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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

PLAINTIFF-BELOW/APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On October 24, 2019, Plaintiff-Below, Appellee James Rivest ("Rivest") commenced this books and records action under Section 220 of the Delaware General Corporation Law ("Section 220") to obtain financial statements[1] of Defendant-Below, Appellant Hauppauge Digital, Inc. (the "Company"), an unregistered, public corporation, in order to value his shares. The case was assigned to a Master in Chancery (the "Master").

The Company would eventually challenge Rivest's purpose and insist that the inspection of its financial statements be subject to an indefinite confidentiality condition, despite 90% of its outstanding shares being held in the public market by retail investors.

On October 26, 2021, a one-day trial was held, during which the Company's witnesses testified to a general concern about the competitive nature of the Company's business to evidence a confidentiality condition was warranted. The Master issued the Master's Report on January 24, 2022 (the "Master's Report").[2]

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[1] While Rivest's Section 220 demands ("Demands") sought other documents, the only documents at issue for trial were financial statements concerning closed periods of performance. *See* September 1, 2022 Memorandum Opinion (the "Opinion" or "Op.") at 27.

[2] The Master's Report is A287-A317, Appendix to Appellant's Opening Br. (Filing ID 68909274); *also Rivest v. Hauppauge Digit., Inc. (Report)*, 2022 WL 203202 (Del. Ch. Jan. 24, 2022) (Griffin, M.).

The Master recommended that (i) Rivest had a proper purpose to inspect the Company's financial statements and (ii) that Rivest's inspection should be conditioned on a two-year confidentiality restriction.

Rivest took exception to the Master's confidentiality condition recommendation, arguing that it interfered with his fundamental interests to communicate freely and ability to value his shares, and that the Company's trial evidence was insufficient to support the condition. Focusing on this Court's holdings in *Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019), Rivest argued that if a corporation could justify a confidentiality condition with standard risk associated with operating in a competitive market, then the Court of Chancery would be applying a presumption of confidentiality in Section 220 actions by another name. The Company took no exception to the Master's Report.

The Court of Chancery reviewed the record *de novo* and agreed with Rivest, granting the exception and ordering that the Company's financial statements are not subject to any confidentiality restriction.[3]

On appeal, the Company argues the Court of Chancery erred in (i) interpreting and applying *Tiger's* balancing of interests test;[4] (ii) being unpersuaded that

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[3] Op. at 6.

[4] Appellant's Amended Opening Brief (Filing ID 69013283) ("Opening Brief" or "Opening Br.") at 11-18.

Southpaw Credit Opportunity Master Fund LP v. Advanced Battery Techs., Inc., 2015 WL 915486 (Del. Ch. Feb. 26, 2015) entitles "dark companies" to confidentiality of their financial statements;[5] (iii) not holding a new trial to make independent witness credibility assessments;[6] and (iii) imposing a confidentiality condition unless Rivest proved no confidentiality condition was "necessary and essential" to achieve his purpose.[7]

The arguments lack clarity and legal and factual support. They do nothing to disturb the Court of Chancery's careful, well-reasoned exercise of statutory discretion under Section 220 to not impose a confidentiality condition on Rivest's inspection of the Company's financial statements. This Court should affirm the Opinion.

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[5] Opening Br. at 19-31.

[6] *Id*. at 32-36.

[7] *Id*. at 37-43.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly interpreted and carefully applied the balancing of interests required by *Tiger* in exercising its discretionary authority under Section 220 not to impose a confidentiality condition on the inspection of the Company's financial statements, appropriately placing the burden of proof on each party to show their respective interests. Its exercise of discretion is well-supported by the record and the Company has not identified any factual finding that it contends was clearly erroneous.

2. Denied. The Court of Chancery correctly found *Southpaw* unpersuasive in supporting the Company's interest in confidentiality, thoroughly explaining why *Southpaw* was distinguishable and how *Southpaw* endorsed a practice in the Court of Chancery that could not be sustained under *Tiger.*

3. Denied. The Court of Chancery was not required to hold a new trial in its *de novo* review of the Master Report. In any event, the Court of Chancery's credibility determinations neither contradicted nor turned on the Master in Chancery's credibility assessment of any witness.

4. Denied. The Company misstates the law. A stockholder does not need to prove that disclosure of documents to be inspected is "necessary and essential" to achieve his purpose to avoid a confidentiality condition under Section 220.

COUNTERSTATEMENT OF FACTS

A. The Company

The Company is a Delaware corporation with its principal place of business in Hauppauge, New York.[8] It develops, manufactures, and sells computer-based television tuners, data broadcast receivers, and video capture products.[9]

Kenneth Plotkin is the Company's chief executive officer, co-founder and sole member of its board of directors.[10] With his wife, he owns approximately ten percent of the Company's common stock, which is its only class of equity.[11] Gerald Tucciarone, an employee since 1995, is the Company's chief financial officer, secretary, and investor relations representative.[12]

B. The Company Goes Public, Prospers, then Suffers Financial Reversals

On January 10, 1995, the Company completed an initial public offering, and its shares began trading on NASDAQ under the symbol "HAUP."[13] The Company's stock continued to trade on NASDAQ until June 28, 2014.[14] During this period,

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[8] Op. at 7.

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] Op. at 8.

[14] *Id*.

Plotkin and other insiders benefited from the Company's public status by selling shares through a secondary offering and in other market transactions.[15]

Beginning in 2010, the Company's fortunes declined.[16] By 2013, the Company's Form 10-K for the fiscal year ending September 30, 2013 disclosed a going-concern risk.[17] The Company's audited financial statements for the same period also contained a going-concern qualification.[18]

By November 15, 2013, the Company had fallen below the financial requirements for trading on NASDAQ and was involuntarily delisted.[19] The Company's stock, however, continued to trade in the public over-the-counter (the "OTC") market.[20]

On July 28, 2014, the Company filed a Form 15 with the SEC, terminating its registration as an issuer.[21] At trial, Plotkin asserted that when the Company

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[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *Id*. at 8-9.

[19] *Id*. at 9-10.

[20] *Id*. at 10.

[21] Op. at 11. The Company identifies a litany of purported factors "considered by management" in connection with its 2014 Form 15 filing, including "pandemic related disruptions of supply chains and inability to obtain microchips." Opening Br. at 5-6. No board minutes memorializing any such considerations were presented at trial, and there is no evidence concerning a pandemic or supply chain disruption

deregistered, the plan was to "go dark for a period of time, with the goal of getting the company righted so that [the Company] could . . . start to publish [its] financials at some point in the future."[22] That never happened.[23]

Since July 28, 2014, the Company has not made any public disclosures;[24] has not released any financial information to any stockholder;[25] and has not held an annual meeting.[26] While the Company contends that it has been acting in its stockholders' best interest, the trial evidence shows, and the Vice Chancellor found, that the Company maintained a standing practice of refusing to provide its stockholders with financial statements.[27]

C. Rivest Invests in the Company

In 2018, Rivest purchased shares of the Company's common stock in the OTC market.[28] Rivest is retired and manages his own money.[29] The Vice Chancellor found Rivest was plainly knowledgeable about investments, but that he is largely

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during that time. The Company's record citation (A192-A201) only refers to the recent COVID pandemic. A192-93.

[22] Op. at 12.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] Op. at 12; A192:1-4.

[28] Op. at 12.

[29] *Id*. at 13.

self-taught and a self-described "common man" who has gained investing experience over the years.[30]

Rivest purchased the Company's shares after researching the Company on a blog devoted to dark companies that trade on the OTC markets.[31] He viewed the Company as a "'deep value' investment."[32] Rivest has invested in other OTC companies as well.[33] He typically buys a few shares of a corporation's stock, then sends a Section 220 demand to the corporation seeking financial information.[34]

D. Rivest Seeks Books and Records

On July 29, 2019, Rivest mailed the Company a demand to inspect its books and records for the purpose of valuing his shares (the "July 2019 Demand").[35] The July 2019 Demand was simple, demanding only financial statements for the last three years.[36] The Company did not respond.[37]

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

[31] *Id*. at 14.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] Op. at 14; B1-14 (JX-005).

[36] B1.

[37] Op. at 14.

Rivest retained counsel and tried again.[38] On October 8, 2019, Rivest's lawyer sent the Company a second demand for the purpose of valuing his shares, this time asking to inspect financial statements for the years 2016 through 2018 and any appraisals or valuations relating to the value of the Company, its stock or any of its assets (the "October 2019 Demand").[39] The Company did not respond.[40]

E. The Filing of this Litigation and the Default Judgment

Rivest filed this action on October 24, 2019, after the Company failed to respond to the July 2019 Demand and October 2019 Demand.[41]

The summons was served on October 25, 2019.[42] The Company did not respond to the summons.[43]

On December 4, 2019, Rivest moved for a default judgment.[44] The Company did not respond to the motion.[45]

The Company made no effort to respond to the Demands or the litigation until the deadline set by the Master for the Company to respond to the long-pending

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[38] *Id*. at 15.

[39] *Id*.

[40] *Id*.

[41] *Compare* Opening Br. at 7.

[42] Op. at 15.

[43] *Id*.

[44] *Id*.

[45] *Id*.

motion for a default judgment.[46] Mr. Plotkin responded himself, seeing no need for the Company to engage counsel or act with urgency. While his letter is dated April 20, 2020, the Master's deadline for a response to the motion, it is not postmarked until the following day and was sent by regular mail.[47] The trial evidence would show that Mr. Plotkin's initial letter to the Master expressed his honest belief with respect to the Demands – that the Company was not required to disclose its financial statements to Rivest because it was deregistered and if Rivest wanted to value his shares, he could "simply look at the daily price of those shares" on the OTC 'pink sheets.'[48] The Opinion notes that "Plotkin did not assert that the Company would suffer any harm due to the disclosure of the financial information that Rivest sought. He relied on other rationales."[49]

The Master granted Rivest's motion for a default judgment on April 24, 2020. In accordance with the Master's order, Rivest provided the Company with a copy of the judgment and made a supplemental demand for 2019 and 2020 financial statements (the "April 2020 Demand"). It was not until this time that the Company

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[46] *Id*. at 16.

[47] *Id*.

[48] Op. at 16.

[49] *Id*. at 17. The Company claimed it was prohibited from providing stockholders with financial information under Regulation FD. *Id*. at 12, 16 and 29. The Company had not obtained legal advice on this issue, it was instead relying on Plotkin's uninformed belief. *Id*. at 29. Plotkin was wrong. *Id*.

responded to the Demands, indicating it was prepared to provide the information requested subject to a standstill and confidentiality agreement.

The Company claims that Rivest was uncompromising in discussions with the Company, but it was the Company that never backed away from an indefinite confidentiality period.[50] Up until trial, Rivest remained ready to compromise, offering to maintain confidentiality for one-year. Instead, the Company responded to Rivest's offer by filing a frivolous motion for summary judgment weeks before trial.

The Company argued Rivest could not establish a proper purpose as a matter of law because he was "abusing his Section 220 right to manipulate this Court into compelling disclosure by a non-public, delisted Delaware corporation, which will then empower some stock broker-dealer [sic] to exploit an exception in a newly amended Rule of the Securities and Exchange Commission."[51] That motion relied entirely on 17 C.F.R. § 240.15c2-11 (the "Quotation Rule"), which, explained at-length in the Opinion, imposes certain requirements before OTC market makers can

[50] *Id*.

[51] Op. at 20.

provide price quotes for OTC stock.[52] The motion was the first time any party raised the Quotation Rule.[53]

The Company did not (and still does not) understand the mechanics of the Quotation Rule, but realized the Quotation Rule could severely impact the liquidity of its stock, and leveraged that reality in a not-so-veiled threat to Rivest in its response to his offer to compromise – "My recommendation is that your Client call his broker and simply ask for a price quote, that is, before Sept. 28th"[54] – the day the Quotation Rule was to take effect.

Thus, while the Company continues to attack Rivest and his motives, the reality is that the Company's unreasonable and baseless positions, insistence on an indefinite confidentiality condition,[55] and its "scorched-earth strategy"[56] – not some stockholder activist agenda – has put *Tiger*, the Quotation Rule. and Section 220 directly at issue.

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[52] *Id*. at 20-24. Rivest disagreed with the Quotation Rule. During the notice and comment period, Rivest shared his view with the SEC that it should just require dark companies to post their financial statements on their website or with OTC Markets. The Company has repeatedly tried to wield Rivest's participation in the SEC's rule making process against him. Both the Master and the Vice Chancellor recognized the attack was baseless. *Id*. at 25-26.

[53] *Id*. at 20.

[54] B15 (Ex. C, Plaintiff's Opening Submission on Remaining Issues (Dkt #101)).

[55] Op. at 1, 29 and 33.

[56] *Id*. at 50.

F. The Trial

The Master held a one-day trial on October 26, 2021 via Zoom.[57] The parties introduced sixty-six exhibits and Rivest, Plotkin and Tucciarone testified live.[58] As the Vice Chancellor noted in the Opinion, "the trial was recorded to facilitate *de novo* review by a constitutional judge if exceptions were taken."[59] The evidence presented by the Company to support its claimed confidentiality need was Plotkin's and Tucciarone's testimony regarding their general concern about the competitive nature of the Company's business.[60] The two specific incidents they testified about occurred nearly a decade ago, while the Company was still reporting its financial statements publicly with the SEC.[61]

G. The Master's Report

On January 24, 2022, the Master issued the Master's Report.[62] The Master recommended a finding that Rivest had a proper purpose in seeking to inspect the

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[57] Op. at 6, 27.

[58] *Id*. at 6, 27-29.

[59] *Id*. at 27.

[60] *Id*. at 27.

[61] *Id*. at 28.

[62] *Id*. at 30.

Company's books and records to value his holdings.[63] No one took exception to that recommendation and it was adopted as a ruling of the Court of Chancery.[64]

The Master considered the Company's argument that Rivest's actual purpose was to circumvent the Quotation Rule and to share information with the marketplace for his personal profit at the Company's expense.[65] The Master recommended a contrary finding because the trial evidence did not support the Company's position.[66] The Master instead recommended the trial evidence supported a finding that Rivest only intended to share the Company's financial information as part of the process of determining the value of the Company's stock, and only if it was legal for him to do so.[67] No one took exception to that recommendation and it was adopted as a ruling of the Court of Chancery[68] (the Vice Chancellor also independently found the record supported this finding).[69]

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[63] Op. at 30.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] *Id*. at 55 ("It is therefore established—and the evidence supports the view—that Rivest intends to operate within the SEC rules and consistent with federal securities policy.").

The Master then turned to whether to impose a confidentiality restriction on the information that Rivest sought.[70] Weighing the parties' arguments, the Master recommended that the court impose a two-year confidentiality restriction.[71]

H. Rivest Takes Exception to the Master's Confidentiality Recommendation

Rivest took exception to the Master's recommendation of a two-year confidentiality condition, arguing that it interfered with his ability to value his shares and contending that the Company's evidence was insufficient to support the condition.[72]

In his opening brief in support of his exception to the Master's Report, Rivest made three arguments: (i) confidentiality in this case was bad public policy for public stockholders; (ii) that the Company had no reasonable expectation of confidentiality over its historical financial statements; and (iii) that the Company had not met its burden to establish a need for confidentiality.[73]

On policy, Rivest argued confidentiality conflicted with Delaware public policy. "Whatever competitive advantage a private company may obtain through confidentiality, the same advantage comes at great cost to public stockholders,"

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[70] *Id.* at 31.

[71] *Id*. at 32.

[72] *Id*.

[73] B18-52 (Plaintiff's Opening Brief in Support of Exception to Master's Report) (Dkt #65) (Exhibit A (Master's Report) omitted).

including, by inhibiting their fundamental right to freely communicate about the Company and restricting the liquidity of their shares, destroying the market value of their investment. Rivest also argued Delaware should have a compelling interest in furthering efforts of the SEC to facilitate liquidity in OTC markets while promoting investor protection and market efficiency. Section 220 is a vehicle for stockholders to obtain information directly from issuers which complements the Quotation Rule's objective of enhancing investor protection by requiring that current issuer information be accessible to investors.[74]

On the law, Rivest argued that the Company had failed to identify any legal basis, whether sounding in contract, federal or state law, constitutional protections or common law, to support that it had a reasonable expectation of privacy in its financial statements. Instead, the trial evidence only showed that Mr. Plotkin mistakenly thought he had a right to insist on confidentiality over the Company's financial statements under Regulation FD.[75]

And, on the facts, Rivest argued that testimony of ordinary market competition could not meet the Company's burden under *Tiger* to show a need for confidentiality. Rivest differentiated the confidentiality bar that may be appropriate

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[74] *See*, *e.g.*, B43-46.

[75] *See*, *e.g.*, B53-B69 (Plaintiff's Reply Br. In Support of Exception to the Mater's Report) (Dkt #72) at B64-65.

for a Section 220 proceeding seeking, *inter alia*, board minutes or emails, against a proceeding seeking financial statements. Confidentiality over the former category based on only the existence of ordinary market competition would revert back to the presumption of confidentiality that this Court has expressly rejected.[76]

After conducting its *de novo* review of the trial record, the Vice Chancellor held that the Company failed to carry its burden of showing that a confidentiality condition was warranted and granted the exceptions that Rivest asserted.[77]

[76] *See*, *e.g.*, B49-50.

[77] Op. at 33.

ARGUMENT

I. THE VICE CHANCELLOR CORRECTLY INTERPRETED AND APPLIED THE BALANCING OF INTERESTS REQUIRED BY *TIGER*.

A. Question Presented

Did the Court of Chancery interpret and apply the balancing of interests required by *Tiger*?

B. Scope of Review

This Court reviews questions of law *de novo*.[78]

C. Merits of the Argument

The Court of Chancery correctly interpreted *Tiger* and adhered to *Tiger's* holding that confidentiality is not presumptively imposed on books and records productions under Section 220.

1. The Court of Chancery Interpretated and Applied the Balancing of Interests Required by *Tiger*.

The Court of Chancery correctly balanced the interests of both parties and exercised its discretionary authority under Section 220 to determine a confidentiality condition was not warranted. In *Tiger*, this Court held that a corporation's books and records to be inspected pursuant to Section 220 are not subject to a confidentiality presumption: "the Court of Chancery should weigh the stockholder's legitimate

[78] *Tiger*, 214 A.3d at 937.

interests in free communication against the corporation's legitimate interests in confidentiality."[79]

Both the Master and Vice Chancellor did that, though, "in exercising *de novo* review, [the Vice Chancellor] weigh[ed] the evidence differently than the Master."[80] As the Vice Chancellor explained, "[u]nder *Tiger*, when a court evaluates whether a confidentiality restriction should be put in place, the court must consider not only the company's showing, but also take into account the interests of the stockholder. . . . The Company's showing falls short. Against that meager showing, Rivest has identified important interests."[81]

The Court of Chancery found the Company's showing was weak with respect to both whether the Company's financial statements were in fact confidential and the harm the Company would experience if the confidentiality of its financial statements was not protected. The only evidence the Company presented to establish that its financial statements were in fact confidential was that the Company did not make its financial statements public.[82] The Vice Chancellor correctly recognized that

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[79] *Tiger* 214 A.3d at 937.

[80] Op. at 2.

[81] *Id*. at 51.

[82] *Id*. at 45.

the Company's showing was insufficient and failed as a matter of law.[83] The Vice Chancellor explained the Company's burden was to show a reason for insisting upon confidential treatment.[84] But the only reason the Company offered relied on *Southpaw*, which as discussed *infra*, the Court of Chancery correctly found to be misplaced and unpersuasive.[85]

In holding that the Company failed to show "that its financial statements are sensitive,"[86] the Vice Chancellor correctly recognized that the nature of the documents at issue should be evaluated to determine whether their sensitivity weighs in favor of confidential treatment. The Vice Chancellor evaluated the sensitivity of the documents at issue and concluded that the financial statements were "the most basic documents necessary to achieve [Rivest's] purpose."[87] They were not the type of sensitive financial or competitive information in which a public company would have a privacy interest, nor did they concern management deliberations, such as meeting minutes of a board of directors.[88] The Court of Chancery also appropriately considered that:

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[83] Op. at 45 (citing *Amalgamated Bank v. UICI*, 2005 WL 1377432, at *5 (Del. Ch. June 2, 2005).

[84] *Id*. (citing *UICI*, 2005 WL 1377432, at *5).

[85] *Id*.

[86] *Id*.

[87] *Id*. at 44-45.

[88] *Id*. at 37, 42-43.

> The Company chose to access the public markets and accept outside financing from public investors, including retail investors. Although the Company subsequently deregistered and is currently dark, retail investors continue to hold ninety percent of its shares. The Company is not an entity that has consistently preserved its status as a private entity. Nor did the Company build confidentiality restrictions into its constitutive documents.[89]

In that regard, the Vice Chancellor noted that "[i]t takes some chutzpah for a company to accept investors' money by accessing the public equity markets, then claim that disclosure of basic financial information would have apocalyptic consequences."[90] After a thorough evaluation of the documents at issue, the evidence put forth, and arguments presented by the Company, the Court of Chancery found that the "factors do not favor the imposition of a confidentiality restriction."[91] The decision was grounded in the law and supported by the record.

The *Tiger* decision explains, and the Court of Chancery recognized, "a corporation need not show specific harm that would result from disclosure before receiving confidentiality treatment in a Section 220 case, [but] one cannot conclude reflexively that the need for confidentiality is readily apparent."[92] In following this exact approach, the Court of Chancery evaluated what it described as the

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[89] Op. at 38.

[90] *Id*. at 3.

[91] *Id*. at 45.

[92] *Id*. at 46 (citing *Tiger*, 214 A.3d at 937 (cleaned up)).

"apocalyptic consequences" the Company claimed it would suffer.[93] The Court of Chancery held that the Company failed to show a meaningful risk of harm from disclosure of its financial statements.[94]

The Court of Chancery explained that the risk of harm must be evaluated on the basis of magnitude and likelihood.[95] The Vice Chancellor evaluated the testimony of the Company's witnesses. Specifically, the Vice Chancellor highlighted that the Master asked both Plotkin and Tucciarone if "they could recall any specific events that would support their view that disclosure of the Company's financial statements would harm the Company."[96] The only potential risk of harm that both witnesses put forward was tied to two previous unrelated incidents from nearly a decade ago where the Company claimed it lost a customer, supplier and financing as a result of its poor financial condition disclosed in its public financial statements.[97] However, the Court of Chancery found that even accepting such harm

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[93] Op. at 46 (highlighting Plotkin's testimony stating that "disclosure of the Company's financial statements 'would be a disaster for the Company,' could lead to 'hav[ing] to close the [C]ompany,' 'would have a catastrophic effect on the [C]ompany,' 'would cause a big harm to the [C]ompany,' and would 'have a harmful effect on the [C]ompany that could potentially put [the Company] out of business.'").

[94] *Id*.

[95] *Id*. at 36.

[96] *Id*. at 46.

[97] *Id*. at 46-48.

could occur its cause was unrelated to the disclosure of financial information and instead, a result of the Company's poor financial condition.[98]

Ultimately, acting within its discretion, the Court of Chancery weighed the interests supported by evidence differently than the Master, and found Plotkin's "apocalyptic" testimony lacked credibility. Moreover, the Vice Chancellor explained that if His Honor were to accept ordinary competition in the market "as a basis for a confidentiality restriction, I would be endorsing a presumption in disguise. The *Tiger* decision does not permit that result."[99] Thus, the Vice Chancellor carefully balanced all of the relevant evidence in considering whether there was a risk of harm, and did so with a deliberate adherence to this Court's binding precedent established in *Tiger*.

2. The Company Seeks to Avoid its Evidentiary Burden Under *Tiger*.

Failing to meet its burden of proof, the Company argues that it should not have one. Instead, the Company argues a stockholder's burden[100] should be to show a credible basis that his interests outweigh a corporation's interest in privacy. As framed by the Company, it is unclear who the Company thinks should carry the

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[98] Op. at 46-48

[99] *Id*. at 51.

[100] Rivest agrees that generally in civil actions the burden of proof, unless otherwise provided, is by a preponderance of the evidence. *Evans v. Avande, Inc.*, 2022 WL 2092126, at *3 (Del. Ch. June 9, 2022).

burden of proof to show a corporation has a privacy interest in the documents, or how the Company's position can be squared with *Tiger's* holding that Section 220 inspections are "not subject to a presumption of confidentiality."[101] But this is not the Company's first effort to shirk its evidentiary burden.

The Company previously argued to the Master that a confidentiality provision was appropriate because, in its view, Rivest could value his shares under a confidentiality condition,[102] effectively asking the Master to impose a confidentiality condition unless Rivest proved he could not value his shares under one.[103] The Master rejected the argument, explaining that "[t]his would improperly shift the burden under *Tiger* away from the Company, which may result in the reflexive conclusion that the Delaware Supreme Court warned against."[104] Instead, the Master explained *Tiger* "impose[d] a burden on the party seeking confidential treatment."[105] No exception was taken to that recommendation, and the Vice Chancellor applied the same burden of proof.

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[101] *Tiger*, 214 A.3d at 935.

[102] Master's Report at 25.

[103] In making this argument and similar arguments on appeal, the Company ignores the Vice Chancellor's finding that Rivest is entitled to explore the market value of his shares as well has their intrinsic value. Op. at 51.

[104] Master's Report at 25.

[105] *Id*. at 21.

Now, the Company seems to argue that a stockholder must prove a corporation does not have an interest in keeping its financial statements confidential. The Company did not fairly present the argument below, but it should be summarily rejected. "Courts generally do not require litigants to prove a negative" for good reason, "it cannot be done."[106] It also makes no sense that a stockholder should carry an evidentiary burden for a corporation that is requesting the Court of Chancery to exercise its discretionary authority to impose a confidentiality condition.

Finally, the Company wrongfully claims that the Court of Chancery did not make any finding that Rivest carried his burden at trial.[107] In concluding that "Rivest's need for information is significant,"[108] the Court held that Rivest carried his burden of proof, showing "important interests"[109] in determining "a value for his ownership interest in a long dark company[,]"[110] including "an interest in sharing information he received with his fellow stockholders so that they can participate in discussions about value[,]" "obtaining a published quotation for the Company's

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[106] 29 Am. Jur. 2d Evidence § 173.

[107] Opening Br. at 17.

[108] Op. at 1.

[109] *Id*.

[110] *Id*.

stock on the OTC market[,]"[111] an interest to sell his shares.[112] The problem for the Company was that it failed to make "a showing sufficient to outweigh Rivest's interest and warrant a two-year confidentiality restriction."[113]

3. The Court of Chancery Did Not Impose a Heightened Burden of Proof on the Company.

The Company argues that the Vice Chancellor erred in requiring the Company to provide "special" and "unique" evidence of harm to obtain confidentiality protection over the financial statements to be inspected.[114] In making the argument, the Company contorts the record. The sum of the Company's trial evidence was a general concern about the competition; nothing more than "capitalism at work."[115] The "formulaic assertion about the reality of conducting business in a free-market economy" was something any corporation could claim, and if accepted by the Court of Chancery "as a basis for a threat of harm sufficient to warrant a confidentiality restriction" the Court of Chancery "would be endorsing a presumption in disguise."[116]

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[111] Op. at 55.

[112] *Id*. at 54.

[113] *Id*. at 59.

[114] Opening Br. at 13-15.

[115] Op. at 48.

[116] *Id*. at 51.

It was with this concern in mind that the Vice Chancellor stated at oral argument on Rivest's exception that:

> The question is what weight to give to a going-concern qualification from a decade ago, a vignette from 2013, and a fellow who says, yeah, if I saw somebody's financial statements that showed they were weak, I would make a pitch. And so I'm looking to you to say why this is so special and unique.[117]

In further colloquy, the Vice Chancellor tried again asking:

> The question is, is it in any way, you know, special testimony that makes this case distinguishable from a general competitive situation? . . . Because when I look at each one of these things in isolation, they seem pretty normal. And when I add them all up, they seem pretty normal. And so what I'm trying to keep getting back to is, like, where is the distinction that would actually make this case *sui generis*?[118]

And again asking, "Presumably, [*Tiger*] requires something - - what *Tiger* says is, there is no presumption. So a confidentiality restriction is not something that, you know, anybody gets just for showing the normal situation."[119] And again asking, "[w]hy is your case more than normal?"[120] In every instance, the response was the same – formulaic concerns of ordinary competition that occurs in the market place.

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[117] A366-67.

[118] A379 (referring to the Company's counsel's own words, A376:12-22).

[119] *Id*.

[120] A380.

The Vice Chancellor's use of the words "special" and "unique" did not concern the burden of proof the Court of Chancery was placing on the Company, it was the Vice Chancellor's careful and patient effort to understand how the showing proffered by the Company at trial to support a confidentiality condition on the inspection of its financial statements could not be made by any other company in the marketplace, and thereby be a presumption by another name.[121] As the Vice Chancellor explained, if the Court of Chancery were to go down that path, "[t]he only real difference between the pre-*Tiger* regime and the functional presumption would be that a corporation would need to have a witness give testimony about a worry that many business owners undoubtedly have."[122]

Finally, *Tiger's* reference to the parties' different burdens when asking the court to impose a confidentiality order, and when the plaintiff is asking for an existing confidentiality order to be amended,[123] does not create ambiguity about which party bears the burden of showing confidentiality is warranted, nor did it cause the Court of Chancery to place a "heightened" burden of proof on the Company. It

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[121] Op. at 3 and 5.

[122] *Id*. at 5.

[123] *Tiger*, 214 A.3d at 939 ("[T]he 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.").

is simply a recognition that it can be more difficult for a party to have an order amended or repealed than it is to have an order entered at the request of all parties.

* * *

The Court of Chancery correctly interpreted and carefully applied the balancing of interests required by *Tiger* in exercising its discretionary authority under Section 220 not to impose a confidentiality condition on the inspection of the Company's financial statements, appropriately placing the burden of proof on each party to show their respective interests. Its exercise of discretion is well-supported by the record and the Company has not identified any factual finding that it contends was clearly erroneous. Accordingly, Rivest respectfully submits that the Opinion should be affirmed.

II. THE COMPANY CANNOT RELY ON *SOUTHPAW* FOR A PRESUMPTION OF CONFIDENTIALTY

A. Question Presented

Did the Court of Chancery abuse its discretionary authority to prescribe a confidentiality condition on the inspection of an unregistered public company's financial statements for closed periods by rejecting the Company's reliance on *Southpaw* to support a presumption of confidentiality?

B. Scope of Review

In a Section 220 action, this Court reviews "for abuse of discretion the Court of Chancery's determination of both the scope of relief and limitations or conditions on that relief."[124] "This standard of review is highly deferential."[125] To the extent the Court of Chancery's rejection of the Company's reliance on *Southpaw* concerns a question of law, the standard of review on the question of law is *de novo*.[126]

C. Merits of Argument

In arguing that the Court of Chancery erred by "overruling" aspects of *Southpaw*, the Company parses *Tiger* and *Southpaw* into incomprehensible pieces. While the argument and its bits and bobs span 19-pages, the Company overlooks the Vice Chancellor's analysis as to why *Southpaw* was not persuasive support for a

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[124] *Tiger*, 214 A.3d at 936-37.

[125] *Id*.

[126] *Id*.

confidentiality condition. Other aspects of the argument were not presented below and are waived, and in any event, are wrong both on the facts and the law.

1. *Southpaw* Is Distinguishable and Employed a Court of Chancery Practice that Could Not be Sustained Under *Tiger*.

In finding the Company's reliance on *Southpaw* unpersuasive, the Vice Chancellor thoroughly explained why he found the facts and issues presented in *Southpaw* distinguishable and how *Southpaw* endorsed a practice in the Court of Chancery that could not be sustained under *Tiger*, which is unremarkable considering *Southpaw* is specifically identified in *Tiger* as an example of the Court of Chancery treating confidentiality agreements as a matter-of-course in Section 220 proceedings.[127]

The Vice Chancellor exhaustively analyzed *Southpaw* and found it distinguishable on its facts and issues involved.[128] The plaintiff-stockholder in *Southpaw* sought not only to value its shares, but also sought extensive books and records, which would be produced publicly, in an attempt to use Section 220 to compel the company to meet public reporting requirements imposed by federal securities laws.[129] In contrast, Mr. Rivest was seeking to value his shares and use information properly obtained under Section 220 in accordance with federal

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[127] *Tiger*, 214 A.3d at 938 n.17.

[128] Op. at 38-40.

[129] *Id*.

securities laws; he was not seeking to use Section 220 to *enforce* those laws.[130] For this reason, *Southpaw* was distinguishable on the facts.[131]

The Vice Chancellor also explained that *Southpaw* endorsed a practice uprooted by *Tiger*.[132] Specifically, the Vice Chancellor noted that the Master deciding *Southpaw* chose "[t]o err on the side of confidentiality, notwithstanding serious doubts about whether the information [at issue was] confidential[.]"[133] The Vice Chancellor recognized that prior to *Tiger*, the Court of Chancery had fallen into the practice of requiring confidentiality agreements as a matter-of-course, not because the information at issue was actually confidential or warranted confidential protection, but because it helped to "preserve the expedited and summary nature of a Section 220 proceeding."[134] The Master deciding *Southpaw* plainly states that she was simply "affording confidential treatment . . . until the Court can properly assess whether a particular document truly is confidential."[135] In other words, *Southpaw* does not even include a recommendation by the Master on whether any document at issue was actually confidential.

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[130] Op. at 55-58.

[131] *Id*. at 57.

[132] *Id*. at 40.

[133] *Id*. at 41.

[134] *Id*. at 40 (quoting *Southpaw*)

[135] *Southpaw*, 2015 WL 915486 at *10.

Accordingly, the Company does not and could not rely on *Southpaw* to establish that its financial statements are actually confidential. *Southpaw* never gets that far. Instead, the Company simply contends that because it is an unregistered public company like the company at issue in *Southpaw*, the same "superficial similarit[y]" the Vice Chancellor considered,[136] the outcome here must be the same as *Southpaw*. As the Vice Chancellor correctly concluded, however, that would require the Court of Chancery treating the Company as something it was not – a private company – under a presumption of confidentiality.[137]

2. The Court of Chancery Correctly Considered Federal Securities Law in Weighing the Parties' Interests Under *Tiger*.

The Company also takes issue with the Vice Chancellor's consideration of federal securities law in weighing the interests of the parties. Again, relying on *Southpaw*, the Company contends that the Vice Chancellor committed legal error by considering how a confidentiality condition would affect Rivest's fundamental rights to communicate freely with other stockholders and buy or sell shares of the Company, particularly in light of the SEC's recent Quotation Rule. The Company contends that the Vice Chancellor was bound by the observation in *Southpaw* that "the Court of Chancery does not craft use and confidentiality restrictions on a

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[136] Op. at 38.

[137] *Id*. at 41.

Section 220 production based on the rights and restrictions found in federal securities law."[138] While the Master's Report found this observation persuasive, the Vice Chancellor thoroughly explained why he did not. Again, as discussed above, the Vice Chancellor notes that the "issue addressed in *Southpaw* [wa]s different than the issue presented in this case."[139] Rivest is not trying to enforce federal securities law, he is simply asking not to be precluded from using the Company's "financial statements in a way that he is permitted to do under the securities law."[140]

Moreover, the observation in *Southpaw* regarding securities law was an overstatement.[141] At oral argument, the Vice Chancellor invited the Company to respond to cases Rivest relied on in making the point.[142] The Company was unable to do so.[143] The Vice Chancellor goes further in the Opinion, explaining that "Delaware law should strive to maintain its historically symbiotic relationship with the federal securities laws" and that to achieve that goal "requires taking into account aspects of the federal securities law and the policies they seek to achieve."[144] The

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[138] Opening Br. at 27

[139] Op. at 57.

[140] *Id*.

[141] A388-89.

[142] A389.

[143] A389-90.

[144] Op. at 57.

Vice Chancellor cites case-after-case where Delaware law does just that to support his reasoning, including actions brought under Section 220.[145] The Company does not cite, address or otherwise explain or distinguish any of those cases. Nor does the Company bother to explain why the distinction the Vice Chancellor makes between the issue presented in *Southpaw* and the issue presented here should not matter.

Even more perplexing is the Company's argument that the Vice Chancellor committed reversible error by not taking into account Rivest's status as an "accredited investor," as that term is defined by federal securities law. The Company contends that because Rivest is an accredited investor he was free to buy and sell shares of the Company in the Expert Market, and therefore his rights could not have been impinged by a confidentiality condition. This argument was not fairly presented to the Master or the Vice Chancellor below, and it is therefore waived.[146] Regardless, it is contradictory to the Company's contention that the Vice Chancellor committed legal error by considering federal securities law. On the one hand, the Company wants the Court of Chancery to ignore federal securities law, while on the other hand, the Company wants the Court of Chancery to rely on federal securities law if it will tip the balance of the *Tiger* scale in its favor. But the "accredited investor" argument is also wrong on the facts. Rivest's status as an accredited investor does nothing for

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[145] Op. at 57-58.

[146] Supr. Ct. R. 8.

his ability to communicate with other stockholders regarding the value of the Company's shares, nor does his status create liquidity. All but Plotkin's shares of the Company are held by retail investors, the buyers and sellers of Company shares with whom Rivest would interact.[147]

The Company also for the first time argues that the Court of Chancery erred by considering Rivest's "future interests" in presumably being able to sell his shares at a profit in a liquid market. Again, this argument is waived. In any event, it is unclear how this "interest" is different than a stockholder's fundamental right to sell his shares, which necessarily concerns a future event. The argument also assumes the Company's financial condition would be well received by the market, contrary to everything the Company has said in these proceedings (including its officers' testimony under oath).

3. Under Section 220, Imposing a Confidentiality Condition is Within the Court of Chancery's, not Management's, Discretion.

Finally, also for the first time on appeal, the Company weaves into its argument that management's decision to cause the Company to go dark and refuse to provide its financial statements to its stockholders is entitled to business judgment protection.[148] For example, citing to Section 141(a) of the DGCL, the Company

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[147] Opening Br. at 54.

[148] *Id*. at 20, 24-27.

contends that it "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, because the non-public nature of the Company's financials is evidence of decisions by Management . . .."[149] The argument was not fairly presented to the Master or the Vice Chancellor and is waived. It is also obviously wrong. The Company's stockholders are entitled to inspect the Company's financial statements under Section 220, and Section 220 places the discretionary authority to impose a confidentiality condition on the inspection of such documents with the Court of Chancery, not Company management.[150]

* * *

The Court of Chancery carefully exercised its discretionary authority in rejecting a confidential condition on the inspection of the Company's financial statements for closed periods and finding the Company's reliance on *Southpaw* to support such a condition unpersuasive. Accordingly, Rivest respectfully submits that this Court should affirm the Opinion.

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[149] *Id*. at 25.

[150] This raises a more complicated question that the Court of Chancery did not have a fair chance to address because it was not raised below: to the extent the Quotation Rule expressly allows for investors to provide Market Makers with current financial statements of "dark" issuers, has federal securities law preempted whatever Delaware law concerns management's decision to cause a corporation to go "dark"?

III. THE COURT OF CHANCERY'S *DE NOVO* REVIEW OF THE MASTER'S REPORT DID NOT REQUIRE A NEW TRIAL.

A. Question Presented

Does the Court of Chancery's practice of recording trials before a Master in Chancery on video address the issue presented in *DiGiacobbe* with respect to the credibility of a witness, and if not, whether the Court of Chancery's *de novo* review of the Master's Report required a new trial?

B. Scope of Review

The Company misconstrues *DiGiacobbe* arguing, as a principle of law, *DiGiacobbe* requires a new trial before the Court of Chancery may make an independent witness credibility assessment in its *de novo* review of a Master in Chancery's report.[151] *DiGiacobbe* concerned only the completeness of the record on which the Court of Chancery relied upon in making a witness credibility determination. To the extent that determination is made on a sufficient record, the standard of review is abuse of discretion.[152] Moreover, when the record presented to the Court of Chancery for *de novo* review includes the complete transcription or video of a witness's testimony before the Master in Chancery, it should be within the Court of Chancery's sound discretion to determine whether further hearings are necessary to determine credibility.

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[151] Opening Br. at 32.

[152] *In re Collins' Will*, 251 A.2d 345, 347 (Del. 1969).

C. Merits of Argument

1. *DiGiacobbe* Does Not Require a New Trial Before the Court of Chancery May Make an Independent Witness Credibility Determination.

The Company is wrong that *DiGiacobbe* requires a new trial before the Court of Chancery may make an independent witness credibility determination in its *de novo* review of a Master in Chancery's report. The question presented in *DiGiacobbe* was whether the Court of Chancery's review of a master's report constituted an improper delegation of judicial authority.[153] The master report at issue was based on only the master's notes and memory because no one had ordered a transcript of the three-day trial.[154]

In deciding *DiGiacobbe*, this Court considered the Court of Chancery's general authority to appoint masters and the applicable standard of review the Court of Chancery must apply in reviewing a master's findings of fact and law.[155] *DiGiacobbe* was decided before the Court of Chancery adopted rules stating the standard of review by which the master's findings should be reviewed.[156] This Court noted that in decisions leading up to *DiGiacobbe*, the Court of Chancery had

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[153] 743 A.2d at 182.

[154] *Id*.

[155] *Id*. at 182-184.

[156] *Id*. at 183 ("Although the Court of Chancery Rules are helpful in defining the role of the master, they do not identify the standard by which the master's rulings and report should be reviewed.").

improperly settled on "the standard of review applied by the Supreme Court in reviewing decisions of a trial judge sitting without a jury, . . . [which] accords deference to the factual findings of another judge as a matter of respect and judicial restraint."[157] As this Court explained, the problem with the deferential standard of review was that the "Delaware Constitution restricts the exercise of judicial authority to those who are appointed Governor and confirmed by the Senate[,]" and masters in the Court of Chancery are only appointed by the Chancellor.[158] Consequently, "the master's rulings, findings or fact, conclusions of law, and recommended disposition have no effect until they are adopted by a judge after a 'meaningful review.'"[159] Otherwise, a master would be exercising unconstitutional judicial power.[160] This Court held that the Court of Chancery's standard of review for a master's findings of both fact and law is *de novo*.[161]

In *dicta* discussing what *de novo* review of factual findings <u>could</u> entail, this Court confirmed *de novo* review is possible on the record.[162] But this Court observed that where an exception taken from a master's report raised a *bone fide* issue as to

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[157] 743 A.2d at 184.

[158] *Id*. at 182.

[159] *Id*. at 183 (citation omitted).

[160] *Id*. at 184.

[161] *Id*.

[162] *Id*.

dispositive credibility determinations, a new hearing may be inevitable. A record on which to decide whether a new hearing or trial was necessary, however, did not exist.

Accordingly, the Court of Chancery's ruling was vacated, and the case was remanded for further consideration of the master's report after the trial record had been transcribed. As this Court explained, "[w]ithout a transcript of the proceedings before the master, we are unable to review the decision of the Court of Chancery" and that the Court of Chancery, "likewise, was unable to review the decision of the master."

2. Court of Chancery Current Rules and Practice Seek to Eliminate the Considerable Burden and Judicial Inefficiency New Trials Entail.

DiGiacobbe was a lesson in judicial inefficiency. By the time the action was remanded, both the vice chancellor and master who originally presided over the proceedings had left the Court of Chancery. The new vice chancellor assigned to the case ordered a trial *de novo*, and the case was referred to a new master.[163] The new master issued his final report on March 3, 2003, eight years after the case had been filed.[164]

Since the time this Court decided *DiGiacobbe*, the Court of Chancery has recognized the burdens that new evidentiary hearings entail and "has taken steps to

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[163] *DiGiacobbe v. Sestak*, 2003 WL 1016985, *1 n. 2 (Del. Ch. Mar. 3, 2003).

[164] *Id*.

streamline the processes for *de novo* review."[165] Specifically, as the Vice Chancellor explained in granting the Company a limited stay pending appeal:

> Court of Chancery Rule 144(e) provides that "[p]roceedings before the Court on any exceptions shall be *on the record* before the Master, unless the Court determines otherwise for good cause shown." Ct. Ch. R. 144(e) (emphasis added). To facilitate *de novo* review on the record and avoid the need for new evidentiary hearings, the Court of Chancery follows a practice of recording trials before the Masters on video. *See McCloskey v. McCloskey*, 2014 WL 4364469, at *9 & n.87 (Del. Ch. Sept. 3, 2014) (conducting *de novo* review of videotape; noting that *DiGiacobbe* "did not consider the availability of videotape to permit the court to make credibility determinations," when stating that a new hearing would be inevitable), *aff'd*, 113 A.3d 1081 (Del. 2015). In this case, the trial before the Master was recorded on video to facilitate a de novo review by a constitutional judge, including de novo credibility determinations. *Rivest*, 2022 WL 3973101, at *2.[166]

Court of Chancery Rule 144 and the Court of Chancery's current practice of recording hearings before a Master in Chancery ensure the Court of Chancery will have a complete record to review *de novo*. The Court of Chancery is able "to observe the demeanor of the witnesses and independently assess their credibility based on the same record that formed the basis for the [m]aster's recommendations as [Court

[165] B70-79 (Order Granting Limited Stay Pending Appeal (Dkt #119)) at 73.

[166] *Id*.

of Chancery] Rule 144(a)(1) contemplates by reviewing the videotape."[167] The Court of Chancery's reliance on a taped video of witness testimony to make credibility determinations has been affirmed by this Court.[168] Because of the completeness of the record available to the Court of Chancery under its current Rules and practice, the determination of whether any further hearings are necessary to complete its *de novo* review of a master's findings should be within the sound discretion of the Court of Chancery.[169]

3. The Vice Chancellor's Witness Credibility Determinations Were Not Inconsistent with the Master's Determinations.

Even if this Court were to decide, notwithstanding the Court of Chancery's current Rules and practice and completeness of the record they provide for *de novo* review, an independent witness credibility determination always requires a new hearing or trial, the Company fails to identify any credibility determination that warrants such further proceedings.

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[167] *McCloskey v. McCloskey*, 2014 WL 4364469, *9 (Del. Ch. Sept. 3, 2014), *aff'd*, 113 A.3d 1081 (Del. 2015)

[168] *Id*.

[169] *See id*. at n.87.

The Company argues the Vice Chancellor reversed the Master's credibility determinations. That is not true. Rather, the Vice Chancellor "weigh[ed] the evidence differently than the Master."[170]

In making its argument, the Company claims that there were "irreconcilable credibility determinations of" Mr. Tucciarone's testimony.[171] However, the Company is mixing and matching the Vice Chancellor's assessment of Mr. Plotkin's testimony regarding the existential harm the Company would experience if its financial statements were disclosed[172] with Mr. Tucciarone's testimony regarding what he would do with another company's financial statements to advance the Company's competitive interests.[173]

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[170] Op. at 51; *see also* A366:11-14 ("please distinguish in your mind between people doubting whether this occurred and people evaluating the weight to give it, which I have to do *de novo*").

[171] Opening Br. at 35.

[172] *Compare* Opening Br. at 35 *with* Op. at 46 ("During trial, Plotkin did his best to depict the disclosure of the Company's financial statements as an existential threat. He claimed that public disclosure 'would be a disaster' and 'could potentially put the company out of business.' Plotkin Tr. 102, 146–47. He repeated those themes throughout his testimony, asserting that disclosure of the Company's financial statements 'would be a disaster for the Company,' could lead to 'hav[ing] to close the [C]ompany,' 'would have a catastrophic effect on the [C]ompany,' 'would cause a big harm to the [C]ompany,' and would 'have a harmful effect on the [C]ompany that could potentially put [the Company] out of business.' *Id*. at 103–04, 118, 146–48, 163. To the dismay of propagandists everywhere, repetition does not make something true. The record at trial does not support Plotkin's sensationalized speculation about the risk of harm to the Company.").

[173] *Compare* Opening Br. at 35 *with* Op. at 48 ("Tucciarone conceded that he had no other examples; instead, he testified that the Company operates in a 'pretty

The Vice Chancellor did not credit Mr. Plotkin's testimony that disclosure of the Company's financial statements was an existential threat. Rather, he found that "[t]he record at trial d[id] not support Plotkin's sensationalized speculation about the risk of harm to the Company."[174] The Master did not make a credibility determination on this testimony, and notably only references market competition in weighing the trial evidence.[175]

The Master found Mr. Tucciarone's testimony regarding competition candid.[176] So did the Vice Chancellor, which Appellee concedes.[177] The problem for Appellee is that, at best, Mr. Tucciarone's testimony only provided "a formulaic assertion about the realty of conducting business in a free-market economy[,]" which the Vice Chancellor recognized, if accepted "as a basis for a confidentiality restriction, [he] would be endorsing a presumption in disguise."[178]

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competitive environment' and that if he got his hands on a competitor's financial information that showed it was 'doing very poorly,' he would use it against the competitor. Tucciarone Tr. 184. There is nothing groundbreaking about this business truism. Tucciarone described the reality of life in a market economy. That is capitalism at work.").

[174] Op. at 46.

[175] Master Report at 26-27.

[176] *Id*.

[177] Opening Br. at 34.

[178] This is why no cross-examination of Tucciarone was necessary. A378. Any company can claim threat of competition and therefore that alone cannot be the basis for a confidentiality condition.

The Vice Chancellor also considered the Company's litigation tactics in assessing the credibility of the harm the Company claimed it would experience. Based on the combination of Mr. Plotkin's "overblown testimony" at trial and the Company first ignoring Rivest and then employing "a scorched-earth strategy[,]" the Vice Chancellor found the Company's "claimed threat for purposes of the balancing required by *Tiger* . . . extremely weak."[179]

The only other witness credibility assessment made by the Vice Chancellor was that Mr. Rivest's testimony regarding his delivery of his July 2019 Demand was credible.[180] At trial, Mr. Plotkin testified that he had no record of receiving the July 2019 Demand. The Master did not decide on either witness's credibility regarding the issue.[181]

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The Company's challenge of the Vice Chancellor's *de novo* review of the record is both unsupported and misleading and the Opinion should be affirmed.

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[179] Op. at 51.

[180] *Id*. at 14.

[181] *Id*. ("The Master did not recommend a finding on this issue. Having taken into account the witnesses' credibility and the Company's pattern of gamesmanship throughout this proceeding, I credit Rivest's testimony.").

IV. THE COMPANY CONFUSES LAW AND MISCONSTRUES FACTS CONCERNING PROPER PURPOSE, THE SCOPE OF INSPECTION AND CONFIDENTIALTY CONDITIONS UNDER SECTION 220

A. Question Presented

Does Delaware law require an inspecting stockholder to prove disclosure of documents to be inspected is "necessary and essential" to achieve the stockholder's purpose before the Court of Chancery may exercise its statutory discretionary authority to not impose a confidentiality condition?

B. Scope of Review

In a Section 220 action, this Court reviews "for abuse of discretion the Court of Chancery's determinations of both the scope of relief any limitations or conditions on that relief."[182] To the extent the Company's argument raises a question of law, the standard of review is *de novo*.[183]

C. Merits of Argument

The Company argues the Vice Chancellor was required to determine whether no confidentiality condition was "necessary and essential" for Rivest to value his shares. The argument is muddled with mischaracterized facts and misconstrued law.

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[182] *Tiger*, 214 A.3d at 936-37.

[183] *Id*.

1. The Company Misconstrues the Law Concerning the Scope of Inspection under Section 220.

The Company fundamentally misconstrues the law on Section 220 inspections. It is well settled that the scope of documents an inspecting stockholder is entitled to under Section 220 are those documents that are necessary and essential to satisfy a stockholder's stated proper purpose.[184] The Company twists this reference to "necessary and essential" to argue that to avoid a confidentiality condition, a stockholder must prove that disclosure of the documents to be inspected is "necessary and essential" to achieve the stockholder's purpose.[185] Again, the Company did not fairly present this argument below, but again it is an argument that should be summarily rejected.

The Company's novel argument is unsupported. While the Company quotes from *Saito v. McKesson*,[186] the case offers no support for the Company's position. *Saito v. McKesson* had nothing to do with conditions to inspection, it concerned the scope of documents to be inspected. In *Saito v. McKesson*, the scope of documents to be inspected under Section 220 by a stockholder investigating wrongdoing in connection with the corporation's acquisition of a target corporation was at issue.

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[184] *See generally*, Donald J. Wolfe, Jr. & Michael A Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY (2d ed.) § 9.07[e][4] Scope of Inspection Rights Under Section 220.

[185] Opening Br. at 37.

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

After finding the stockholder had asserted credible evidence of possible wrongdoing to satisfy his burden of establishing a proper purpose, the Court of Chancery limited the stockholder's access to relevant documents in three respects: (i) that the stockholder could not obtain documents created before the date he held stock because he would lack standing to challenge wrongdoing prior to that date; (ii) that the stockholder was not entitled to documents relating to possible wrongdoing by the company's financial advisors; and (iii) that the stockholder could not obtain documents of the target company's subsidiary because he was not a stockholder of the subsidiary.

This Court affirmed that the stockholder could not obtain documents of the target company's subsidiary to the extent the corporation did not have possession of the documents. The Court reversed the other limitations on the scope of the inspection, and for example, explained with respect to the financial advisor documents that the "issue is whether the ***documents*** are necessary and essential to satisfy the stockholder's proper purpose."[187] There is no question the documents at issue here are necessary and essential to Rivest's purpose, and the Company has never challenged the scope of the documents at issue.

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[187] 806 A.2d at 118 (emphasis added).

2. Requiring a Stockholder to Show it is Necessary and Essential for Records to be Free From Confidentiality Conflicts with *Tiger*.

The Company's claim that Rivest failed to show it was necessary and essential for him to share Company financial information to achieve his purpose is really the Company's burden-shifting argument in a different form. If a stockholder bears the burden of showing lack of confidentiality is necessary and essential, then there is a presumption of confidentiality a stockholder must overcome. This Court has already ruled in *Tiger* that Section 220 "inspections are not subject to a presumption of confidentiality."[188] The Company's argument is contrary to *Tiger* and can be summarily dismissed.

[188] *Tiger*, 214 A.3d at 935.

CONCLUSION

For the reasons set forth herein, the Opinion and all rulings and orders incidental thereto should be affirmed.

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Dated: February 16, 2023

CERTIFICATE OF SERVICE

I, Marcus E. Montejo, do hereby certify on this 16th day of February 2023, that I caused a copy of Plaintiff-Below, Appellee's Answering Brief to be served by eFiling via File&Serve Xpress upon the following counsel of record:

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