

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: June 18, 2004
Decided: June 22, 2004

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RE: George D. Orloff v. Weinstein Enterprises, Inc.
C.A. No. 186-N

Dear Counsel:

Weinstein Enterprises, Inc., the defendant, has appealed from this court's June 9, 2004 Supplemental Final Order and Judgment (the "Final Order") and now moves for an order staying the effect of the Final Order pending appeal. The Final Order implements the court's ruling that the plaintiff, George D. Orloff, who is a substantial stockholder of Weinstein, has the right pursuant to 8 *Del. C.* § 220 to inspect specified books and records of J.W. Mays, Inc., a New York corporation that was found to be a "subsidiary" of Weinstein within the meaning of recently enacted amendments to the Delaware General Corporation Law ("DGCL").

The Final Order further directs Weinstein to “attempt to cause Mays to comply” with its terms. If Mays should refuse to produce the required documents, the Final Order requires Weinstein to promptly notify the court. Finally, the Final Order provides that the production of the Mays documents “shall be on or before June 15, 2004, or such later date as Plaintiff may agree to in writing.” Although the Final Order does not specify what steps the court would take to enforce compliance by Mays, the court has discussed with the counsel the likelihood that it would authorize the issuance of a commission seeking the issuance of a subpoena by the appropriate court of the State of New York calling for the production of the specified documents. In fact, Weinstein has notified the court that Mays is resisting the production of documents, and the plaintiff has filed a motion for the issuance of such a commission.

The statutory provision at issue is new, having been added to Section 220 by Section 21 of 74 Del. Laws, c. 84, which became effective September 23, 2003. The newly added language gives stockholders of Delaware corporations the right to inspect the books and records of a “subsidiary” corporation and defines “subsidiary” to mean “any entity directly or indirectly owned, in whole or in part, by the corporation of which the stockholder is a stockholder and over the affairs of which the corporation directly or indirectly exercises control.”

Mays is a publicly held corporation, but Weinstein owns more than 45% of its stock and, in the common sense of the word, is able to exercise control over Mays. Thus, for example, Lloyd Shulman (who, with his mother, owns or controls an additional 10% of the Mays common stock) is the Chairman and CEO of both Weinstein and Mays. Nevertheless, because Mays is a separate legal entity with minority shareholders, it is true that the fiduciary duties of the Mays directors do not run directly to Weinstein and Weinstein does not have the unfettered power to tell the Mays board of directors what to do.

The defendant relies upon this lack of absolute control in arguing that the court should construe the newly added language of Section 220 narrowly to apply only in situations where the subsidiary is 100% owned by the parent. In advancing this argument, Weinstein points to the following language in the new statutory provision, giving a stockholder the right to inspect:

- (2) A subsidiary's books and record, to the extent that:
 - a. ...
 - b. The corporation could obtain such books and records through the exercise of control over the subsidiary....

Since, it claims, the Mays board of directors has balked at turning over its books and records to Orloff, nothing more is needed to show that Weinstein lacks the requisite control.

Orloff, of course, contends that the statute cannot be limited to wholly owned subsidiaries and that the court must take a much broader view of Weinstein's ability to exercise control over Mays than the mere fact that the Mays board of directors, when advised by Weinstein and its counsel of the Final Order, is resisting turning over its files. He suggests that if Weinstein wanted the documents for its own purposes, it could no doubt obtain Mays's cooperation in making them available. Of course, Shulman (the Chairman and CEO of both corporations) has access to whatever Mays documents or information he wants.

Stays of proceedings "have utility in summary proceedings in the Court of Chancery. For example, a corporation ordered to produce books and records in an action brought pursuant to Section 220 of the Delaware General Corporation Law may seek a stay of the order pending appeal."¹ In this case, a stay is particularly appropriate because the statutory provisions involved are new and raise fair ground for litigation over their scope and meaning.² Unless a stay is entered, it is likely that the full production required by the Final Order could be accomplished before the appeal is heard and, thus, moot the appeal. Against these factors, the court

¹ D. Wolfe & M. Pittinger, *CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY*, § 14-9 at 14-19 (2004 ed.)(citations omitted).

² *Kirpat, Inc.v. Delaware Alcoholic Beverage Control Comm'n*, 741 A.2d 356, 356 (Del. 1998).

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weighs the plaintiff's need for the documents and the threat of harm to either Weinstein or Mays from their production. Taking all of these factors into consideration, the court concludes, in the exercise of its discretion, that a stay of further proceedings in this court is warranted pending the appeal. For that reason, the court has today entered the order accompanying Weinstein's motion to stay and denied the order for a commission.

/s/ Stephen P. Lamb
Vice Chancellor