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Case Number 442,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAUPPAUGE DIGITAL INC.,	)	
	)	
Defendant Below,	)	No. 442, 2022
Appellant,	)	
	)	Court Below:
v.	)	Court of Chancery of the
	)	State of Delaware
JAMES RIVEST,	)	C.A. No. 2019-0848-JTL
	)	
Plaintiff Below,	)	
Appellee.	)	

APPELLANT'S AMENDED OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes, Regulations and Court Rules

Secondary Authority

NATURE OF PROCEEDINGS

Defendant, Hauppauge Digital, Inc. ("HDI" or the "Company"), has undergone some financial difficulties, which caused Management to decide to deregister from the NASDAQ and "go dark" in 2014. This caught the attention of self-proclaimed "deep value investor," Plaintiff, James Rivest, who bought shares in December 2018. Approximately six months later, Rivest began his campaign to obtain the Company's financials, free of any confidentiality restrictions, so he could value his shares, then publish the books and records on the Internet in creating a more profitable, public marketplace in which to sell.

The Company was willing to produce what Rivest requested, in writing in April 2020, but, as management needs to protect and preserve the Company's ability to continue operations, without alarming its suppliers, vendors and customers, the Company responded by requesting a non-disclosure agreement; even inviting Rivest to draft an agreement he believed appropriate for the Company to review.

Rivest, however, was uncompromising, rejecting the non-disclosure offer without regard for the likely harm the publication of its financials would cause the Company. Rivest could have reviewed the financials confidentially and "valued his shares" years ago; but, an individual shareholder's review of financial information is ***not*** what this case is about; it is about whether a Delaware Corporation can protect itself by disclosing financial information to a Shareholder with confidentiality.

While this Section 220 litigation was pending, this Court issued the *Tiger v. Boast* decision, which Rivest interprets as encouragement to be disagreeable toward confidentiality requests from Management, the Company Directors and Officers charged with stewardship of the Company.

The S.E.C. also promulgated a new rule limiting the circumstances in which stock prices of a company, exempted by Federal Law from public reporting (such as HDI), may be quoted for public sale. 17 C.F.R. § 240.15C2-11(a)(1).[1] Rivest wrote to the S.E.C. on multiple occasions, during the comment solicitation phase, forecasting ("disaster" and a "hellish experience") if companies that had gone dark were not ***forced*** to publish their financials on the Internet.

The S.E.C. did not follow Rivest's suggestions. But, there is an exception found in the new rule which allows brokers to make a public quotation for sale, if that broker has received a dark company's financials that are less than sixteen months old; upon which other brokers can "piggyback."

After Trial, where the Master recommended production with two-years confidentiality, Rivest took an Exception. Following the subsequent Hearing, the Vice Chancellor reversed the credibility findings of the Master and Ordered the Company to produce without any confidentiality protection whatsoever, so that Rivest - - who is presently, already able to sell his shares on the OTC Expert Market,

[1] The Trial Court calls this the "Quotation Rule"; that referent is used herein.

in accordance with Federal Law and without interference by this Court in the greater securities marketplace - - can maximize his personal profits in an end-around of the new S.E.C. rule, leaving the Company in a vulnerable state.[2]

In so doing, the Trial Court has allowed a shareholder, who is unconcerned with the longevity of the Company, to make a management decision regarding confidentiality, which diminishes the dignity of the Delaware Corporate form.

[2] A motion to stay execution pending appeal is pending before the Trial Court.

SUMMARY OF ARGUMENT

1. The Trial Court erred in interpreting ambiguities in *Tiger* to formulate imbalanced evidentiary standards. The Trial Court should have employed a credible basis, by a preponderance of the evidence, standard with burden on Plaintiff.

2. The Trial Court erred within its application of the *Tiger* balancing test, when it "overruled" aspects of the *Southpaw* rationale. The Trial Court should have recognized that dark companies are akin to private companies, because their non-reporting is evidence of a Management decision, and not have crafted Section 220 relief based on Plaintiff's desire to unwind the Management decision to go dark.

3. The Trial Court erred in reversing material credibility determinations made by the Master, despite their being no cross-examination of the most crucial Company witness, in the absence of a new Trial as required by *DiGiacobbe*.

4. Trial Court erred in considering Plaintiff's commitment to publishing the Company's financials, despite that being neither essential nor sufficient to his stated purpose of share valuation.

STATEMENT OF FACTS

A. Defendant, Hauppauge Digital Inc., Goes Dark to Protect Business as Going Concern

HDI designs and manufactures video products for personal computers, certain of which allow for the ability to watch television on computers, while others allow gamers to record and upload game play to YouTube. Management decided to take the Company public and it was listed on the NASDAQ. A106-07. The Company experienced difficulties and, in, "October 2013, the [C]ompany fell below the requirements for NASDAQ for continued listing." *Id.*

Management then decided to file a Form 15 with the S.E.C. A117, 403. The effect of this filing, and it being accepted by the S.E.C., was, "that [HDI] no longer needed to publish [their] financials and go through the audit process, mail out the financials and so forth." A117-19.

The reasons for going dark included: a history of operating losses; highly competitive market, where competition has comparatively greater resources; reliance upon limited shelf space with large, retail stores; specific instance of loss of shelf space at Best Buy to a competitor due to the competitor's weaponizing publicly disclosed, poor financials; savings to Company in avoiding costly compliance with public reporting requirements; and avoidance of loss of confidence among customers and sales. A109-20, 125-26, 158.

Additional factors considered by management included: an increased acuteness of the damage that would be caused by a competitor, again, weaponizing challenging financials and stealing customers, due to pandemic-related disruptions of supply chains and the inability to obtain microchips; "going concern opinions" indicating the Company cannot generate enough cash internally to satisfy its needs for the next twelve months; manufacturers loss of confidence that company would continue to exist as a going concern and, therefore, a related "pull back on their credit lines," which can cause a "death spiral," that is, the lessening of credit with which to obtain manufactured product, causing the lessening to obtain product to sell, causing the lessening to generate the revenue which is the source of payment of business debt owed to product manufacturers, necessary to continue operations. A192-201.

The Company's management was motivated by a desire to protect the Company and all of its Shareholders from the harm they believe will ensue with public disclosure of challenging financials. A184 ("The company would be harmed, and all of the other shareholders would be harmed [ ] including myself and my wife, would be harmed."). The restriction of credit extended to the Company by vendors and manufacturers "heavily factored" into the decision to go dark. A201.

B. Plaintiff, James Rivest, Deep Value Investor Targets HDI

Mr. Rivest has approximately $10.5 million invested in the stock market, having started "seriously investing" twenty-six years ago. A43, 69. He ran an investment business and earned income primarily in "deep value investing." A42. Mr. Rivest has no concerns about HDI having filed an S.E.C. Form 15 and deregistering, because he, "own[s] a lot of these type of companies," and "dark companies [are] where you find the bargains." A45, 47. Mr. Rivest made an initial purchase of HDI shares on December 17, 2018, when the Company was dark, and has since change the size of his position. *See* A408.

C. Unwilling to Negotiate a Non-Disclosure Agreement, Rivest Files Section 220 Action and Litigates with Aggression

In response to Rivest sending demand letters seeking various books and records to "value his shares," the Company responded by hiring Delaware Counsel to negotiate production, subject to a reasonable Non-Disclosure Agreement. Upon Rivest's insistence on publishing all information he obtains, the Company's former Counsel resigned and Rivest filed suit.

During discovery, the Company obtained responses to some of its requests. Those included: (a) an admission from Rivest that he will publish the Company's financials *after* he values his stock, to "engage meaningfully in the public market for the Company's stock to assess those values" (A410); and (b) "since October 8, 2019, the Delaware Supreme Court decided *Tiger v. Boast Apparel, Inc.*, 214 A.3d 933

(Del. 2019), casting serious doubt on a public company's ability to routinely insist on such confidential restrictions under Delaware law." A421.

D. Master in Chancery Conducts Trial and Recommends Production with Two-Year Confidentiality

At Trial, Rivest testified on his own behalf, while Messrs. Plotkin (C.E.O.) and Tucciarone (C.F.O.) testified for the Company. Rivest did not have any expert witness testify regarding whether it was a necessary part of his valuation processes to publish the financials.

Rivest testified that he: (1) would implement an intrinsic valuation methodology, which does *not* require publication (A86, 89, 98); (2) celebrated when another dark company's financials were published on the Internet, (A85); and (3) criticized the OTC Expert Market in relation to the Quotation Rule, recommending companies that have gone dark be ***forced*** to publish their financials on the Internet, or else a, "disaster for investors who invest in legitimate OTC companies that provide little to no public information" would ensue. A83.

The Company presented evidence and testimony consistent with its reasoning behind the Management decision to have gone and remain dark. Notably, Rivest elected not to cross-examine the C.F.O. A179.

In the Final Report, Her Honor recommended that: (i) Rivest presented a proper purpose; and, upon conducting a *Tiger* balancing analysis for the first time in our jurisprudence, (ii) the evidence and testimony presented weighed in favor of

production with a two-year confidentiality protection. A316-17. Rivest took exception to the Master's recommendation of confidentiality.

E. Vice Chancellor Hears Rivest's Exception and Reverses Course, Allowing Plaintiff to Utilize New Exception to S.E.C. Rule

At Oral Argument on Plaintiff's Exception, on more than one occasion, Vice Chancellor Laster sought Company's Counsel to proffer "special" circumstances to seemingly satisfy a heightened burden of proof on the Company: "[t]he question is, is it in any way, you know, special testimony that makes this case distinguishable from a general competitive situation?"[3] Too, the Vice Chancellor inquired: "I'm looking to you to say why this is so special and unique."[4]

His Honor issued a Memorandum Opinion which: (a) side-stepped the issue of proper purpose, because an Exception was taken by Rivest on the issue of confidentiality;[5] and (b) re-conducted the *Tiger* balancing test, setting forth evidentiary standards not found in the Opinion of this Court, as well as seemingly "overruling" aspects of the *Southpaw* rationale.[6]

The Vice Chancellor also reversed credibility determinations made by the Master concerning Rivest's testimony regarding his commitment to publishing the

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[3] *E.g.*, A375-380.
[4] A366-67.
[5] The Company did not raise Exception because it can tolerate the Master's conclusion implementing two years of confidentiality protection.
[6] *Southpaw Credit Opportunity Master Fund LP v. Advanced Battery Techs., Inc.*, 2015 WL 915486 (Del. Ch. Feb. 26, 2015).

Company's production in navigating an exception to the Quotation Rule (irrelevant vs. significant weight) and the Company's C.F.O.'s testimony regarding likelihood of harm (persuasive with perceptible "candor" vs. "incredible and hyperbolic"), despite there being no possibility for impeachment in the written, Trial transcript.

Incorporating the rationale in the Memorandum Opinion, the Vice Chancellor issued a Final Order and Judgment that, among other things, clarified that His Honor placed the *Tiger* burden of proof on the Company (not Plaintiff) and directed the Company to produce without a scintilla of confidentiality protection.

ARGUMENT

I. The Trial Court Erred in Interpreting Ambiguities in *Tiger* to Formulate Imbalanced Evidentiary Standards

A. Question Presented

Did the Court err in interpreting *Tiger* to place the burden of proof upon the Company, which required a special showing of the likelihood of harm? This is a matter of first impression, as the *Tiger* balancing test has not been procedurally interpreted or substantively applied by a Court in the First State; the question was raised below (*e.g.*, A379) and considered by the Court of Chancery (*id.*, Op. 33, Jdgmnt. 1-2).

B. Scope of Review

This court reviews questions of law *de novo*. *Concerned Citizens of Ests. of Fairway Vill. v. Fairway Cap, LLC*, 256 A.3d 737, 743 (Del. 2021). This Court's review of the formulation of legal principles by the Chancery Court is plenary and requires no deference. *Kahn v. Lynch Commc'n Sys.*, 669 A.2d 79, 84 (Del. 1995).

C. Merits of Argument

The Trial Court misinterpreted what the evidentiary standards should be in performing a *Tiger* balancing analysis, when it seemed to place a higher evidentiary burden upon the Company. The appropriate *Tiger* evidentiary standard should be credible basis, by a preponderance of the evidence, burden upon the Plaintiff.

This Court should also clarify whether certain language in *Tiger*, which can be interpreted as placing an elevated burden upon a company when a confidentiality agreement had not been reached pre-suit, is *dicta*. That would avoid incentivizing opportunistic shareholders from being disagreeable in private negotiations, to enjoy a procedural advantage in litigating confidentiality.

1. Narrow issue resolved in *Tiger*: no presumption of confidentiality

In *Tiger*, this Court was presented with the narrow issue of whether Delaware law provides for a presumption of confidentiality in books and records litigation. This Court held: "there is no presumption of confidentiality in Section 220 productions." *Tiger*, 214 A.3d at 939. Not before the Court, then, was the issue of which party has the burden of proof. Nor, at that time, was the Court required to determine the standard of proof, in the wake of eliminating the presumption.

Notwithstanding the narrow issue presented, some substantive guidance was provided: "the Court of Chancery [ ] must assess and compare benefits and harms when determining the initial degree and duration of confidentiality." *Id.* Further, although, "a corporation need *not* show specific harm that would result from disclosure before receiving confidentiality treatment in a Section 220 case[,] one cannot conclude reflexively that the need [for confidentiality] is readily apparent."

Id. (emphasis added).[7] But this Court has not, until now, had the occasion to identify the standard or burden allocation when the Court of Chancery is to weigh the evidence and testimony presented within the *Tiger* balancing analysis.

This opportunity to set forth the evidentiary rules is important, because there is *dicta* in *Tiger* that can be reasonably interpreted to complicate the analysis: "[i]f anything, the burden upon the corporation is more demanding - and the corresponding burden upon the stockholder less demanding - when the parties request a court to craft an initial confidentiality order than when a stockholder later requests a court to modify a presumably reasonable existing confidentiality order." *Id.* This suggests that, when a shareholder and corporation find themselves in a books and records dispute over confidentiality, it is advantageous to the shareholder to be unwilling to negotiate a confidentiality agreement pre-suit, then litigate the issue and enjoy the advantage of a higher evidentiary burden upon the corporation in the Courtroom.

2. Trial Court seemingly placed *Tiger* burden on Company with elevated evidentiary standard

Without the benefit of fulsome instruction from this Court, Chancery was left to its own devices in conducting a *Tiger* balancing analysis, *sans* presumption of

[7] This language identifies some parameters to the conceptual framework of balancing the, "stockholder's legitimate interests in free communication against the corporation's legitimate interests in confidentiality." 214 A.3d at 935.

confidentiality, for the first time in history. Despite twice referencing the preponderance of the evidence standard upon the shareholder-plaintiff in other aspects of Section 220 analyses (Op. 34), the Vice Chancellor placed the evidentiary burden on the corporation: "the Company failed to carry its burden under *Tiger* [ ] to establish the need for a confidentiality restriction." Jdgmnt. 1-2 (para. 4); Op. 35

Moreover, the Vice Chancellor decided that the evidentiary standard is credible basis: "[i]n my view, the Company failed to provide a *credible basis* for a threat of harm sufficient to warrant a confidentiality restriction." Op. 51. This determination, albeit without reference to the *Tiger dicta*, seems to jibe with an increased burden on a Delaware Corporation targeted by a disagreeable Shareholder.

During Oral Argument, the Vice Chancellor, more than once, requested the Company's Counsel identify "special" circumstances in the record that would seemingly satisfy such a heightened burden. A375-80 ("The question is, is it in any way, you know, special testimony that makes this case distinguishable from a general competitive situation?"); A366-67 (similar inquiry).

The Trial Court's requiring a special showing by the Company seems without the compass of instruction from this Court: forcing a Delaware Corporation to provide "special" and "unique" evidence and testimony to obtain confidentiality protections is, at best, contrary to the teachings of *Tiger* (*i.e.*, no need to show

"specific harm" and expectation that targeted companies will, "often be able to demonstrate that some degree of confidentiality is warranted").

3. Credible basis, by a preponderance of the evidence, with burden on Plaintiff is the more appropriate evidentiary framework

With these evidentiary issues ripe, it is paramount this Court clarify the standard and burden in the formulation of the *Tiger* balancing test. The Company submits: credible basis, by preponderance of the evidence, with the burden on the plaintiff is the most appropriate standard to capture the *essentia* of balance in *Tiger*.

The preponderance of the evidence standard is routinely employed by Chancery. "By implication, the preponderance of the evidence standard also means that if the evidence is in equipoise the party carrying the burden will lose." *Id.* In other words, if the plaintiff-shareholder has not presented evidence and testimony that demonstrates, in a particular case, the shareholder's interest in communication outweighs the corporation's interest in privacy, then the plaintiff-shareholder, having the burden of proof, has not satisfied this standard.[8]

Interpreting this as the evidentiary framework for *Tiger* balancing would be harmonious with the lack of a presumption of confidentiality; it would ask the shareholder make a showing that the *benefits* of publication outweigh the related likelihood of *harms* to the company. Neither party would be aided by a presumption;

[8] *See* Super. Ct. PJI 4.1 ("Burden of Proof - Preponderance of the Evidence").

that is, neither would be relieved from the labors of presenting testimony and evidence in support of their respective position, prior to those proofs being measured against each other in the Courtroom.

a. Chancery is familiar with this evidentiary framework

This evidentiary framework is a natural extension of existing Section 220 practice, which places the burden upon the plaintiff-shareholder as the party seeking affirmative relief. Moreover, it is a familiar facet of Chancery practice, generally, that the burden of proof is placed upon the party seeking injunctive relief, which includes a presentation of proofs that benefits outweigh harms.[9]

Chancery is also familiar with the credible basis, by preponderance of the evidence, as that is used when a Section 220 plaintiff seeks disclosure for the purpose of investigating wrongdoing or mismanagement. *E.g.*, *Haque v. Tesla Motors*, 2017 WL 448594 (Del. Ch. Feb. 2, 2017). Adjusting language delineating this standard to fit within the *Tiger* balancing framework could track as follows:

> [T]he plaintiff must present some evidence to suggest a credible basis from which this Court can infer that [the benefits to the shareholder of publication are greater than the harms to the corporation which are likely to occur]. [T]he credible basis standard sets the lowest possible

[9] The elements for a permanent injunction, for example, include plaintiff making a showing of competing interests, where the proofs are weighed in favor of relief. *E.g.*, *Sierra Club v. Delaware Dep't of Nat. Res. & Env't Control*, 919 A.2d 547, 555 (Del. 2007)(identifying one of plaintiff's elements as showing, "the harm that will result from a failure to enjoin the actions that threaten plaintiff outweighs the harm that will befall the defendant if an injunction is granted.").

> burden of proof and may be satisfied by a credible showing, through documents, logic, testimony or otherwise, that there are legitimate [benefits to the shareholder, outweighing the likely harms to the corporation]. It is, however, a burden the plaintiff seeking inspection must bear; it is not a formality. The purpose of requiring the plaintiff to articulate a credible basis when he proffers [the benefit to himself being greater than the likely harm to the corporation] is to strike the appropriate balance between (on the one hand) affording shareholders access to corporate records that may [support the shareholder's stated purpose] and (on the other) safeguarding the corporation's right to deny requests for inspection based [upon the ability of management to protect and preserve the business].
>
> *Haque*, 2017 WL 448594, at *4 (adjusted).

b. The Trial Court erred by not placing burden on Plaintiff

The Trial Court should not have placed the burden on the Company, but upon Plaintiff. Neither the Opinion nor Judgment contains any findings that Plaintiff carried any burden. And that makes sense, because the Trial record cannot support such a finding: (1) the Company presented evidence and testimony from its Chief Financial Officer that the Company: (a) had its line of credit with its suppliers reduced in the past due to the suppliers awareness of the Company's published, financial difficulties, and that a further credit reduction could be an existential issue to the business (A200-01); and (b) is in such a highly competitive market over shelf space at large retailers (unlike other businesses providing direct sales), that if he came into possession of uncomplimentary financials of a competitor, he too (as competitors have done to the Company) would use them to the Company's advantage in acquiring a monopoly of shelf-space (A206); meanwhile (2) Plaintiff

testified that he does not need to publish the Company's financials to satisfy his stated purpose of valuing his shares. A86, 89.

Accordingly, as the evidentiary standard that should have been employed when conducting the *Tiger* balancing is a credible basis, by a preponderance of the evidence, with the burden placed upon Plaintiff, in employing a divergent standard, the Trial Court committed reversible error.

II. The Trial Court Erred within Applying the *Tiger* Balancing Test to Effectively "Overrule" Aspects of the *Southpaw* Rationale

A. Question Presented

Within its application of the *Tiger* balancing test, did the Trial Court err when it set aside aspects of the *Southpaw* rationale, such that: (a) non-reporting Delaware Corporations should not be treated as "private" companies for Section 220 purposes; and (b) a shareholder may use Section 220 to exploit an exception to a new S.E.C. Rule within the complex overlay of federal securities regulations? This is a matter of first impression, as the *Tiger* balancing test has not been procedurally interpreted or substantively applied by a Court in the First State; the question was raised below (*e.g.*, A321, 327-28, 340) and considered by the Court of Chancery (Op. 40-41).

B. Scope of Review

This court reviews questions of law *de novo*. *Concerned Citizens of Ests. of Fairway Vill. v. Fairway Cap, LLC*, 256 A.3d 737, 743 (Del. 2021). This Court's review of the formulation of legal principles by the Chancery Court is plenary and requires no deference. *Kahn v. Lynch Commc'n Sys.*, 669 A.2d 79, 84 (Del. 1995).

C. Merits of Argument

The Trial Court erred in preventing the Company from using an analogy in *Southpaw* that a non-reporting company may be thought of as private within Section 220 confidentiality analysis. This is because, in a part of *Tiger* other than where the Trial Court looked, this Court approved of *Southpaw*. Also, this analogy remains

viable because it evidences a bedrock principle of Delaware Corporate law, that Management is responsible for protection and preservation of the company when it decides to go and remain private. 8 DEL. C. § 141(a).

Furthermore, the Trial Court committed error in crafting Section 220 relief to allow Rivest to circumvent Federal Securities Law. This is because, Rivest is an "accredited investor" and is able to sell his shares on the OTC Expert Market, even with confidentiality restrictions; Rivest is already entitled to the maximum communication interest to which he is entitled under Federal Law and would not be harmed by the imposition of confidentiality. Rather than weigh his present interests as a shareholder with a market, the Court erroneously assigned weight to his potential, future capacity as a post-disclosure, more-profitable, public market-maker. Rivest does not need to publish to value his shares, which he bought and changed positions all while the Company has been dark.

1. *Tiger* does not impact the precedential value of the private company analogy

Decisions pre-dating *Tiger* that promote the now-prohibited presumption no longer have the same precedential value. The Company has made use of an analogy found in an antecedent decision providing, "because it is not publicly reporting, it is more akin to a private company for purposes of [confidentiality] analysis."[10] In this

[10] *Southpaw*, 2015 WL 915486, at *9 (Del. Ch. Feb. 26, 2015).

case, this analogy reflects that Management determined there is an interest in maintaining confidentiality to protect the business. Moreover, the Company looks to *Southpaw* for the position that, "the Court of Chancery does not craft use and confidentiality restrictions on a Section 220 production based the rights and restrictions found in federal securities law." A310.

The Trial Court committed reversible error in misapplying *Tiger* to include a *de facto* "overruling" of the *Southpaw* rationale, in two aspects: (1) disallowing the Company's reliance upon the "private company" analogy, in contradiction to the statutorily defined role of management (8 DEL. C. § 141(a)); and (2) allowing the Plaintiff's post-production stratagem to publish financials in availing himself of an exception in Federal Securities Law to dictate a Section 220 proceeding.

a. The Trial Court misinterpreted the scope of the presumption elimination to include *Southpaw*

The Trial Court discredited reliance upon the private company analogy, because it determined that *Tiger* set aside aspects of the *Southpaw* rationale: "[a]fter *Tiger*, I do not believe that the Company can rely on *Southpaw* to support treating deregistered companies as if they were private entities under a presumption of confidentiality." Op. 41. The Trial Court declared that, "[t]he *Tiger* decision specifically identified *Southpaw* as one of the decisions that incorrectly treated confidentiality agreements 'as a matter-of-course.'" *Id.* (*citing Tiger*, 214 A.3d at

938 n.17). As this interpretation resulted in an application of *Tiger* misaligned with the directives of this Court, the Trial Court committed reversible error.

The Trial Court sought to justify its expansive construction by viewing footnote seventeen as "overruling" *Southpaw*.[11] A closer examination of how that footnote harmonizes within the greater framework of *Tiger*, however, reveals that the precedential value of *Southpaw* remains vibrant.

This Court rejected the "presumption of confidentiality" which appeared within one of several decisions in a Section 220 litigation involving Roy Disney. The particular decision containing the prohibited presumption is *Disney v. Walt Disney Co.*, 857 A.2d 444, 447 (Del. Ch. 2004). This Court noted that, in a later decision within the complex Disney litigation (*Disney v. Walt Disney Co.*, 2005 WL 1538336 (Del. Ch. June 20, 2005)), how Chancery, there, "retreat[ed] from its earlier position that there is a *presumption* of confidentiality[,]" and made the "*observation* that the provision of nonpublic corporate books and records to a stockholder making a demand pursuant to Section 220 will *normally* be conditioned upon a reasonable

[11] The Trial Court rationalized that *Tiger* rejected the, "then prevailing practice of implementing a prophylactic confidentiality restriction with the expectation that the parties would meet and confer regarding the specifics documents, then approach the court with any disputes." Op. 4. But, the Trial Court is inviting a new practice of prelitigation disagreeability that will increase the volume of Section 220 filings upon the Chancery Docket: every putative Section 220 plaintiff would be incentivized to file first and negotiate confidentiality later. *See, e.g.*, A180 (Company communicating willingness, but Plaintiff refused to agree).

confidentiality order." *Tiger*, 214 A.3d at 938. The *Tiger* footnote which forms the basis for the Trial Court's misinterpretation that *Southpaw* has been "overruled" references language from the subsequent *Disney* decision ("observation") - - which does **not** contain the presumption.[12]

Footnote seventeen contains maxims and guidance on contemporary Section 220 confidentiality analysis; it does not indicate disapproval of *Southpaw*. The footnote makes reference to *Southpaw* as but one decision, in addition to the subsequent "observation" *Disney* decision, as "treat[ing] such confidentiality agreements as a matter-of-course so long as they are reasonable." *Tiger*, 214 at 938 n. 17 (emphasis supplied).

b. In another part of *Tiger*, this Court approves of *Southpaw*

To fully express the flaw in the reasoning of the Trial Court when it disallowed the *Southpaw* analogy, one need only examine the second-half of the next footnote (eighteen), which reveals this Court ***approved*** of the restraint displayed in the very *Southpaw* decision the Trial Court suggests is without precedential value:

> Other Court of Chancery cases, however, have taken a more restrained view of *Disney. See, e.g.*, *Louisiana Mun. Police Employees' Ret. Sys.*

[12] Let us recall that a "presumption" is a legal device the existence of which has the power to alter the outcome of an adjudicative proceeding. BLACK'S LAW DICTIONARY (11th ed. 2019)("presumption")(providing most applicable definition as, "[a] legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts … [a] presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption."). An "observation" is the use of one's eyes.

> *v. Countrywide Fin. Corp.*, 2007 WL 4373116, at *2 n.7 (Del. Ch. Dec. 6, 2007) ("As Countrywide argues, nonpublic documents shared as the result of a Section 220 action are customarily given confidential treatment. *See, e.g.*, *Disney v. Walt Disney Co.*, 857 A.2d 444, 447 (Del. Ch. 2004). The need for confidential treatment is generally readily apparent. In this instance, however, the documents sought are several years old and do not involve the ongoing business of Countrywide. There, of course, may be valid reasons for confidential treatment of these documents, but *one cannot conclude reflexively that the need is readily apparent.*" (emphasis added)).
>
> *Tiger*, 214 at 939.

There is no indication of the existence of a legal presumption in the subsequent *Disney* decision or in *Southpaw*; the tethering of them together can only be sewn with unenlightened hand. Surely, this Court has no qualms with the exercise of reason or observations of the legal landscape, which is why it made another observation that: "[this Court] expect[s] 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." *Tiger*, 214 A.3d at 939. The Trial Court misinterpreted the scope of this Court's elimination of the presumption of confidentiality to include *Southpaw*.

c. The *Southpaw* analogy evidences efforts of the Company's management to protect and preserve the business

Of course, there is a reason why this analogy should remain a viable part of Delaware law and available to the Company. The Company is not asserting that because its financials have not previously been made public, they should

presumptively remain private; that would be contrary to *Tiger*. Rather, the Company asserts it is similar to a private company,[13] because the non-public nature of the Company's financials is evidence of decisions made by Management, following deregistration (A403), to protect and preserve the viability of the struggling business by way of privacy. 8 DEL. C. § 141(a)("[t]he business and affairs of every corporation shall be managed by or under the direction of the board of directors[.])[14]

The Trial record contains plentiful evidence and testimony explaining the decision by Management to deregister and avoid reporting to the greater public, including: history of operating losses (A109); highly competitive market, where competition has comparatively greater resources (A110); reliance upon limited shelf space with large, retail stores (A112); specific instance of loss of shelf space to a competitor due to the competitor's weaponizing publicly disclosed, poor financials (A112-20, A125-26); savings to Company in avoiding costly compliance with public reporting requirements (A119-20); and loss of confidence among customers and sales. A158.

The C.F.O. provided testimony and evidence supporting the management decision not to publish financials to non-shareholders: competitor weaponizing

[13] Not just because it is relieved under Federal Law from the public reporting requirements of a registered company.

[14] Authority in support of this bedrock proposition of Delaware Corporate law is legion and, in exercising restraint, a string citation belaboring this point is omitted.

challenging financials and stealing customers, with harm more acute due to pandemic-related disruptions of supply chain issues and inability to obtain microchips (A192-93); "going concern opinions" that Company cannot generate enough cash internally to satisfy its needs for the next twelve months (A194-200); manufacturers loss of confidence that company would continue to exist as a business and related "pull back on their credit lines," which can cause a "death spiral," that is, the lessening of extended credit with which to obtain manufactured product, causing the lessening of product to sell, causing the lessening of revenue which is the source of payment for debt necessary to remain a going concern. A200-01.

d. Our Courts must respect management's decision to go and remain private

It was a management decision to "go dark" and keep financials non-public. Management was motivated by a desire to protect the Company and all of its Shareholders from the harm that they believe will ensue with public disclosure of the challenging financials. A184 (articulating harm to all shareholders, management included). The restriction of credit provided to the Company by vendors and manufacturers "heavily factored" into the decision to go dark. A201.

Our Courts must respect the role of management of a Delaware Corporation, including the decision to not publicly report financials to non-shareholders likely to harm the business, in performing their duty to protect and preserve the company.

Accordingly, as the Trial Court misinterpreted whether the *Southpaw* analogy was invalidated, its misapplication of the *Tiger* balancing test constitutes reversible error.

2. *Tiger* does not impact the precedential value of the *Southpaw* craft and use restraint regarding Federal Law

The Trial Court also committed reversible in misinterpreting *Tiger* to have discounted another aspect of the *Southpaw* rationale. That aspect, paraphrased by the Master, is: "the Court of Chancery does not craft use and confidentiality restrictions on a Section 220 production based on the rights and restrictions found in federal securities law." A310.[15]

The Master, relying upon this proposition, assigned no weight to Rivest's testimony of his commitment to post-receipt publication of the Company's financials to any and all market participants, so he may create a *more* profitable marketplace for his shares. A306 (irrelevant). The Vice Chancellor, on the other hand, assigned an outcome-determinatively-heavy amount of weight to Rivest's proofs regarding his desire to exploit an exception to the Quotation Rule (A55),[16] via unfettered

[15] The verbatim language from *Southpaw* is: "I do not believe ordering parties to comply with federal law is consistent with the intent of Section 220. The inspection right afforded to stockholders under Section 220 is an important feature of the Delaware General Corporate Law, but it is a right entirely separate from the complex overlay of rights and regulations created under the federal securities law."

[16] The Vice Chancellor speculated, "[o]ne possible way to determine the value of his stock is to obtain a quotation from a Market Maker." *Id.* However, there is no evidence that Rivest needs (*see infra* Arg. IV) or will use this valuation methodology.

publication to the marketplace *writ large*, including the Company's competitors, suppliers, manufacturers and retailers.

a. Rivest is an accredited investor and already benefits from communications and sales over the OTC Expert Market

Under the Quotation Rule, the Company's stock is only trading in the OTC Expert Market because it has "gone dark" and elected not to make its current, financial information publicly available. Mr. Rivest has expressed his dissatisfaction to the S.E.C. with the OTC Expert Market and Quotation Rule, specifically, the lack of requirement for "dark companies" to make their financials public.[17] Yet, even disgruntled Rivest acknowledges that, as it has deregistered, the Company, "no longer ha[s] to file with the SEC." A94-95. The Vice Chancellor stated:

> [a]fter the promulgation of the Quotation Rule, there are only three ways to trade in the stock of a dark company. The first is in the Expert Market, where broker-dealers can publish unsolicited quotations from third parties that are restricted from public view and are only available to broker-dealers and ***accredited investors***.
>
> Exh. A, 54 (emphases supplied).

The Trial Court went on to describe the two other avenues within the nooks and crannies of the Quotation Rule, but that was an academic exercise. A critical fact was not considered, at all, within the Trial Court's application of the *Tiger*

[17] *E.g.*, A75-76 (describing dark company not publishing financials as, "a purgatory for remaining shareholders [and a] hellish experience."); A83 (describing Quotation Rule as "disaster for investors who invest in legitimate OTC companies that provide little to no public information.").

analysis: Rivest is as an accredited investor, who may presently sell his shares on the OTC Expert Market. To be clear, Rivest satisfies the definition of "accredited investor" under the Code of Federal Regulations, which includes: "any natural person whose individual net worth, or joint net worth with that person's spouse or spousal equivalent, exceeds $1,000,000,"[18] by Mr. Rivest's self-directed individual retirement accounts, which he valued at $10M. A68-69.

As Mr. Rivest can claim "accredited investor" status and avail himself of the OTC Expert Market, he has the ability to trade his shares as envisioned by the S.E.C.; he is not crippled by the lack of a "viable option" for trading beyond the limitations prescribed by S.E.C. rules. Failing to consider that Rivest is presently able to avail himself of the maximum level of shareholder communications to which he is entitled,[19] because he is an accredited investor trading over the OTC Expert Market in shares of a dark company, the Trial Court committed reversible error. [20]

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[18] 17 C.F.R. 230.501(a)(5). *See also Zhou v. Deng*, 2022 WL 1024809, at *10 (Del. Ch. Apr. 6, 2022), *aff'd*, 2022 WL 16832660 (Del. Nov. 9, 2022).

[19] In tension with the *de jure* privacy rights afforded the Company under Federal Law authorizing deregistration, within what is called in *Southpaw,* the, "complex overlay of rights and regulations created under the federal securities law."

[20] This critical evidence and testimony, which was not placed on the scale by the Trial Court, is clear evidence of reversible error in the context of *Tiger* balancing, but is outcome determinative viewed under the analytical lens of proper purpose. *See infra* Arg. IV (arguing commitment to publication and creation of a ***more profitable*** market is Mr. Rivest's secondary purpose, belied by his profit maximization preference *qua* market maker).

b. The Trial Court should not have considered the interests of Rivest *qua* more-profitable, future market maker

In considering Rivest's use of Section 220 to navigate the federally governed securities market, the Trial Court contradicted the *Southpaw* proposition of restraint and ran afoul of limitations in *Tiger*. This Court referenced, "weigh[ing] the stockholder's legitimate interests in free communication against the corporation's legitimate interest in confidentiality." 214 A.3d at 935. But the interests of Rivest *qua* more-profitable, future market-maker, beyond that of accredited investor in the current OTC Expert Market, should not have been weighed; such considerations throw *Tiger* off-balance.

The Court considered Mr. Rivest's evidence and testimony which focused solely on his future capacity as a more-profitable, public-market maker, which could only occur post-disclosure. Among other things, Mr. Rivest: (1) testified he would only implement an intrinsic valuation methodology, which does ***not*** require publication (A98); (2) admitted he will publish the Company's financials ***after he values*** his stock to "engage meaningfully in the public market for the Company's stock to assess those values" (A410); (3) believes that confidentiality terms that "do not prevent Plaintiff from ascertaining the value of his HDI stock" are somehow unreasonable (A422); (4) criticized the SEC's organization of the OTC Expert Market and lobbied that it require dark companies [such as Company] to publish their financials on websites (A73-74); and (5) celebrated when a dark company's

private financials were published on the Internet, as he is committed to doing here post-disclosure in the absence of confidentiality protections (A85)(feeling "like the boy in a Christmas Story receiving your hoped-for Daisy Red Ryder BB gun").[21] Accordingly, the Trial Court should not have considered Rivest's ***future*** interests, as a post-publication, more profitable, market-maker within its *Tiger* balancing.

To be clear, Rivest made his living as a "deep value investor" (A42), managing investments into companies that have "gone dark," similarly to the Company. *E.g.*, A47 ("They are going to be less transparent[, but] this is where you can make some serious money."). He presently manages his own money, which includes investing in dark companies. Rivest made the initial purchase of his shares of the Company on December 17, 2018 (A408), after the Company went dark, and he has since been able to change his position size, without publication of the Company's financials. Accordingly, when its consideration travelled beyond Rivest's legitimate, ***present*** interests in communications *qua* shareholder, as well as exceeded the restraint recommended in *Southpaw*, the Trial Court misapplied the *Tiger* balancing test and committed reversible error.

[21] Rivest has been accused of wrongfully publishing the private financials of companies on the Internet in the past. (Tr. 62).

III. The Trial Court Erred in Reversing Material Credibility Determinations in the Absence of a New Trial

A. Questions Presented

Did the Court err when it reversed the material credibility determinations made by the Master in the absence of a new Trial, as required by *DiGiacobbe v. Sestak*?[22] This is a matter of first impression, as the *Tiger* balancing test has not been procedurally interpreted or substantively applied by a Court in the First State; the question was raised below (A356, A378, A395-96) and considered by the Court of Chancery (Op. 5, 14, 49-50; Jdgmnt. 3).

B. Scope of Review

This court reviews questions of law *de novo*. *Concerned Citizens of Ests. of Fairway Vill. v. Fairway Cap, LLC*, 256 A.3d 737, 743 (Del. 2021). This Court's review of the formulation of legal principles by the Chancery Court is plenary and requires no deference. *Kahn v. Lynch Commc'n Sys.*, 669 A.2d 79, 84 (Del. 1995).

C. Merits of Argument

The Trial Court reversed the credibility determinations of the Company's witnesses made by the Master. Because those reversals caused deviations from conclusions in the Master's Final Report, two-years of confidentiality protection to none, they were material and, therefore, under *DiGiacobbe* a new Trial should have been conducted.

[22] 743 A.2d 180, 184 (Del. 1999)

1. The Master found the Trial testimony of the C.F.O. to have been presented with candor and credible

This Court has held that, "where exceptions raise a *bona fide* issue as to dispositive credibility determinations [ ] a new hearing [will] be inevitable." *DiGiacobbe*, 743 A.2d at 184. Following Trial before the Master,[23] the *Tiger* balancing analysis memorialized in the Final Report seemed, in significant part, to weigh in favor of limited confidentiality based upon the C.F.O.'s testimony.

The Master made a favorable credibility determination of the C.F.O. upon observing his demeanor and hearing him testify that he, too, would use a competitor's unflattering financial records to secure the highly-sought-after shelf-space at large retail stores, which can make-or-break businesses in the computer products industry. A313.

Finding the C.F.O.'s testimony candid and credible, the Master recommended disclosure with a two-year confidentiality protection. A314-17. Upon considering the Exception and paper record, albeit anew, yet disadvantaged by a lack of "aware[ness] of the variations in demeanor or voice inflections that are frequently

[23] The Master made direct inquiry of certain witnesses at Trial, in furtherance of developing the facts and refining Her Honor's credibility determinations. Whereas, during Oral Argument on Appellee's exception, the Vice Chancellor did not hear any testimony, let alone make meaningful inquiry; nonetheless, the Vice Chancellor made independent, "credibility determinations." A Trial Judge, "may [not] insulate his or her factual findings from appellate review by denominating them as credibility determinations." *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 492 (Del. 2000).

dispositive influences upon the listener's understanding of and belief in what is said,"[24] the Vice Chancellor reversed this credibility determination and tipped the scale to eliminate even a modicum of confidentiality protection to the Company.

2. Vice Chancellor's reversal of credibility determination of C.F.O.'s testimony, changed outcome of proceeding and required new Trial

That the Master's material credibility determination was reversed is somewhat perplexing. At Trial, the C.F.O.'s testimony was not subjected to cross-examination by Rivest and, therefore, was not in any way impeached. A207. ("Your Honor, there is no cross-examination."). During oral argument, the Vice Chancellor confirmed that the Company's witnesses provided credible testimony: "I mean, nobody is saying that your folks lied…." A366.[25] The Vice Chancellor even made efforts to avoid making credibility re-assessments. A395 ("So do I really need to tangle with whether it's pretextual?"). Most perplexingly, however, the Vice Chancellor ***confirmed*** the credibility of the C.F.O.'s testimony: "[n]obody thinks he's lying. [ ] Everybody - - again, its' not the least bit implausible testimony." A378. The Opinion resolving the Exception, however, contains an about-face.

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[24] *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 492 (Del. 2000)(citation omitted).

[25] Suggesting that assigning weight in *Tiger* balancing is not based upon credibility of proofs at Trial, but more of a value assessment or policy determination. *Id.* This suggestion, however, does not comport with the directions from this Court to balance the proofs presented by the Parties; it does not give the Court of Chancery license to engage in the swirling of abstract concepts while dismissing what is presented inside the Courtroom.

The Trial Court completely changed course: "[t]he testimony that the Company's witnesses gave bordered on the hyperbolic and lacked credibility" (Op. 5); "the Company has advanced claims of harm that are overblown and which border on the hyperbolic" (*id.* 46); the Company presented "sensationalized speculation about the risk of harm to the company." *Id.* This is the polar opposite of the credibility determination made by: (a) the Master who directly perceived the variations in demeanor and inflections in the voice of the C.F.O. when he testified, and found his testimony candid and credible; as well as (b) the initial credibility determinations apparently made by the Vice Chancellor himself. [26]

The irreconcilable credibility determinations of the C.F.O.'s testimony found in the Memorandum Opinion changed the outcome of this Action, which is objectively difficult to process in the absence of a new Trial. Indeed, this Court must perceive the disconnect between what procedurally transpired at Trial and the Hearing, through the lens of *DiGiacobbe*; when *bona fide* issues regarding dispositive credibility determinations arise on Exception, a new Trial is ***inevitable***.[27]

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[26] The Vice Chancellor also reversed the Master's dispositive credibility determination regarding Mr. Rivest's testimony that he is committed to disclosing the Company's financial records obtained in this action to the public *writ large* and, thereby, avail himself of an exception to the SEC Quotation Rule: from no weight because of irrelevance (Master), to full credibility (Vice Chancellor). The propriety of utilizing Section 220 to manipulate SEC Regulations has been discussed *supra*.

[27] *DiGiacobbe*, 743 A.2d at 184 (emphases supplied).

While recognizing the standard for Chancery when reviewing a Master's Findings on Exception is *de novo*, the extreme severity of the pendulum swing from a real-time, in-person determination of "candor" (Master), on the one hand, to an *ex post facto* and lifeless paper record determination of "hyperbolic" (Vice Chancellor), on the other, should cause discomfort to this Court's sense of equity and procedural fairness, [28] and compel the Trial Court to conduct a new Trial.

Accordingly, as it made reverse credibility determinations material to the outcome of this matter, but without a new Trial, under *DiGiacobbe*, the Trial Court committed reversible error.

[28] In other contexts, our Law recognizes that credibility determinations are most accurately made by the factfinder that hears the testimony and sees the evidence. *E.g.*, *State v. Miller*, 2010 WL 8250815, at *2 (Del. Super. Ct. July 20, 2010)("[i]n Delaware, the jury is the sole trier of fact, responsible for determining witness credibility and resolving conflicts in testimony ... [j]urors should be afforded every opportunity to hear impeachment evidence that may undermine a witness' credibility."); *see also Murphy & Landon, P.A. v. Pernic*, 121 A.3d 1215, 1226 (Del. 2015)(recognizing how both the Superior Court and this Court are prohibited from weighing the evidence, determining questions of credibility, or making its own factual findings … which would be usurping the [ ] role as factfinder.").

IV. Trial Court Erred in Considering Plaintiff's subsequent publishing of financials despite being neither Essential nor Sufficient to Stated Purpose

A. Questions Presented

Did the Court err when it concluded, as a matter of law, that no confidentiality protection to the Company was warranted, despite Plaintiff's forthcoming public disclosure being neither essential nor sufficient to his stated purpose of share valuation? This is a matter of first impression, as the *Tiger* balancing test has not been procedurally interpreted or substantively applied by a Court in the First State; the question was raised below (A86-87, A76) and considered by the Court of Chancery (A301-06, Op. 42-45, 55, 58).

In the alternative, pursuant to Supr. Ct. R. 8, the interests of justice require that this question be heard on Appeal, because the Company had no reason to raise an Exception to the recommendation made by the Master on proper purpose, since Her Honor's ultimate recommendation on confidentiality (two-years protection) was one the Company can tolerate. Raising an exception would have been academic or more akin to a "concurrence." Moreover, the most recent demand from Rivest, and response from the Company, both of which post-dated Trial, have been incorporated into this proceeding, as an accommodation to Plaintiff, in exchange for "proper purpose" being a contested issue ripe for review by this Court. *See* A426-34.

B. Scope of Review

This court reviews questions of law *de novo*. *Concerned Citizens of Ests. of Fairway Vill. v. Fairway Cap, LLC*, 256 A.3d 737, 743 (Del. 2021). This Court's review of the formulation of legal principles by the Chancery Court is plenary and requires no deference. *Kahn v. Lynch Commc'n Sys.*, 669 A.2d 79, 84 (Del. 1995).

C. Merits of Argument

The Trial Court committed reversible error when His Honor considered Rivest's testimony and evidence regarding his commitment to publish the Company's financials and create a more profitable market, because that is neither necessary nor essential to Rivest's stated purpose of share valuation. Rivest testified he did not need to publish financials to value his shares, which he can sell presently on the OTC Expert Market.

1. It unnecessary that Rivest publish financials to sell his shares, it is simply his preference to create a more profitable, public market

"Once a stockholder establishes a proper purpose under § 220, the right to relief will not be defeated by the fact that the stockholder may have secondary purposes that are improper [but t]he scope of a stockholder's inspection, however, is limited to those books and records that are *necessary* and *essential* to accomplish the

stated, proper purpose."[29] A shareholder's preference underpinning a secondary purpose is not relevant.

Rivest's stated purpose is share valuation. Once he reviews and values, Rivest may be able to sell his shares on the OTC Expert Market with more confidence; but, critically, Mr. Rivest's participation in the OTC Expert Market does not require publication of the Company's financials: "[r]ight now, in the expert market, from OTC markets, [the Company does] get bids and quotes at all the brokers; they just can't share it publicly with their customers, unless it's an unsolicited bid." A62-63. Mr. Rivest's secondary purpose is publication and more-profitable, public market creation by way of exception to the Quotation Rule.

However, it is not the case that without publication, there is no market; it is simply that it is Rivest's preference that there be a public market, because it would be more profitable to him in his capacity as the market maker. A62-63 ("I much ***prefer*** it when a dark company will actually put their financials on their website or be more public with their financials….").[30]

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[29] *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002)(emphasis added).

[30] This is the same gripe Rivest aired to the S.E.C.; he wants the power to unwind a management decision to "go dark" by forcing publication of financials; especially, when he has them.

2. The Trial Court should not have considered evidence and testimony regarding Rivest's secondary purpose

The Master identified that Delaware law recognizes stock valuation, as stated by Rivest, as a proper purpose. The Vice Chancellor side-stepped the issue, noting that an Exception was only taken by Rivest on issues of confidentiality.[31] However, Rivest made a post-trial Section 220 demand, in which he sought Company records for the years 2021 and 2022. A426.[32]

Rather than attempt to move the Trial Court to allow for an amendment to the Complaint, post-Trial and -Exception to include the most recent Section 220 demand (unlikely to succeed) or commence a separate lawsuit and move to consolidate with the instant action (costly and time consuming), the Parties negotiated a Stipulation that allowed Rivest's most recent demand to be a part of this proceeding, in exchange for the propriety of Rivest's purpose to be placed at issue, and ripe for contest on appeal.[33] Indeed, the Parties' dispute concerning propriety of purpose is, because of

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[31] Again, the Company did not raise Exception with the Final Report because the Company can tolerate the Master's conclusion implementing two years of confidentiality protection. It was not worth additional investment of the Company's limited resources into litigation to file an Exception to reach the same result, but upon different legal reasoning - - which sounds more like a "Concurrence."

[32] The Company responded, as it has in the past, with a request to Mr. Rivest that he provide a non-disclosure agreement for execution before production. A434.

[33] The Stipulation provides that: "[t]he stated purpose for the New Demand, which was made under oath and directed to HAUP at its principal place of business, was to ascertain the value of Plaintiff's stock of the Company[ ]" and Defendant contends, among other things, that public disclosure of its financials will cause harm to the Company and that Plaintiff is being insincere, because his purpose is not to value his

the most recent demand, live and capable of repetition; which makes is appropriate for consideration by this Court.[34]

With the propriety of Rivest's purpose for seeking production squarely at issue, as the source of likely recurring injury, the Court's analysis should not have included consideration of evidence and testimony regarding Rivest's commitment to publish the Company's financials to create a more profitable market, unless it was necessary and essential to his valuing his shares in the capacity of a shareholder.

There is no evidence and testimony from Rivest that he needs to publish the Company's financials to value his shares. To the contrary, Rivest admits publication is ***not*** essential to his stated purpose:

> Q. All right. Now, by obtaining the books and records under a confidentiality agreement, one can still determine the intrinsic value of a company's shares. Right?
>
> A. Individually, yes, I could.

A86; *see also* A89.

3. Rivest cannot show that publication is required for him to perform an intrinsic valuation of his shares

Despite the burden being upon him to show the scope of disclosure was necessary and essential to satisfy his stated purpose of share valuation, Rivest did not produce any expert testimony at Trial demonstrating a necessity of publication

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shares, but to make a public market for the Company's shares in exploitation of Federal Securities Laws." A399-402.

[34] Supr. Ct. R. 8 (interests of justice).

so that he may implement his valuation methodology.[35] Indeed, the Master inquired directly of Rivest whether publication was required in his valuation methodology:

> The Master: What do you need, or why do you need the requested information to value your stock?
>
> Mr. Rivest: Well, Your Honor, the stock price means nothing until you see the actual financials, what's in the company. So I definitely need all the financial statements to see what it's worth.
>
> The Master: And do you have a methodology you're planning to follow in order to value your stock?
>
> Mr. Rivest: Well, I look at all three statements. I look at the income statement, the cash flow statements, and the balance sheet, and then I determine if this - - if the price is much cheaper than the actual intrinsic value of the company.
>
> The Master: So your methodology is more of an internal methodology. Is that - -
>
> Mr. Rivest: [cutting off Master in Chancery] Well, it's both. You know, I need cash flow, but I also like to see what the assets of the company are. In some of my investments, I buy 50-cent dollar bills. Other cases, they have free cash flow of 20 percent. So it all depends what – you know, what the company is.

A98.

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[35] In preparing this Appeal, a professional valuation expert has been consulted. According to that consultant, there are methodologies of valuing a company that do not require financial records to be public. It is helpful to consider, how are shares in private companies bought or sold? Answer: after valuation based on examination of the non-public financials. As it is a pedestrian fact that publication of financials is not required for valuation, this may be why Mr. Rivest did not present any Expert at Trial; because any credible valuation professional would acknowledge this reality as an Achilles heel in Mr. Rivest's position.

There was no better opportunity for Rivest to explain why he needs to publish the financials to value his stock; the Master extended generosity and provided him with the specific questions that would have elicited his explanation as to necessity, if there was any. Rivest did not state a reason why he needs to publish the financials for valuation purposes, because there is no reason. His commitment to publication to create a public market is his secondary purpose, which is underpinned by his ***preference*** to sell his shares at a greater profit than that which the OTC Expert Market will afford him.

Accordingly, as the Vice Chancellor considered Rivest's testimony and evidence regarding his commitment to publish the Company's financials to create a more profitable market, despite publication being neither necessary nor essential to the stated purpose of share valuation, the Trial Court committed reversible error.

CONCLUSION

The Decision of the Trial Court should be reversed and remanded for findings consistent with the Master's recommendation of two-years confidentiality. In the alternative, this matter should be reversed and remanded for a new Trial, where material credibility decisions can be made in a manner more faithful to our adjudicative process.

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DATED: January 27, 2023

CERTIFICATE OF SERVICE

I, Douglas J. Cummings, Jr., Esquire, hereby certify that on this 27th day of January, 2023, I caused a copy of the foregoing Appellant's Amended Opening Brief to be served by File&ServeXpress on Counsel of record at the following address:

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