

Delaware Supreme Court Rejects Presumption of Confidentiality for Books-and-Records Productions

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The Delaware Supreme Court yesterday rejected a presumption of confidentiality for documents produced pursuant to books-and-records inspection requests under § 220 of the Delaware General Corporation Law. The decision in [*Tiger v. Boast Apparel, Inc.* \(Del. Aug. 7, 2019\)](#) holds that courts can impose confidentiality restrictions in appropriate cases, but that some justification of confidentiality is necessary – and that an indefinite period of confidentiality should be the exception, not the rule.

In light of the emphasis that the Delaware Supreme Court has placed on § 220 requests particularly in the context of shareholder derivative actions, parties making and receiving those requests might now need to focus more closely on whether and the extent to which confidentiality restrictions can be justified and, if so, how long they should last.

Background

Section 220 allows shareholders of Delaware corporations to demand inspection of corporate books and records if the shareholders can satisfy certain requirements, including establishing a proper purpose for the inspection request. Proper purposes can include valuing the shareholder's shares, investigating potential mismanagement and potential claims, communicating with other shareholders about a potential proxy campaign, etc.

Delaware courts have repeatedly encouraged shareholders contemplating derivative actions on behalf of Delaware corporations to make § 220 inspection demands before suing. The courts have hoped that prospective plaintiffs' pre-suit receipt of books and records will discourage meritless derivative actions – and bring more focus and detail to potentially meritorious ones.

Corporations producing books and records in response to § 220 demands frequently seek to impose confidentiality restrictions on the productions. Over the past decades, loose language in certain Delaware cases has led some courts to *presume* that confidentiality is appropriate for nonpublic corporate information, and some broad confidentiality orders have been entered.

Delaware Supreme Court's Decision

The Delaware Supreme Court rejected that approach in the *Tiger* case, holding that “there is no presumption of confidentiality in Section 220 productions.”

The Supreme Court acknowledged that the Court of Chancery “certainly has the power to impose reasonable confidentiality restrictions” and that “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 confidentiality must be justified; it cannot simply be presumed. The Court of Chancery “must assess and compare benefits and harms when determining the initial degree and duration of confidentiality.”

As to the duration of any confidentiality restrictions, the Supreme Court held that “an indefinite period of confidentiality should be the exception and not the rule.” “While indefinite confidentiality may well be reasonable in a given case, a party demanding Section 220 books and records need not show exigent circumstances for a court to grant something less than indefinite confidentiality.”

Accordingly, a court that is asked to impose confidentiality restrictions on a § 220 production must “weigh the stockholder’s legitimate interests in free communication against the corporation’s legitimate interests in confidentiality.” That assessment must be made on a case-by-case basis, without any presumption in favor of confidentiality.

Implications

The *Tiger* decision will likely cause shareholders and corporations to focus more closely on the need for and duration of any confidentiality restrictions on § 220 productions. Indefinite confidentiality restrictions now appear to be disfavored.

Where shareholders make § 220 inspection demands in contemplation of potential derivative actions, confidentiality agreements often allow the shareholders to use the produced documents in support of any claims they might file. But the agreements usually require redaction of nonpublic § 220 information, so the shareholders file their complaints under seal and also file redacted, public versions of the pleadings. The *Tiger* decision does not specifically address that practice, which would not seem to impose serious restrictions on shareholders' ability to use the § 220 information.

However, future cases might explore whether and the extent to which confidentiality agreements can restrict § 220 requesters from communicating with other shareholders about potential derivative claims involving nonpublic information gleaned from § 220 productions. The *Tiger* decision does not specifically address that scenario.

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