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Confidentiality and Inspections of Corporate Books and Records

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In *Tiger v. Boast Apparel, Inc.*, — A.3d —, 2019 WL 3683525 (Del. Aug. 7, 2019), the Delaware Supreme Court recently ruled on an issue of first impression: whether Section 220 inspections of corporate books and records are presumptively subject to confidentiality orders. The Court's decision, which reverses a recent line of cases that found a presumption of confidentiality, may significantly impact Section 220 demands and subsequent litigation arising from these proceedings.

Background and the Chancery Court's Decision

In *Tiger*, the plaintiff delivered a Section 220 demand to the defendant, the stated purposes of which were to "value his shares, investigate potential mismanagement, and investigate director independence." *Id.* at *2. The defendant responded by proposing a confidentiality agreement that would have barred the plaintiff from using the documents in subsequent litigation. The parties negotiated over the proposed confidentiality terms, but were unable to reach an agreement. *Id.* The plaintiff then filed a Section 220 action, and the Court of Chancery was called upon to decide the scope of the parties' confidentiality obligations. *Id.* The Chancery court ordered "an indefinite confidentiality period lasting up to and until [the plaintiff] filed suit based on facts learned through his inspection, after which confidentiality would be controlled by the applicable court rules." *Id.* The plaintiff appealed to the Delaware Supreme Court.

The Delaware Supreme Court Holds That Section 220 Demands Are Not Subject To A Presumption of Confidentiality.

The Delaware Supreme Court began its analysis by noting that the Court of Chancery is "empowered to place reasonable confidentiality restrictions on a Section 220 production." *Id.* (citing *CM & M Group, Inc. v. Carroll*, 453 A.2d 788 (Del. 1982)).

The Court then analyzed both the Court of Chancery's and its own holdings in *Disney v. Walt Disney Co.*, which has been the basis for a recent string of cases finding a presumption of confidentiality in Section 220 actions. In *Disney*, the parties had executed a confidentiality agreement, and the plaintiff subsequently petitioned the Court of Chancery to lift the confidentiality conditions for certain documents. The Court of Chancery "beg[an] its analysis with the presumption that . . . a demand pursuant to Section 220 should be conditioned upon a reasonable confidentiality order." *Id.* at *3. The Court of Chancery denied the plaintiff's request, and he appealed to the Delaware Supreme Court, which remanded the case with an instruction to make specific findings about whether the documents were confidential. On remand, the Court of Chancery "recast its mode of inquiry, retreating from its earlier position that there is a *presumption* of confidentiality." *Id.* (emphasis in original). Rather, the Court of Chancery stated that "a demand pursuant to Section 220 will *normally* be conditioned upon a reasonable confidentiality order." *Id.* (emphasis in original).

After analyzing the *Disney* decisions, the Court found that there is no presumption of confidentiality. *Id.* at *4. In so holding, the Court found that recent decisions had misapplied the prior decisions in *Disney*:

Although on remand the Court of Chancery in *Disney* essentially disclaimed a presumption of confidentiality, its original 2004 statement touting a presumption has, directly and indirectly, become the basis for several recent Court of Chancery decisions applying just such a presumption. And here the Master's Report followed suit, paraphrasing a corporate law treatise, quoting only from the Court of Chancery's original *Disney* decision, and concluding that there is a presumption of confidentiality.

Id. Therefore, the Court decided to resolve the apparent confusion and "clarified that there is no presumption of confidentiality in [Section 220](#) productions." *Id.* Rather, the Court of Chancery "must assess and compare benefits and harms when determining the initial degree and duration of confidentiality." *Id.*

The Takeaways

The Court's decision in *Tiger* bucks the recent trend in which courts had found a presumption of confidentiality in Section 220 demands. Given the high importance that many corporations place on maintaining the confidentiality of their books and records, the decision in *Tiger* is likely to result in a vast amount of litigation over confidentiality issues in the context of inspections of corporate books and records.

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