The Supreme Court of The State of Delaware Clarifies That Productions of Records to Stockholders Under Section 220 Are Not Subject to a Presumption of Confidentiality

On August 7, 2019, in *Tiger v. Boast Apparel, Inc.*,[1] the Supreme Court of the State of Delaware affirmed the Court of Chancery's order and final judgment relating to a confidentiality order for books and records produced to a stockholder under Section 220 of the Delaware General Corporation Law. Although the Delaware Supreme Court affirmed the Court of Chancery's order and final judgment on the grounds that the lower court did not abuse its discretion, the Delaware Supreme Court held that while Section 220 inspections *may be* conditioned on the entry by the parties "of a reasonable confidentiality order, such inspections are not subject to a *presumption* of confidentiality."[2] The Court found that a confidentiality order's "temporal duration is not dependent on a showing of the absence of *exigent circumstances* by the stockholder."[3] The Court explained that the Court of Chancery should conduct a balancing test of the "stockholder's legitimate interests in free communication against the corporation's legitimate interests in confidentiality" in determining the scope of confidentiality and temporal duration of the limitation in a Section 220 production.[4]

I. Background

In 2010, Alex Tiger, the plaintiff, and John Dowling revived the Boast Brand, an apparel brand created in 1973 by tennis pro Bill St. John and retired in the 1990s.[5] Tiger and Dowling started Boast Investors, LLC, which was converted into BAI Capital Holdings, Inc., the defendant, as well as Branded Boast, LLC. Boast Investors purchased the Boast intellectual property from Boast, Inc.

Over the next several years, Dowling loaned $4 million to Boast Investors and increased his equity stake through an amendment to Boast Investors' operating agreement, which allowed him to convert the loans into additional member units.[6] Tiger opposed this action and refused to participate in a preemptive rights offering that took place as part of the conversion, diluting Tiger's interest in Boast Investors. In December of 2014, Tiger delivered a Section 220 demand to BAI for certain corporate records.[7] Section 220 of the Delaware Corporation Law provides that any stockholder "shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from" certain enumerated corporate records.[8] Tiger stated that the purposes of the "inspection demand were to, among other things, (1) value his shares, (2) investigate potential mismanagement, and (3) investigate director independence."[9]

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[1] *Tiger v. Boast Apparel, Inc.*, C.A. No. 2017-0776 (Del. Aug 7, 2019).

[2] *Id.* at 2 (emphasis added).

[3] *Id*. at 2 (emphasis added).

[4] *Id.* at 2-3, 9.

[5] *Id*. at 3.

[6] *Id.* at 4.

[7] *Id.* at 4.

[8] 8 *Del. C.* § 220(b).

[9] *Boast Apparel* at 4.

After several requests by BAI that Tiger enter into a confidentiality agreement in exchange for the production of records, which initially prohibited Tiger from using the corporate records in a subsequent litigation and later was modified to prohibit litigation by Tiger other than through derivative actions, the parties were unable to come to an agreement regarding the confidentiality agreement.[10] After BAI gave notice to the non-consenting stockholders in the preemptive rights offering that it had sold substantially all of its assets, Tiger filed a Section 220 action against BAI in the Court of Chancery for an order to compel access to BAI's corporate records.[11]

In 1982, the Supreme Court of the State of Delaware in *CM & M Group, Inc. v. Carroll* empowered the Court of Chancery "to place reasonable confidentiality restrictions on" Section 220 productions.[12] The Court held that the Court of Chancery was charged with protecting the stockholders' rights as well as the interests of the corporation.[13] The Court granted a broad power to the Court of Chancery to "prescribe any limitations or conditions with reference to the inspection," including the power to order a confidentiality limitation.[14]

II. The Dispute before the Delaware Court of Chancery

The main dispute between Tiger and BAI before the Court of Chancery was the scope of the confidentiality obligations upon production of the requested corporate records.[15] On July 23, 2018, the Master in Chancery submitted her report, "recommending an indefinite confidentiality period lasting up to and until Tiger filed suit based on facts learned through his inspection, after which confidentiality would be controlled by the applicable court rules."[16] The Court of Chancery held that that the corporate records produced to a stockholder under Section 220 are "*presumptively* subject to a 'reasonable confidentiality order.'"[17] Further, in a request by the stockholder for a time limitation on the confidentiality order, the Master in Chancery responded that, absent the demonstration by the stockholder of "the existence of *exigent circumstances*, confidentiality should be maintained 'indefinitely, unless and until the stockholder files suit, at which point confidentiality would be governed by the applicable court rules.'"[18] Tiger, the stockholder, appealed, "arguing that the indefinite nature of the confidentiality order constituted an abuse of discretion."[19]

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[10] *Id*. at 4-5.

[11] *Id.* at 5. If a corporation refuses to permit inspection of corporate records, the stockholder may apply to the Court of Chancery for an order compelling such inspection, and the Court of Chancery "may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other or further relief as the Court may deem just and proper." 8 *Del C.* § 220(c).

[12] *Boast Apparel* at 7 (quoting *CM & M Group, Inc. v. Carroll*, 453 A.2d 788 (Del. 1982)).

[13] *Boast Apparel* at 7 (citing *Carroll*, 453 A.2d at 793).

[14] *Boast Apparel* at 7 (quoting *Carroll*, 453 A.2d at 793-94).

[15] *Boast Apparel* at 6. Tiger suggested a one-year confidentiality order, while BAI suggested a three-year period of confidentiality. *Id.*

[16] *Id.* at 6.

[17] *Id*. at 2 (quoting Master's Post-trial Draft Report ("Master's Report"), *Tiger v. Boast Apparel, Inc.*, 2017-0776 (Del. Ch. July 23, 2018) Dkt. No. 2) (emphasis added).

[18] *Boast Apparel* at 2 (quoting *Master's Report, supra* note 17, at 8) (emphasis added).

[19] *Boast Apparel* at 6.

III. There Is No Presumption of Confidentiality in Section 220 Productions

The Supreme Court of the State of Delaware held that there is no presumption of confidentiality in Section 220 productions.[20] Rather, the Court held that "the Court of Chancery should weigh the stockholder's legitimate interests in free communication against the corporation's legitimate interests in confidentiality" and must "assess and compare benefits and harms when determining the initial degree and duration of confidentiality."[21] In a footnote, the Court noted that an example of a benefit to be weighed "might include a stockholder's reasonable desire to use Section 220 documents in communications with other stockholders in a legitimate proxy campaign."[22]

Relevant to the *Boast Apparel* case, the Court observed that an often cited opinion for the presumption is the Court of Chancery's 2004 opinion in *Disney v. Walt Disney Co.*, where the Court of Chancery initially held (and began its analysis with the assumption) that the production of confidential records under a Section 220 demand are made under the *presumption* of a reasonable confidentiality order.[23] On appeal of Mr. Disney's request to lift the confidentiality conditions, the Court remanded the case to the Court of Chancery to "address the potential benefits and potential harm from disclosing the documents for . . . [the] stated purposes."[24] The *Disney* Court of Chancery retreated from its "position that there is a *presumption* of confidentiality" and conducted a balancing test in determining whether "lifting the confidentiality order was appropriate."[25] Although the *Disney* Court of Chancery retreated from the presumption, the Court of Chancery in *Boast Apparel* – as several other recent decisions by the Court of Chancery have done – followed the original *Disney* opinion by paraphrasing a corporate law treatise which quoted only from the original *Disney* decision.[26]

The Court added that it expects "that the targets of Section 220 demands *will often be able to demonstrate* that some degree of confidentiality is warranted where they are asked to produce nonpublic information," but an analysis of the benefits and harms must be conducted when determining "the initial degree and duration of confidentiality."[27] The Court explained that in situations where the burden is more demanding on the corporation "when the parties are requesting a court to craft an *initial* confidentiality order than when a stockholder later requests a court to *modify* a presumably reasonably existing confidentiality order."[28]

IV. Exigent Circumstances Are Not Required To Reduce Duration

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[20] *Id.* at 11.

[21] *Id.* at 2, 11.

[22] *Id.* at 11 n. 20 (citing *Disney v. Walt Disney Co.*, No. 380, 2004 (Del. Mar. 31, 2005) (Order) at 1).

[23] *Boast Apparel.* at 8 (citing *Disney v. Walt Disney Co.*, 857 A.2d 444, 447 (Del. Ch. 2004)). In the *Disney* case, Mr. Disney executed a confidentiality agreement with the Walt Disney Company and later "petitioned the Court of Chancery to lift the confidentiality conditions so that he might conduct a proxy campaign against the directors." *Id.*

[24] *Boast Apparel* at 8-9 (quoting *Disney v. Walt Disney Co.*, No. 380, 2004 (Del. Mar. 31, 2005) (Order)).

[25] *Boast Apparel* at 9.

[26] *Id.* at 10-11 (comparing Edward C. Welch *et al*., *Folk on the Delaware General Corporation Law*, § 220.06[1], 7-241-42 with *Master's Report*, *supra* note 17, at 7).

[27] *Boast Apparel* at 11 (emphasis added).

[28] *Id.* at 11-12 (emphasis added).

Lastly, the Court held that the general rule is that stockholders need not show "'the existence of exigent circumstances' in order to receive anything less than an indefinite confidentiality."[29] The Court reasoned that as there is no presumption of confidentiality, it follows that there is no presumption of indefinite confidentiality.[30] The Court stated that in determining whether to modify the temporal scope of a confidentiality order, it must "weigh the stockholder's legitimate interests in free communication against the corporation's legitimate interests in confidentiality."[31] In this case, the Court found that although it is theoretically possible that an indefinite confidentiality order could be used to unfairly burden the stockholder, the stockholder "has not shown that it is *reasonably probable*."[32] Tiger had argued that in a hypothetical situation, an indefinite confidentiality order may require permission before corporate documents may be presented to an accountant or attorney for valuation purposes. The Court, offering deference to the Court of Chancery, rejected this argument because the confidentiality order in this case permitted Tiger to present the documents to his accountants and tax preparers so that they may value his shares.[33]

V. Conclusion

Although the Supreme Court of the State of Delaware affirmed the Delaware Court of Chancery's judgment not to modify the confidentiality order, the Court clarified that, although several recent Court of Chancery decisions have been applying the presumption of confidentiality to Section 220 orders of corporate records, there is no such presumption. Further, the Court held that the existence of exigent circumstances is not necessary in order to modify or reduce an indefinite confidentiality order. Rather, the Court held that in such situations the Court of Chancery should conduct a balancing test to weigh the benefits to the stockholder against the harm to the corporation of lifting or not placing a confidentiality order on a Section 220 production.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Helene Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; or Paul Rafla at 212.701.3388 or prafla@cahill.com.

[29] *Id.* at 12 (quoting *Master's Report*, *supra* note 17, at 7).

[30] *Boast Apparel*. at 12. The Court held that "an indefinite period of confidentiality protection should be the exception and not the rule." *Id.* at 12.

[31] *Id.* at 2.

[32] *Id.* at 13

[33] *Id.* at 13-14.