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PERSPECTIVE

TRANSACTIONS WITH BOIRON

Clarity on the right to inspect books

By Marc Boiron

In *Weingarten v. Monster Worldwide, Inc.*, the Delaware Court of Chancery dismissed a complaint seeking corporate records under Section 220 of the General Corporation Law of the State of Delaware for lack of standing. Specifically, Joe Weingarten was not, as Section 220 requires, a stockholder at the time he filed the complaint.

On Aug. 8, 2016, Monster entered into a merger agreement, pursuant to which Monster would be acquired by a subsidiary of Randstad North America, Inc. Under the merger agreement, Randstad's subsidiary commenced a tender offer on Sept. 6, 2016, which expired on Oct. 28, 2016.

More than 10 weeks after Monster entered into the merger agreement, on Oct. 19, Weingarten sent a letter to Monster's board of directors demanding to inspect Monster's books and records. One week later, Monster's board rejected the demand. Weingarten responded the same day that he would refrain from filing a complaint seeking to inspect Monster's books and records with the express expectation that Monster would not assert the argument that Weingarten lost standing to inspect those books and records because of the merger closing before the complaint was filed.

Monster did not respond to Weingarten until four days before the merger closed and did not agree to refrain from asserting any defenses it may have had available to it.

On Nov. 1, 2016, after consummation of the tender offer by Randstad's subsidiary, the merger closed and Weingarten ceased to be a stockholder.

On Nov. 4, 2016, Monster informed Weingarten that the purpose stated in his demand was mooted by the closing of the merger.

Weingarten then commenced an action against Monster in the Delaware Court of Chancery seeking to compel inspection of Monster's books and records. The court dismissed the action for lack of standing because Weingarten was not a stockholder at the time he filed the complaint.

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The court rejected Weingarten's argument that Monster should be estopped from challenging Weingarten's standing under a doctrine of equitable estoppel. The doctrine of equitable estoppel requires that a party whose conduct has misled another party have caused that other party to detrimentally change its position in reliance on the conduct. Although Weingarten expected Monster not to assert the defense of lack of standing, there was no conduct by Monster on which Weingarten could rely. Monster's silence on the issue was not considered to be sufficient conduct.

The court then determined that Weingarten lacked standing at the time the complaint was filed because he was no longer a stockholder at that time. Section 220(b) requires that a stockholder make a written demand under oath stating the purpose thereof. If that demand is rejected or not replied to within five business days, then the stockholder has the right to apply to the court to compel inspection of the books and records. Under Section 220(c), before a stockholder may inspect a corporation's books and records, the stockholder must establish, among other things, that he, she or it is a stockholder.

Although Weingarten satisfied the first requirement that he make a written demand to the board, he did not satisfy the requirement that he be a stockholder. The court concluded that the language of Section 220(c) is plain and unambiguous regarding the obligations of plaintiffs to inspect books and records: The legislature has made clear that only a stockholder who can "demonstrate both that it 'has' — past tense — complied with the demand requirement, and that it 'is' — present tense — a stockholder" has standing to invoke the court's assistance under Section 220.

The court also rejected Weingarten's argument that two cases decided by the Delaware Court of Chancery supported his position. In both *Cutlip v. CBA Int'l, Inc. I* and *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, stockholders commenced actions under Section 220 and then the ceased being stockholders due to mergers that closed during the *pendency* of the actions, and the Delaware Court of Chancery found that the mergers did not cause the plaintiffs to lose standing going forward or otherwise require dismissal of the actions because, in both cases, the plaintiffs were stockholders when the actions were *commenced*. Contrarily, Weingarten was not a stockholder when he commenced the action against Monster.

The *Weingarten* decision addressed an issue of first impression that provides clarity for stockholders of a company contemplating a merger. On the one hand, a stockholder without sufficient information regarding a contemplated merger must make a demand on the board of directors and commence an action under Section 220 in the Delaware Court of Chancery before that merger closes. It is insufficient for a stockholder to make a demand before the merger closes and commence an action under Section 220 after the merger closes.

Clarity on the timing of when a stockholder must commence an action under Section 220 is of particular importance for historically passive stockholders. It is common for corporations that follow a relatively traditional growth trajectory to have a large number of stockholders in the form of early stage investors and employees. Those stockholders often do not pay attention to their ownership in the corporations or the actions taken by the board of directors until an exit (often a merger) is contemplated. They generally do not understand their obligations under Section 220 when they seek to inspect books and records of the corporations, especially when they desire to compel the corporation to make available those books and records. If those stockholders have any need to inspect the books and records of the corporation, then they should be given clear guidance on the requirements of Section 220.

On the other hand, it is important to keep in mind that actions pursuant to Section 220 can be expensive without resulting in any inspection of books and records. In addition, the inspection of books and records for the purpose of investigating misconduct may be only the first step in lengthy litigation. If there is any potential misconduct, then the stockholder will, unless an out-of-court agreement can be reached, again be required to litigate a claim before obtaining any damages. Of course, the costs of litigation are incurred without any assurance of success in the litigation.

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