IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ROY E. DISNEY,	)	
	)	
Plaintiff,	)	C.A. No. 234-N
	)	
v.	)	
	)	On Appeal
THE WALT DISNEY COMPANY,	)	Del. Supr., No. 380, 2004
	)	
Defendant.	)	

OPINION ON REMAND

Remand Order: March 31, 2005
Remand Opinion: June 20, 2005

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LAMB, Vice Chancellor.

On August 6, 2004, I issued an Opinion and Order (the "Opinion") denying plaintiff Roy E. Disney's motion to lift the confidentiality designation placed on ten documents.[1] Those ten documents constituted a small percentage of the material made available by the defendant Walt Disney Company (the "Company") in response to Mr. Disney's January 2004 demand to inspect the Company's books and records pursuant to Section 220 of the DGCL. The documents were given to Mr. Disney in voluntary compliance with that demand.

Mr. Disney appealed to the Delaware Supreme Court and, by order, the Supreme Court remanded the matter for certain additional analysis and explanation (the "Remand Order").[2] In the Remand Order, the Supreme Court instructs me to "make specific findings as to whether the documents are confidential." If so, the court further orders me to address "the potential benefits and potential harm from disclosing the documents for [Mr.] Disney's stated purposes, and reach a conclusion as to whether the confidentiality designation should be removed or reduced to allow for specified communications." This is the response to the Remand Order.

[1] *Disney v. Walt Disney Co.*, 857 A.2d 444 (Del. Ch. 2004), *remanded*, No. 380, 2004 (Del. Mar. 31, 2005) (ORDER).
[2] *Disney v. Walt Disney Co.*, No. 380, 2004 (Del. Mar. 31, 2005) (ORDER).

I.

My analysis begins, as did the Opinion, with the observation that the provision of nonpublic corporate books and records to a stockholder making a demand pursuant to Section 220 will normally be conditioned upon a reasonable confidentiality order.[3] Delaware courts have repeatedly "placed reasonable restrictions on shareholders' inspection rights in the context of suit brought under 8 *Del. C.* § 220, and [have] made disclosure contingent upon the shareholder first consenting to a reasonable confidentiality agreement."[4] I also note that the documents at issue were not produced in litigation. Thus, the general standard governing protective orders under Rule 26 is not directly implicated.[5]

Pursuant to the Supreme Court's instructions, I again review the ten documents at issue and evaluate whether they are confidential. I will then evaluate "the potential benefits and potential harm from disclosing the documents[.]" For the sake of clarity, I will describe each document in turn.

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[3] *See* 8 Del. C. § 220(c); *see also CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 793-94 (Del. 1982) ("[T]he Court of Chancery is empowered to protect the corporation's legitimate interests and to prevent possible abuse of the shareholder's right of inspection by placing such reasonable restrictions and limitations as it deems proper on the exercise of the right.").

[4] *See Stroud v. Grace*, 606 A.2d 75, 89 (Del. 1992) (and cases cited therein).

[5] *Cf. Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997) (the court held that a comprehensive discovery order under Rule 34 and an order under Section 220 are not the same and should not be confused. A Section 220 proceeding should result in an order circumscribed with rifled precision, while Rule 34 production orders may often be broader in keeping with the scope of discovery under Rule 26(b).).

A. The Contested Documents[6]

The first disputed document is a letter from Stanley P. Gold, a long-time associate of Mr. Disney and former director of the Company, to Judith Estrin and John Bryson,[7] dated September 12, 2003 (the "Gold Letter").[8] The Gold Letter was also copied to the entire Disney Board of Directors, of which Mr. Disney was then a member. The letter is a detailed account of Mr. Gold's thoughts and assessments of the Company's proposed director compensation plan.

The second disputed document is an excerpt of a presentation of financial results and internal targets in connection with the Company's tax-qualified compensation plan.[9] It sets out non-public targets established for the compensation plan.[10]

The third disputed document is an email from Michael Breckinridge[11] to Ms. Estrin, dated November 20, 2002.[12] The email is heavily redacted and it relates to year-end compensation issues for FY 2002.

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[6] The ten documents at issue in this case were most recently attached as Exhibit C to the May 17, 2005 letter from Robert K. Payson, Esquire, counsel for the Walt Disney Company, to the court. These are the same documents I reviewed in connection with the Opinion.

[7] Ms. Estrin was Chairman of the Company's Compensation Committee, and Mr. Bryson was a member of that Committee.

[8] Appendix Page No. A86-A91.

[9] Appendix Page No. A93-A97.

[10] Mr. Disney proposed releasing the document with the operating performance targets for FY 2004 redacted. The Company has resisted the production of the document even with these redactions.

[11] "Michael Breckinridge" is Michael Eisner's *nom de plume*.

[12] Appendix Page No. A99-A101.

The fourth disputed document is a letter from Mr. Eisner to Mr. Gold, dated December 11, 2002.[13] The letter refers to (and states that it attaches) another letter from Mr. Eisner to Ms. Estrin. It also refers to "the overall book that describes the bonus levels for each individual in the company that is to receive a bonus" which was given to Mr. Gold and the entire Compensation Committee. The letter asks Mr. Gold for his opinion on compensation issues.

The fifth disputed document is a memorandum from Irwin E. Russell (Mr. Eisner's personal attorney) to Mr. Eisner, dated November 21, 2003.[14] In it, Mr. Russell comments on the materials sent to the Compensation Committee regarding bonuses for Mr. Eisner and another executive.

The sixth disputed document is a series of emails between and among Mr. Eisner, John England, and Ms. Estrin, dated December 9 and 10, 2003.[15] Mr. England works for Towers Perrin, a consulting firm. In these emails, the parties discuss Mr. Eisner's bonus for FY 2003. Mr. Eisner also forwarded an email from Mr. Russell, regarding Mr. Eisner's compensation, to Mr. England and Ms. Estrin.

The seventh disputed document is an email from Ms. Estrin addressed to, and copied to, certain directors, members of senior management, and their advisors, dated November 20, 2003.[16] The email advises the recipients of the

[13] Appendix Page No. A102.
[14] Appendix Page No. A104-A105.
[15] Appendix Page No. A106-A110.
[16] Appendix Page No. A112.

issues that were going to be discussed at upcoming Compensation Committee meetings.

The eighth document is a letter from Mr. Eisner to Ms. Estrin, dated December 15, 2002.[17] The letter was also copied to Mr. Bryson, Leo O'Donovan, and Sidney Poitier.[18] This letter describes in great detail the Company's performance in 2002, and details the Company's business strategy for 2003. It also describes the performance of several top Disney executives and gives recommendations for their future compensation.[19]

The ninth document is the Minutes of a Special Meeting of the Compensation Committee of the Board of Directors (the "Compensation Committee Minutes").[20] The meeting took place on December 15, 2002. The meeting dealt primarily with the Company's Executive Performance Plan. Specifically, the Committee discussed the achievement of financial targets for FY 2002, and set financial targets for FY 2003. The meeting also dealt with which executives would be allowed to participate in the Company's Executive Performance Plan for FY 2003. According to the minutes, the Compensation

[17] Appendix Page No. A114-A122.
[18] Mr. O'Donovan and Mr. Poitier were both members of the Company's Compensation Committee.
[19] Mr. Disney proposed redacting the performance evaluations of three senior Company executives, while not redacting the performance evaluation of another senior executive, and not redacting at all the other information contained in the letter. The Company has resisted releasing the document, whether or not redacted.
[20] Appendix Page No. A124-A128.

Committee resolved that the matters discussed at the meeting were "confidential business information of the Corporation because the disclosure thereof could generate undue speculation about projected earnings of the Corporation or unwarranted inferences about the board's expectations in this regard."[21]

The last document is an email from Robin Coleman addressed to, and copied to, certain directors, members of senior management, and their advisors, dated November 21, 2003. This email described materials that had been sent to the email's recipients in anticipation of certain Compensation Committee meetings.

B. The Documents Are Confidential

After a second review of the ten documents, I again conclude that they are of an intrinsically confidential nature and that the Company is justified in demanding that they remain confidential, subject to the possibility of disclosure, as discussed in the Opinion. They all relate to "private communications among or deliberations of the Company's board of directors."[22] These documents "reflect[] and relat[e] directly to preliminary deliberations of the Company's board of directors."[23] Furthermore, "[t]here is little doubt that those who participated in these communications had a reasonable expectation that they would remain private

[21] Mr. Disney proposed releasing the document with the operating performance target for FY 2003 and FY 2004 redacted. The Company has resisted the production of the document even with these redactions.
[22] *Disney*, 857 A.2d at 448.
[23] *Id.*

unless disclosed in the course of litigation or pursuant to some other legal requirement."[24]

The confidential nature of these documents is evidenced by the Company's written confidentiality policy that bars present and former directors from disclosing information entrusted to them by reason of their positions, and includes a prohibition on the disclosure of "non-public information about discussions and deliberations" of the board.[25] Messrs. Disney and Gold participated as board members in the approval of this confidentiality policy and appear to be bound by it. The ten documents requested by Mr. Disney all fall under the ambit of this policy. By adopting this policy, the board has recognized the necessity of keeping the thoughts, opinions, and deliberations of its members confidential. This board policy deserves significant weight.[26]

The Gold Letter illustrates the relevance of this policy to the issue at hand. It is a letter from one board member to another, and copied to the entire board, discussing an issue to come before the board. In very frank and direct language, Mr. Gold attempts to convince his fellow directors of his view of proper compensation for the board and senior management of the Company.

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[24] *Id.*
[25] *Id.* at 445 n.1.
[26] *See, e.g., Amalgamated Bank v. UICI*, C.A. No. 884, letter op. at 17 (Del. Ch. June 2, 2005) (holding as confidential that information which the company believed, "in good faith constitutes confidential, proprietary, or commercially or personally sensitive information that needs the protection of confidential treatment").

The very fact that Mr. Disney found it necessary to request the Gold Letter from the Company in his Section 220 demand suggests that even he believes that it is a confidential document that he is bound not to disclose in accordance with the board's policy that he approved. It is clear that Mr. Disney either has the Gold Letter in his possession or could easily get it. Mr. Gold is well-known to be an associate of Mr. Disney, and he surely would give Mr. Disney the document if asked.[27] Furthermore, as a member of the Company's board at the time Mr. Gold wrote the letter, Mr. Disney should have received a copy of this document. The most plausible explanation for why Mr. Disney would request a document that he already has is that he is seeking to have the court remove the confidentiality restriction to which he apparently feels bound, and which he participated in adopting. By doing so, in a strong sense, he is admitting that the document is confidential. The same can be said of the fourth document, a letter sent by Mr. Eisner to Mr. Gold. Surely, Mr. Disney has or can easily obtain a copy of that letter from Mr. Gold.

[27] In its letter to the court, counsel for Mr. Disney states: "In its Letter, the Company lumps Mr. Gold's letter with other books and records in the apparent hope of obscuring the fact that it is attempting to prevent Mr. Gold from disclosing his own opinions merely because they were memorialized in a letter." Letter from A. Gilchrist Sparks to the court of May 27, 2005 at 7. Of course, the Company is not preventing Mr. Gold from doing anything in this case, because Mr. Gold is not a party to this action. It is Mr. Disney who is trying to disclose the information in the Gold Letter. However, counsel's comment is indicative of the close relationship between Messrs. Disney and Gold.

Finally, as I noted in my earlier Opinion, Mr. Disney's proposed selective release of documents or excerpts of documents regarding the board's deliberations would place the Company in an untenable position. Mr. Disney, acting *qua* stockholder, has no fiduciary obligation to make complete or candid disclosures. Instead, he would be free to disclose snippets of information culled from a few emails or internal memoranda that, he contends, are inconsistent with the corporation's public disclosures or otherwise evidence misconduct of some sort. His public disclosure of that information would lead the Company to disclose even more otherwise non-public information in order to put Mr. Disney's disclosures in, what the corporation believes to be, the proper context. There is no reason to believe that such a process would necessarily advance the best interests of the corporation or its stockholders.

Therefore, I again conclude that the ten disputed documents are confidential. Pursuant to the Supreme Court's instructions, I must now balance the potential benefit and potential harm of disclosure.

C. The Potential Harm Outweighs The Benefit Of Disclosure

The potential benefit of the release of these documents can be easily stated. Stockholders have a legitimate interest in monitoring how the boards of directors of Delaware corporations perform their managerial duties. Stockholders also have a legitimate interest in discussing decisions of a board that could affect the value of

their investments, such as executive compensation. Both of these interests might be served by allowing Mr. Disney to disclose the ten documents to the public.

Balanced against that benefit is the potential great harm to the deliberative process of the board, and the boards of directors of all Delaware corporations. If any shareholder can make public the preliminary discussions, opinions, and assessments of board members and other high-ranking employees, it would surely have a chilling effect on board deliberations. At the foundation of Delaware General Corporation Law is the presumption that, in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the Company and that, absent an abuse of discretion, the courts will respect that judgment.[28] Concomitant to this grant of deference to the directors of a corporation is the need to allow the directors the ability to deliberate openly and candidly with each other. The preliminary deliberations of a corporate board of directors generally are non-public and should enjoy "a reasonable expectation that they [will] remain private."[29]

In addition, as already noted, the board, including Mr. Disney, adopted a confidentiality policy relating to the communications in the disputed documents. Evidently, the board, including Mr. Disney, made the judgment that the interests of

[28] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).
[29] *Disney*, 857 A.2d at 448.

the Company are best served by maintaining these types of communications in strict confidence. That judgment is sensible. In the circumstances, there is no adequate reason to relieve Mr. Disney of his duties under that policy.

In his briefing and before me at oral arguments, Mr. Disney made two additional arguments as to why I should remove the confidentiality designation from these ten documents. First, he argued that executive compensation is a topic of such importance that it warrants what amounts to special treatment under Section 220. By disclosing information regarding compensation obtained through a Section 220 demand when it contradicted the statements of the Company and board, stockholders would be able to more effectively place a "corporate check" on the board's compensation decisions.

The problem with this argument, as I stated in my earlier Opinion, is that there is nothing in the language of Section 220 to differentiate its use in relation to compensation issues from any other subject relating to the management of the corporation. Thus, I expect that whatever rule is applied in this case would necessarily cover the gamut of management decision-making.

Second, Mr. Disney argued that he is uniquely suited to decide what disclosures would be in the best interests of the corporation. Mr. Disney contends that, due to his decades-long association with the Company, and the large number and value of shares he owns, his interests are perfectly aligned with the corporation

such that he would never do anything to harm it. Therefore, the harm of disclosure would be minimal.

While not doubting Mr. Disney's *bona fides* in the least, I simply cannot accept this reasoning. The policy of Section 220 allows a stockholder, even one owning a single share, access to the corporation's books and records.[30] There is nothing in the language of Section 220, nor in any case cited by Mr. Disney, that gives a large shareholder greater access to the corporate books and records and a greater ability to share those documents with other shareholders. Nor am I convinced that allowing any one shareholder to assume the role of public scourge of management with broad rights to release the corporation's confidential documents is sound public policy. There are other avenues for bringing directors to account for their mismanagement, most notably by contesting elections and by instituting derivative litigation. Nothing suggests to me that Mr. Disney or any other stockholder needs the ability to make public disclosure of the directors' confidential, internal deliberations to successfully pursue those other avenues.

For all of the above reasons, I must conclude that the potential harm of disclosure outweighs the potential benefit.

[30] The right to inspect and copy documents is not "conditioned . . . on any minimum threshold investment on the part of the stockholder." DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 8-6[a] at 8-56 (2001) (quoted approvingly in *Madison Ave. Inv. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P.*, 806 A.2d 165, 176 n.27 (Del. Ch. 2002)).

III.

In the Remand Order, the Supreme Court also stated that "if the trial court takes the position that no review of the disputed documents is appropriate because [Mr.] Disney may only seek a change of designation in the course of a subsequent substantive lawsuit, the court should so advise this Court."

I do not take such a position. In my earlier Opinion, I noted the circumstances in which a stockholder is entitled to use information obtained by making a Section 220 demand in ways that will lead to public disclosure of that information. Chief among these, of course, is the use of the information to bring a derivative suit in the case of corporate waste or mismanagement, or to bring a suit attacking some aspect of a company's public disclosures.[31] However, there are also other instances, where a lawsuit was not prosecuted, in which it might be proper to publicly disclose confidential information obtained after a Section 220 demand. Specifically, the court will "entertain an application for relief from a Section 220 confidentiality agreement in the context of an active proxy solicitation,"[32] or under other "exigent circumstances (*e.g.*, an active election contest) in which time constraints will not allow a stockholder to draft and file a complaint and then deal with issues of confidentiality in the ordinary course."[33]

[31] *Disney*, 857 A.2d at 448.
[32] *Id.* at 449.
[33] *Id.* at 450.

There may, of course, be other instances in which it would be appropriate to relieve a Section 220 plaintiff from a confidentiality order. These instances would include the so-called "smoking gun" situation, where Section 220 documents definitively prove that the corporation made false or misleading disclosures. In such a circumstance, the faster such information is given to investors the better. However, this is not a smoking gun case. None of the documents contain any proof that the board of the Company made any deliberately false or misleading statements. Thus, under the circumstances, I find no reason why these ten documents should be made public.