted in bad faith). If the corporation is compelled under section 14-2-1602 to furnish certain books and records that contain confidential corporate information and the corporation fears the shareholder misappropriated the information to harm the corporation, the corporation may resort to trade secret law and seek an injunction barring the shareholder from using the misappropriated information for competitive gain. *See* Am. Bldgs. Co. v. Pascoe Bldg. Sys., 392 S.E.2d 860, 864 (Ga. 1990) ("When one has acquired knowledge of a trade secret by reason of a confidential business relationship with the holder of the trade secret, an injunction restraining divulgence of the trade secret will lie."); Sutter Capital Mgmt. v. Wells Capital, Inc., 714 S.E.2d 393, 394–95 (Ga. Ct. App. 2011) (stating

The restriction against shareholders owning 2% or less of the outstanding shares does not accomplish the goal of reducing corporate harassment as effectively as the requirements of proper purpose and particularity. No evidence suggests that shareholders owning less than 2% of a corporation's shares are more likely to engage in corporate harassment than those owning more. In fact, a minority shareholder owning shares greater than 2% of those outstanding and having invested generously in the corporation may be more likely to harass the corporation with repetitive or ill-purposed requests in order to closely monitor her investment.[178] Indeed, this was the conclusion the ABA reached when they revised their model provisions for the statutory right of inspection. The MBCA removed provisions restricting inspection rights to those who either owned more than 5% of the outstanding shares or had owned stock for more than six months because those provisions "do not necessarily *or even probably* ensure that inspection requests are made for proper purposes."[179] Georgia once again should follow the lead provided by the MBCA and amend its corporate code by removing the ineffectual 2% provision.

2. O.C.G.A § 14-2-1602(e) as Interpreted Destroys Traditional Property Interests. The ineffectiveness of a statutory provision should be reason enough to consider its removal. Such a shortcoming is particularly troublesome, however, when the provision itself impedes upon established property rights. During the rise of the modern corporation, corporation law sought to establish the framework for dealing with the relationship between stockholders and the corporate entity itself.[180] Early corporation law was modeled on the theory that the stockholders were not simply beneficiaries of the corporation, but instead held ownership interests in the corporation.[181] With ownership interests came certain property rights, including the right to inspect the corporate

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that a plaintiff will gain relief under Georgia trade secret law by showing that the information was misappropriated and a trade secret).

[178] These types of requests would likely be ill-purposed in light of Georgia's case law. *See, e.g.*, *Craven*, 193 S.E.2d at 569–70 (stating that requests made speculatively or to gratify curiosity are improper).

[179] MODEL BUS. CORP. ACT § 16.02 history (2008) (emphasis added).

[180] *See supra* notes 17–20 and accompanying text.

[181] *See* COOKE, *supra* note 16, at 69–71 (discussing early developments in corporation law).

books and records.[182] Today, the law generally recognizes that "shareholders are the equitable owners of the property and assets of the corporation" or that shareholders have "indirect . . . interest[s] in the corporate property."[183] Georgia recognizes that the right to inspect corporate records exists so shareholders can protect their interests.[184] Indeed, the Georgia legislature has acknowledged the "seriousness" of statutory provisions that place restrictions on access to corporate records.[185] The *Mannato* decision effectively turned a statute that placed "serious[ ]"[186] restrictions on the right of shareholders owning less than 2% of the outstanding shares to inspect corporate records into a statute that entirely abolished those shareholders' historic rights. The General Assembly should remedy this sudden and unintended infringement of property rights by removing altogether the restrictions against shareholders owning 2% or less of the outstanding shares.

3. O.C.G.A. § 14-2-1602(e) Is Arbitrary. In addition to infringing on established property rights with tenuous effectiveness, section 14-2-1602(e) is arbitrary. The provision could just as easily have imposed a restriction on 1% or 4% shareholders.[187] The legislature arrested debate on the issue, however, fearing that opening up debate on the line drawing might affect the swift passage of the revised Georgia Code in its entirety.[188] For this reason the restriction remained at 2%.[189]

Of course, legislatures often engage in line drawing that, for want of precise empirical data, appear to be chosen randomly from

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[182] *See id.* at 75–76 (listing the rights that accrued to shareholders).

[183] 11 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5100 (perm. ed., 1986).

[184] Master Mortg. Corp. v. Craven, 193 S.E.2d 567, 570 (Ga. Ct. App. 1972).

[185] *See* Barfield, *supra* note 69, at 300 (discussing the legislature's reservations over adopting a restriction on access to corporate records). Alabama has noted the gravity of restricting access to corporate records. *See, e.g.*, Miles v. Bank of Heflin, 328 So. 2d 281, 287 (Ala. 1975) ("[A]ny effort to statutorily limit [the right of inspection] by arbitrarily excluding certain books and records from the scope of full inspection would raise serious constitutional questions.").

[186] Barfield, *supra* note 69, at 300.

[187] *See id.* (describing the debate surrounding the 2% restriction).

[188] *Id.* at 299–300.

[189] *Id.* at 301.

a list of potential choices. O.C.G.A. § 14-2-1602, however, is arbitrary for a reason beyond the legislature's random choice: the 2% restriction does not provide an accurate framework for separating those shareholders with large interests and investments from those with smaller interests and investments. An ownership of less than 2% of a corporation may still be worth millions of dollars. For example, at the time the statute was passed in 1988, a 2% ownership in AFLAC was worth $22.2 million.[190] A statute that arbitrarily denies a shareholder having invested $20 million in one corporation but allows a shareholder having invested $2,000 in another corporation to inspect the books creates a large disparity of rights.[191]

4. The Difference Between Probusiness and Pro-Individual Business. Members of the General Assembly claimed the 2% restriction was "necessary for Georgia to remain a probusiness state."[192] Even ignoring the provision's questionable effectiveness, this provision instead disrupts probusiness foundations. Economic theory envisions optimum market success in fictional worlds where consumers receive perfect information at little to no transaction costs.[193] Although these worlds are largely unattainable, erecting barriers against the facilitation of information, like O.C.G.A. § 14-2-1602, only makes them more fanciful. A truly probusiness statutory provision would enable investors, even small ones, to take their investments and place them in their "perfect" corporation based on the free flow of information. Provisions that disallow certain

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[190] *Id.* at 299 n.138.

[191] Of course, the 2% restriction serves as a proxy for dividing those shareholders who have a more compelling interest from those who do not in proportion to the overall value of the corporation. The corporation whose 2% shareholders only invested $2,000 may be more willing to accommodate those shareholders' requests because of the relative value of those shareholders' investment. This view, however, only addresses the interests the corporation has in granting access to corporate information and does nothing to address the disparity in treatment that may arise between individual shareholders who invest their own personal capital in different corporations.

[192] Barfield, *supra* note 69, at 300.

[193] *See* Boyd Cohen & Monika I. Winn, *Market Imperfections, Opportunity and Sustainable Entrepreneurship*, 22 J. BUS. VENTURING 22, 40 (2007) (discussing the reality of markets based on perfect information and describing information asymmetry as one of the primary causes of market failure).

participants in the market from receiving basic corporate information impede this goal.

The Georgia legislature likely called the provision "probusiness" because they believed that it would help protect corporations against prying shareholders and the potential for derivative lawsuits. These protections, however, are not probusiness, but are rather pro-individual business. Under economic theories of information, access to the corporate books and records will better inform shareholders' subsequent choices.[194] If a disgruntled shareholder receives the information they request and no longer sees a basis for a derivative lawsuit, all parties prevail. If the same shareholder receives information that suggests corporate mismanagement or a director's breach of a fiduciary duty, the shareholder may bring a derivative lawsuit that in fact should be brought for the benefit of herself, other shareholders, the corporation itself, and the public. O.C.G.A. § 14-2-1602 takes away an important monitoring tool from a large pool of interested individuals and increases the likelihood that corporate malefactors will succeed in their malefactions. Thus, Georgia's provision best serves the interests of those who have something to hide.

IV. CONCLUSION

In *Mannato*, the Georgia Court of Appeals erroneously found that O.C.G.A. § 14-2-1602 abrogates shareholders' common law right of inspection. The court failed to notice the important procedural differences that exist between the statutory and common law right of inspection. By missing these distinctions, the court believed that the common law must be usurped by necessary implication. The court also brushed aside the rather explicit preservation of the common law in section 14-2-1602(f) by placing limitations on the statutory language not found within the statute itself. In so doing, Georgia joined the minority of states that have abrogated the common law right of inspection.

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[194] *See* Beth Allen, *New Developments in Economic Theory: Information as an Economic Commodity*, 80 AM. ECON. REV. 268, 268 (1990) ("[E]conomic agents desire information because it helps them to maximize their . . . utilities.").

The errors in *Mannato* have altered the balance between corporate oversight and corporate freedom. Rather suddenly, large numbers of corporate shareholders in Georgia have been barred absolutely from using one of their most effective tools for ensuring the relative security of their interests. In *Mannato*'s wake stands O.C.G.A. § 14-2-1602, the sole means through which shareholders can seek access to corporate records and a provision that allows corporations to prevent shareholders owning less than 2% of a corporation's outstanding shares from accessing corporate records. O.C.G.A. § 14-2-1602's restriction against 2% shareholders is ineffective at accomplishing its intended goal, infringes on historic property interests, arbitrarily discriminates between shareholders worthy of accessing corporate records, and shields corporate offenders from the full sight of corporate inspectors. The General Assembly should remedy the consequences of *Mannato* by removing the 2% restriction from the corporation code. In so doing, Georgia would restore powerful oversight abilities to shareholders who have suffered as of late from the economic downturn, precipitated in part by corporate misdirection.[195]

Ruari James O'Sullivan

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[195] *See, e.g.*, Dominic Rushe, *Financial Crisis was Caused by Corporate Mismanagement, Says U.S. Government*, GUARDIAN, Jan. 23, 2011, http://www.guadian.co.uk/business/2011/jan/26/financial-crisis-us-commission ("The 2008 financial meltdown was avoidable and largely caused by unnecessary risk-taking, corporate mismanagement and inept regulation . . . .").