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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 REPLY BRIEF

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INTRODUCTION

In his Answering Brief, the Appellee takes positions that call for a careful review of the language used in the Decision. Upon doing so, it becomes apparent that the Court of Chancery, Appellee and the Company all have dissimilar interpretations regarding *Tiger v. Boast*.[1] Before this Court are three different interpretations as to how the *Tiger* balancing test of confidentiality may be implemented within a Delaware Section 220 proceeding.[2]

The first interpretation, employed by the Court below and confessed by His Honor to be a "new approach," places the affirmative burden only on the Delaware Corporation. Another approach, meeting the approval of Appellee, but neither employed by the Court below, nor elsewhere in Section 220 practice (unprecedented), is opposing burdens on Shareholder and Corporation, at the same time.

The third approach, recommended to this Court by the Company, is to have the burden of proof for confidentiality on the Shareholder, whom carries the burden in all other aspects of Section 220 practice. This comports with the principle that a party seeking relief has the burden to show equitable or legal entitlement before our Courts will grant relief. Moreover, to capture the spirit of *Tiger*, the evidentiary

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[1] *Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019).
[2] 8 DEL. C. § 220.

standard should be a preponderance of the evidence by a credible basis, which would have the effect, in practice, of making it comparatively easier for a Shareholder to shoulder that burden than a traditional preponderance of the evidence standard, yet not over-incentivizing Shareholders to be reluctant to negotiate confidentiality issues with Management of Delaware Corporations before commencing an action.

Such a balanced approach would be faithful to *Tiger* in eliminating any presumption of confidentiality. Instead, by engaging in Judicial Activism, the Trial Court committed reversible error.

The Appellee also contends that the Court below factually distinguished the *Southpaw* decision,[3] despite the Vice Chancellor's plain language to the contrary. Indeed, Rivest does not even address the textual explanation of why *Tiger* not only does not prohibit, but endorses *Southpaw* and, thereby, validates the two legal principles therein articulated on which the Company relies. This is with good reason, because the notion that Delaware Courts should exercise restraint from delving into the complexities of Federal Securities Laws, Rules and Regulations in a Section 220 Action is a dose of wisdom, to which our Courts should adhere.

As the Vice Chancellor chose not to heed this warning, both overlooking the definition of a material term within the nooks and crannies of Federal Securities

[3] *Southpaw Credit Opportunity Master Fund LP v. Advanced Battery Techs., Inc.*, 2015 WL 915486 (Del. Ch. Feb. 26, 2015).

Regulations, as well as reversing the credibility determinations made by the Master in Chancery, which had a *dispositive* impact, causing the Vice Chancellor to reach a different conclusion (no confidentiality protection) than that reached by the Master (two years confidentiality protection), the Trial Court, in failing to conduct a new Trial required under *DiGiacobbe*,[4] committed reversible error.

[4] *DiGiacobbe v. Sestak*, 743 A.2d 180 (Del. 1999).

ARGUMENT

I. Rivest Mischaracterizes the Vice Chancellor and Ignores the Balanced Approach to *Tiger* Recommended by the Company

The plain language of the Decision makes clear that, when he conducted the *Tiger* balancing test, the Vice Chancellor placed the burden of proof solely on the Company. *E.g.*, Ant. Op. Br. 14 ("[T]he Company failed to carry its burden under *Tiger* [ ] to establish the need for a confidentiality restriction.").[5] The language used by this Court when it drafted *Tiger* does not, however, endorse this "new approach."[6]

Rivest endeavors to agree with the conclusion reached in the Decision, that is, no confidentiality protection to the Company and unfettered ability to Rivest to disclose financials in creating a more profitable, public marketplace. But, in his Answering Brief, Rivest cannot create enough distractions to cause this Court to miss the fatal flaws in the Trial Court's reasoning; one of which being, the Vice Chancellor placed no burden of proof regarding confidentiality on the Shareholder.

While somehow contending there is no ambiguity about burden allocation and standard identification in *Tiger*,[7] Rivest asserts that the Court of Chancery, "appropriately placed the burden of proof on each party to show their respective

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[5] *Citing* Jdgmnt. 1-2, para. 4 *and* Op. 35.

[6] B76-77 (acknowledging that *Tiger* "abrogated a number of decisions by this [C]ourt and appeared, at least to this [J]udge, to call for a new approach.")

[7] This is contrary to the explicit language of the Vice Chancellor genuflecting that, "[t]here are fair grounds for disagreement over the implications of the decision in *Tiger v. Boast* …." B76-77.

interests."[8] But, this is *ipse dixit* - - nowhere in the Decision does the Vice Chancellor ever make mention of a burden being placed upon (let alone carried by) Rivest. Exhs. A and B. Said differently, whenever the word "burden" appears in the Decision it references, only, an onus upon the Company - - not Rivest.

In response to the Company's recommended approach to conducting the *Tiger* balancing test, that is, a preponderance of the evidence by credible basis with burden on the plaintiff-shareholder (Ant. Op. Br. 15-18), Rivest does not contest its reasonableness. Instead, he labels it "unclear" and attempts to divert this Court's attention away from the Company's showing of reason. Answ. Br. 23-26. What is clear, is that Rivest refuses to consider the Company's interpretation of *Tiger* and its implications on Delaware Law.[9]

The Company's recommendation, however, is an approach that: (a) does *not* contain a presumption,[10] and, therefore, complies with *Tiger*; (b) places the burden upon the plaintiff-shareholder, as the party seeking affirmative, equitable relief, which comports with all other aspects of Chancery practice; (c) includes a lessened evidentiary standard (rationale basis), which imposes upon the plaintiff-shareholder a lighter-than-ordinary burden and likelihood of non-confidential disclosure; yet (d)

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[8] Answ. Br. 29.

[9] Rivest also refuses to consider the implications of the Trial Court's approach; without undertaking the struggles inherent to careful consideration, his overuse of adverbial praise for the Trial Court is evidence of his base focus: winning.

[10] *See* Ant. Op. Br. 23, ftne. 12 (clarifying definition of "presumption").

does not overly incentivize Shareholders to be reluctant to negotiate confidentiality with Management of Delaware Corporations before filing suit. This is the approach that should have been employed by the Court of Chancery when it conducted the *Tiger* balancing test in this matter, but was not.

Accordingly, as Rivest has mischaracterized the Vice Chancellor's interpretation, which does not place any burden on Rivest, and ignored the reasonableness of the Company's balanced approach, which should have been employed, the Court cannot Affirm the Decision.

II. The Vice Chancellor's Disregard for *Southpaw* Warnings Causes Confused Application of *Tiger*

Rivest contends the Company cannot rely upon *Southpaw* because it is factually distinguishable. This contention misses the point. The Company relies upon two **legal** principles articulated in the *Southpaw* rationale.[11] Moreover, the Vice Chancellor found *Southpaw* to have no precedential value, as a matter of Delaware Law, because it stands for the presumption of confidentiality *Tiger* prohibits: "[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.[12]

The Company has explained, in detail, how *Tiger* does not abrogate *Southpaw*. Ant. Op. Br. 19-24 ("The Trial Court misinterpreted the scope of the presumption elimination to include *Southpaw*") *and* ("In another part of *Tiger*, this

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[11] The first legal principle being the "private company" analogy, where, for purposes of Section 220 confidentiality analysis, "because [a corporation] is not publicly reporting, it is more akin to a private company[,]" (Ant. Op. Br. 20, 24-27)(*citing* *Southpaw*, 2015 WL 915486, at *9 (Del. Ch. Feb. 26, 2015)("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.")(*citing* 8 DEL. C. § 141(a)). The second legal principle being the (2) "craft and use" limitation, where, "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." Ant. Op. Br. 27 (*citing* A310); *id.*, 27-30.

[12] A factual dispute would provide a more favorable Standard of Review for Rivest, who wants to win at any cost. But, this is a legal dispute.

Court approves of *Southpaw*")(emphasis added)). The epicenter of the Company's argument regards the misinterpretation by the Vice Chancellor of the difference in treatment by this Court of two, separate and distinct decisions in the complex *Disney* books and records litigation: one decision, dated 2005, was looked at with favor by this Court; whereas, another, dated 2004, was overruled by this Court. The Decision conflates the two and, in so erring, purports to eliminate the precedential value of *Southpaw*, which cites to the 2005 *Disney* decision.

In response, Rivest ignores *Disney* altogether. *See* Ans. Br. 30-31 (dismissing Company's argument as, "bits and bobs"). To be clear, the word *Disney* does not appear in the Answering Brief. And for good reason: the Company has identified flaws in the Trial Court's analyses, when it failed to recognize the wisdom in both the (1) "private company" analogy and (2) "craft and use" limitation in *Southpaw*. Of course, that makes sense; if Rivest acknowledged that the Trial Court erred, there would be either a remand (with victory much, much less likely) or a reversal.

Notwithstanding, Rivest contends it is permissible for Chancery to skew the *Tiger* balancing test with concerns for the greater securities marketplace, because there should be a symbiotic relationship with Federal Securities Law. Answ. Br. 34. But, what Rivest fails to perceive is that: (a) the Vice Chancellor misapplied Federal Securities Laws, Rules and Regulations, in overlooking the "accredited investor" definition; and (b) with Rivest satisfying that definition (although the Vice

Chancellor did not consider this), the balancing of the harms *must* turn in favor of the Company, because Rivest is already entitled to trade his shares of the Company as part of the OTC Expert Market.[13] What Rivest is essentially asking this Court, by way of his Answering Brief, is to approve the Vice Chancellor's misapplication of Federal Securities Laws, Rules and Regulations and disregard for the *Southpaw* warning and imploring for restraint, because the Trial Court handed him a favorable Decision.

Moreover, the governance of the relationship between Management and Shareholders, including whether books and records are disclosed from one to the other with some degree of confidentiality, as well as the business judgments made by Management concerning whether to insist upon confidentiality as a condition of disclosure, is the quintessence of the internal affairs doctrine.

To approve of a discombobulated application of Federal Securities Laws, Rules and Regulations that shrinks the adjudicative governance space of the Delaware General Corporations Law over the internal affairs of one of its own Corporations and Shareholders, is not only unfair to the litigants, but it causes Delaware to bow, where there is no need to do so.

[13] Ant. Op. Br. 28-29.

Accordingly, as the legal principles articulated in *Southpaw* retain their precedential value and the Vice Chancellor erred in disregarding them, the Decision cannot be Affirmed.

III. Rivest's Deemphasis of "Dispositive" Aspect of Rule Causes *DiGiacobbe* to Lose its Meaning

In response to the Company's argument that a new Trial is mandatory, Rivest deemphasizes a critical aspect of *DiGiacobbe* that causes the law to lose its meaning. It is not, as Rivest contends, that a new trial is always required when an independent witness credibility assessment is made. Answ. Br. 43 ("always"). Rather, a new hearing is inevitable, "where exceptions raise a bono fide issue as to ***dispositive*** credibility determinations[.]" *DiGiacobbe*, 743 A.2d at 184 (Del. 1999)(emphases adjusted).

Rivest next contends, by implication, that the credibility determinations made by the Vice Chancellor after Oral Argument do not give rise to *bona fide* or dispositive changes from those made by the Master after Trial. This argument, however, creates a false equivalence between the credibility determinations in the plain language of the Master's Final Report and the Vice Chancellor's Decision.

To be clear, the determinations made by the Master and the Vice Chancellor are not the same - - they stand in stark opposition to each other. Indeed, as the basis for the recommendation of two-year confidentiality protection, the Master found the CFO's testimony both candid and credible. A313-17. Whereas, as the basis for eliminating the entirety of confidentiality protection recommended, the Vice Chancellor found that: (a) "[t]he testimony that the Company's witnesses gave bordered on the hyperbolic and ***lacked credibility***" (Op. 5 (emphases added)); (b)

"the Company has advanced claims of harm that are overblown and which border on the hyperbolic" (Op. 46); and (c) the Company presented, "sensationalized speculation about the risk of harm to the company." *Id.*[14]

These are the *bona fide* and dispositive credibility issues - - resulting in a polar-opposite conclusion of a proceeding before the Delaware Judiciary (two years of confidentiality versus naked disclosure) - - that, if *DiGiacobbe* is to have any meaning, whatsoever, it must be recognized to contemplate. Any use of Judicial Resources, despite they being limited, to conduct a new Trial under these circumstances would be a worthy investment.[15]

Accordingly, as the Trial Court's reversal of credibility determinations were of a dispositive nature, changing the outcome of this proceeding, under *DiGiacobbe*, a new Trial is inevitable and the Decision cannot be Affirmed.

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[14] The reversal of credibility determinations of a *bona fide* and dispositive manner is not limited to defense witnesses. The Master found Rivest's testimony regarding his commitment to disclosing the Company's financial records obtained in this Action to the public *writ large* and, thereby, availing himself of an exception to the Quotation Rule to be irrelevant and not part of the *Tiger* balancing. Yet, the Vice Chancellor assigned full credibility to this testimony, and endorsed Rivest's use of Section 220 to end-around the Quotation Rule and tap into an exception, in enforcing certain aspects of Federal Securities Laws, Rules and Regulations - - but not others. *See* II *supra* (defending wisdom of *Southpaw* warning Delaware Courts against spelunking into the caverns of Federal Securities Laws, Rules and Regulations).

[15] As has been said, in different iterations, "eternal vigilance is the price of liberty."

IV. Burden to Prove the Scope of Inspection, including Confidentiality, is "Necessary and Essential" to Stated Purpose Must be on Shareholder

Rivest's stated purpose is to value his shares. The Company argues that it was reversible error for the Vice Chancellor to consider Rivest's evidence and testimony regarding his commitment to publish the Company's financials to the Securities Marketplace *writ large*, because publication is not "necessary and essential" to Rivest's valuation purpose as an "accredited investor" in the OTC Expert Marketplace. Ant. Op. Br. 37-43. In response, Rivest counters that it is not a plaintiff's burden to carry, because "then there is a presumption of confidentiality a stockholder must overcome," which would be contrary to *Tiger*. Answ. Br. 50.

This response, however, is unthoughtful. As an initial concern, if Rivest is contending that the plaintiff-shareholder does not have the burden to prove "necessary and essential," then he is uprooting the foundation of Section 220 practice. Next, Rivest should (but does not) address how: (1) it is unnecessary and unessential for Rivest to publish the Company's financials to conduct a valuation of the stock;[16] (2) it is merely Rivest's *preference* to publish the financials and become a market maker; and (3) as an "accredited investor," Rivest is allowed to trade his

[16] Rivest does not have an Expert Witness, despite having the burden, to prove why publication is "necessary and essential" to his purpose of internal valuation. Ant. Op. Br. 41-42.

stock in the OTC Expert Market ***without*** making use of the piggyback exception to the Quotation Rule. Ant. Op. Br. 37-43 (emphases added).

That Rivest puts forth this recycled response is further evidence of his inability (or refusal to attempt) to understand the deeper implications of *Tiger*, which extend far beyond his self-centered, "deep value" investing, and how the burden and standard of proof should be allocated under the Company's recommended approach. Accordingly, as Rivest has the burden to prove publication is "necessary and essential" to his valuation purpose, but is unable, the Decision cannot be Affirmed.

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 dispositive credibility decisions can be made in a manner more faithful to our adjudicative process.

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