

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

GERHARD FRANK DOBLER, :  
ROBERT CHAPMAN, GRACE :  
KITTRELL, GTRW :  
PARTNERSHIP, GARY McKEE, :  
JAMES BRYANT, LLOYD :  
DAWSON, PETER GAULD, JOHN :  
BROWN, and HAROLD SWART, :

Plaintiffs, :

v. :

C.A. No. 18105 NC

MONTGOMERY CELLULAR :  
HOLDING CO., INC., :

Defendant. :

GERHARD FRANK DOBLER, :  
ROBERT CHAPMAN, GRACE :  
KITTRELL, GTRW :  
PARTNERSHIP, GARY McKEE, :  
JAMES BRYANT, LLOYD :  
DAWSON, PETER GAULD, JOHN :  
BROWN, and HAROLD SWART, :

Plaintiffs, :

v. :

C.A. No. 18499

MONTGOMERY CELLULAR :  
HOLDING CO., INC., :

Defendant. :

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## MEMORANDUM OPINION

Date Submitted: March 12, 2001

Date Decided: October 19, 2001

Martin S. Lessner, Esquire and John J. Paschetto, Esquire of Young, Conaway, Stargatt & Taylor, LLP, Wilmington, Delaware; Of Counsel: Attison L. Barnes, III, Esquire of Gardner, Carton & Douglas, Washington, D.C., Attorneys for Plaintiffs.

David A. Jenkins, Esquire of Smith, Katzenstein & Furlow, LLP, Wilmington, Delaware, Attorney for Defendant.

NOBLE, Vice Chancellor

Plaintiffs, minority shareholders of Montgomery Cellular Holding Co., Inc. ("MCHC" or "Defendant"), a Delaware corporation, have brought two "books and records" actions under § 220 of the Delaware General Corporation Law.<sup>1</sup> This is the Court's decision after trial of both actions on January 18, 2001.

## I. STATEMENT OF FACTS

MCHC, formed in the late 1980's, operates an FCC licensed non-wireline cellular system in the Montgomery, Alabama area. The Plaintiffs acquired their minority interests in MCHC at the time the corporation was formed. They each own 45 shares of MCHC's stock, which represents, in the aggregate, approximately 5% of MCHC's shares. Palmer Wireless Holdings, Inc. ("Palmer Wireless") holds the remaining 95% of MCHC's shares.

The current ownership structure of the majority interest in MCHC is somewhat complicated because of a substantial number of affiliate relationships. Ultimately, however, control is now vested in Robert Price ("Price") through various Price-controlled entities. Originally, the majority interest was owned by Edward Forks. Soon after incorporation, Forks sold

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<sup>1</sup> The Plaintiffs in these actions are: Gerhard Frank Dobler ("Dobler"), Robert Chapman, Grace Kittrell, GTRW Partnership, Gary McKee, James Bryant, Lloyd Dawson, Peter Gauld, John Brown, and Harold Swart.

his majority stake to Palmer Wireless, Inc. through the entity Palmer Wireless Holdings, Inc. Price acquired his interest in 1998 by merging an entity called Price Communications Wireless, Inc. ("PrCW") with Palmer Wireless, Inc. As a result of that merger, PrCW was the surviving entity and held Palmer Wireless as a wholly-owned subsidiary.<sup>2</sup>

Thus, under MCHC's ownership structure, the majority shareholder of MCHC is Palmer Wireless, which is a wholly-owned subsidiary of PrCW, which, in turn, is the wholly-owned subsidiary of the ultimate parent company, Price Communications Corporation. MCHC is the sole shareholder of Montgomery Cellular Telephone, Co., Inc., which is the sole shareholder of Price Communications Wireless, IV, the current licensee of the cellular system.

Price's domination over MCHC is not limited to his ownership interest through affiliated entities. Price also has managerial control as the chairman and sole member of MCHC's board of directors.

After Price gained control of MCHC, the flow of information to the minority shareholders was substantially reduced. Before Price gained control, the minority shareholders had received annual summaries of

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<sup>2</sup> Palmer Wireless owns, in addition to its stake in MCHC, interests in fifteen other cellular systems in Georgia, Florida, and Alabama.

MCHC's performance. These reports were typically distributed at the annual shareholders meeting. After Price assumed control, these reports were no longer prepared and distributed. The last report was distributed at the May 1998 meeting when Price was elected the sole director.

In addition to discontinuing the practice of providing the performance reports to the minority shareholders, MCHC failed to hold the required annual shareholders meeting in 1999. Twenty-eight months elapsed between meetings until the most recent annual meeting was held on August 25, 2000.

Concerned by the lack of available information regarding MCHC's finances, Dobler, a minority shareholder, sent Price several certified letters in 1999 asking for information concerning MCHC's financial health. Especially troublesome to Dobler was the fact that the shareholders of MCHC had never received dividends from their investment. Dobler also sent letters to, and called, Patrick Meehan, Price's attorney, seeking the same information. These pleas were without result.

When these somewhat informal requests for information failed, the minority shareholders made a formal demand for an inspection of MCHC's

books and records under 8 *Del. C.* § 220.<sup>3</sup> The demand letter stated that the information was sought for the purposes of determining: (1) the reason for the non-payment of dividends to the minority shareholders, (2) whether the corporation had the financial wherewithal to pay such dividends, and (3) whether MCHC had been the victim of waste or mismanagement. This time, Defendant responded by providing the Plaintiffs with some financial records.<sup>4</sup> The Plaintiffs concluded that these records were not fully responsive to their demand and, thus, filed the first of two books and records actions in this Court.<sup>5</sup>

After the April Demand and the filing of the first books and records action, as noted above, MCHC noticed and held a shareholders meeting in August 2000. At that meeting, the minority shareholders asked many pointed questions concerning the financial status of MCHC but received no concrete answers from Price's representative, his attorney, Patrick Meehan. After the meeting, and "off the record," Mr. Meehan asked the minority shareholders if they would sell their shares to the majority shareholder. Based on this development, the Plaintiffs sent another demand letter to the

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<sup>3</sup> Demand for Inspection of Corporate Books and Records (April 24, 2000). Tr. Ex. 1 ("April Demand").

<sup>4</sup> In response to the April Demand, Defendant provided Plaintiffs two sets of documents. The first, on May 15, 2000, contains certain financial records. Tr. Ex. 3. The second, provided on June 28, 2000, contains certain non-financial records. Tr. Ex. 4.

<sup>5</sup> *Dobler v. Montgomery Cellular Holding Co., Inc.*, Del. Ch., C.A. No. 18150.

Defendant seeking access to corporate books and records for the purpose of valuing their minority shares.<sup>6</sup> Again, they were not satisfied with the response and chose to file a second books and records action in this Court.<sup>7</sup>

These two actions were consolidated and proceeded to trial in January 2001. The Plaintiffs presented two witnesses: Dobler, a shareholder, and Hal Young, their expert in valuation and forensic accounting.<sup>8</sup> MCHC called no witnesses.

## II. ANALYSIS

The Delaware General Corporation Law expressly provides shareholders with the right to inspect the books and records of the corporations in which they have an ownership interest.<sup>9</sup> This right, however, is not absolute. A shareholder seeking access to a corporation's books and records must demonstrate (1) that the shareholder has demanded inspection

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<sup>6</sup> Demand for Right to Inspect Books and Records (November 2, 2000). Tr. Ex. 2 ("November Demand").

<sup>7</sup> *Dobler v. Montgomery Cellular Holding Co., Inc.*, Del. Ch., C.A. No. 18499.

<sup>8</sup> The foregoing statement of facts is based upon the testimony of Plaintiffs' two witnesses and the documents admitted into evidence. I found the witnesses to be credible, a conclusion not seriously challenged by Defendant.

<sup>9</sup> 8 *Del. C* § 220(b) provides in pertinent part that:

Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose the corporation's stock ledger, a list of its stockholders, and its other books and records, and to make copies or extracts therefrom. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder

of the records in the proper form and manner, and (2) that the shareholder has a proper purpose for making such a demand.<sup>10</sup>

In this case, the Defendant has not disputed that the Plaintiffs' demands, both in April and in November, were proper both as to form and manner. Instead, the Defendant disputes the propriety of two of the three purposes advanced by the Plaintiffs for the demand and the ultimate scope of any court-ordered inspection of the corporation's books and records.

**A. Proper Purpose.**

As noted above, shareholders seeking to inspect a corporation's books and records pursuant to § 220 must articulate a proper purpose for demanding an inspection. A "proper purpose" means "a purpose reasonably related to such person's interest as a stockholder."<sup>11</sup>

Through their April and November Demands, the Plaintiffs advanced the following three purposes:

1. to investigate potential acts of waste and mismanagement by MCHC's Board;
2. to evaluate MCHC's failure to pay dividends over the life of the corporation,<sup>12</sup> and

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<sup>10</sup> See 8 *Del. C.* § 220(c); see also *Security First Corp. v. U.S. Die Casting and Dev. Co.*, Del. Supr., 687 A.2d 563, 566-69 (1997); *Saito v. McKesson HBOC, Inc.*, Del. Ch., C.A. No. 18553, mem. op. at 7, Chandler, C. (July 10, 2001).

<sup>11</sup> 8 *Del. C.* § 220(b).

<sup>12</sup> The first two purposes identified in the April Demand have been combined here for convenience.



3. to value their minority shares in MCHC.

The Defendant acknowledges that valuing the minority shares is a “proper purpose” under the statute.<sup>13</sup> It does, however, challenge directly the validity of the need to evaluate the non-payment of dividends and, indirectly, the desire to investigate suspected acts of corporate waste and mismanagement.

The Defendant argues that seeking to evaluate the non-payment of dividends is not a recognized “proper purpose” because the shareholder does not have the ability to compel the corporation to pay dividends. While the law in Delaware may be unclear as to whether this purpose, standing alone, is proper, it is well-settled that this purpose is proper when combined with a request to value shares of the corporation.<sup>14</sup> Here, the Plaintiffs have articulated a need for valuing their shares and have made that need the subject of their November Demand.

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<sup>13</sup> See *CM & M Group, Inc. v. Carroll*, Del. Supr., 453 A.2d 788, 792-93 (1982).

<sup>14</sup> *Helmsman Management Servs., Inc. v. A & S Consultants, Inc.*, Del. Ch., 525 A.2d 160, 165 (1987). In *Helmsman*, the Court concluded:

Likewise valid are Helmsman’s stated purposes of determining A & S’s present and past ability to pay dividends. The ability to pay dividends is one of several recognized components of a corporation’s fair value. Therefore, A & S’s ability to pay dividends would be a proper purpose for an inspection under § 220, if only as part of a more general inquiry into the value of Helmsman’s A & S holdings.

*Id.* (citations omitted).

The Defendant also argues that these two purposes, non-payment of dividends in the April Demand and valuation of MCHC holdings in the November Demand, were never “linked” together. The two demands were independent of each other, and, accordingly, Defendant argues that the records initially sought for the purpose of ascertaining the reasons for non-payment of dividends, but not specifically sought in November for valuation purposes, are not properly subject to inspection. The Defendant cites no authority for this proposition and I find the argument unpersuasive.<sup>15</sup> Moreover, the records sought in the April Demand generally address the waste and mismanagement concerns; the November Demand focuses on valuation. Although Plaintiffs may have described their demands as “independent,” I do not understand that description to have set up an insurmountable barrier between the two Demands. Finally, to the extent that certain records may serve multiple purposes, it should be noted that “[o]nce a shareholder has established a proper purpose for the demanded inspection,

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<sup>15</sup> The Defendant asserts that the issue is now moot because it has provided all existing financial records responsive to the Plaintiffs’ demand for information necessary to value their shares. I decline MCHC’s invitation to avoid this issue on mootness grounds. First, the only evidence that certain records do not exist is correspondence from counsel. While I do not doubt counsel’s veracity, I do not know the source or the reliability of his information. Second, if such records are subsequently discovered, there will be no need to revisit the claim. Third, Defendant’s representation that certain records do not exist came only three days before trial. Finally, there may be some question as to whether the document involved is an MCHC record or a record of an affiliate. See discussion *infra* Part II.C.

any secondary purpose he or she may have is generally considered to be irrelevant . . . .”<sup>16</sup>

It is also well-settled that investigation into corporate waste and mismanagement is a proper purpose for a books and records inspection under § 220.<sup>17</sup> “[A] stockholder may demonstrate a proper demand for the production for corporate books and records upon a showing, by a preponderance of the evidence, that there exists a credible basis to find probable corporate wrongdoing. The stockholder need not actually prove the wrongdoing itself by a preponderance of the evidence.”<sup>18</sup> The Plaintiffs’ request will fail to meet this standard if it evinces a “[m]ere curiosity or a desire for a fishing expedition. . . . But the threshold may be satisfied by a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing.”<sup>19</sup>

The Defendant contends that the Plaintiffs have failed to adduce sufficient record evidence to show, by a preponderance of the evidence, that there exists a credible basis for finding probable corporate wrongdoing and,

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<sup>16</sup> *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, Del. Supr., 681 A.2d 1026, 1030 n.1 (1996) (citations omitted).

<sup>17</sup> *Security First Corp.*, 687 A.2d at 567.

<sup>18</sup> *Id.* at 565.

<sup>19</sup> *Id.* at 568; *see also Thomas & Betts*, 681 A.2d at 1031 (stating that this purpose must be supported by credible record evidence).

thus, fail to state a proper purpose for a books and records inspection. I disagree.

The Plaintiffs have introduced sufficient record evidence to satisfy this standard. Through the testimony of their two trial witnesses and the documents introduced as evidence, the Plaintiffs have raised serious and credible concerns that MCHC's Board, through its single board member Price, has engaged in or authorized transactions that may evidence corporate waste and mismanagement.

The Plaintiffs' expert, relying on the financial statements released by the Defendant, testified that those statements raised several "red flags." For example, Plaintiffs' expert expressed serious concern about "advances" to affiliates. In the early years, affiliates advanced money to MCHC. In fact, in 1993, MCHC owed approximately \$12 million to its affiliates. Those liabilities had been paid in full by 1998. After Price took control, however, the flow of money reversed and MCHC began making "advances" to its affiliates. These advances to affiliates were \$1.2 million in 1998 and grew cumulatively to \$8 million in 1999 and to \$13 million through November 2000.<sup>20</sup> During this period, "advances to affiliates" exceeded MCHC's net

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<sup>20</sup> Trial Transcript at 91-92 ("T.T.").

income. These “advances” now represent the second largest asset of this cellular telephone company.<sup>21</sup>

While “advances” to affiliates, in some contexts, may be entirely proper, the Plaintiffs have provided credible evidence that these “advances” are suspect. For example, the financial statements merely label them as “advances.” There is no evidence, however, concerning the nature of these advances and who received them. The Defendant asserts that these advances are in the nature of “loans” and are, thus, viable assets of the corporation. Surprisingly, the Defendant states that no documents exist regarding the nature, terms, or obligors of nearly \$13 million in loans.<sup>22</sup>

Further, Plaintiffs’ expert illustrated that expenses paid to affiliates as a percentage of total expenses were 30% in 1998, but in 1999, they were only 16% of the total; there were, however, gaps in the numbers – the actual figure could be either higher or lower.<sup>23</sup> Also troublesome was Defendant’s assertion that there are no records memorializing these expenses such as contracts, invoices, or the like.

Finally, Dobler provided credible testimony that raised concerns about the handling of equipment at MCHC. Dobler stated that at one time he was

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<sup>21</sup> *Id.* at 96.

<sup>22</sup> Tr. Ex. 15.

<sup>23</sup> T.T. at 90; Tr. Ex. 11.

told that MCHC paid several million dollars for a “switch” that transfers calls through the system. It is now unclear whether MCHC owns this significant piece of equipment and, if not, who does own it. There is evidence that MCHC is now paying annual rent of over \$1 million for use of a switch.

I find that the record contains sufficient credible evidence showing probable corporate wrongdoing. Especially telling is the apparent lack of documentation for significant transactions with affiliates. For that reason, I find that Plaintiffs have established that the investigation of corporate waste and mismanagement is, here, a proper purpose for a books and records inspection under § 220.

### **B. Scope of Relief.**

Having found that the Plaintiffs have invoked proper purposes for an inspection of the corporate books and records, the Court must now determine the scope of the relief that should be granted. “In determining the scope of inspection relief, the overriding principle is that only those records that are ‘essential and sufficient’ to the shareholder’s purpose will be included in the court-ordered inspection.”<sup>24</sup> The Plaintiffs bear the burden of

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<sup>24</sup> *Helmsman*, 525 A.2d at 167; see also *Security First Corp.*, 687 A.2d at 570; *Kortüm v. Webasto Sunroofs, Inc.*, Del. Ch., C.A. No. 17237, mem. op. at 11, Jacobs, V.C. (Feb. 9, 2000).

meeting this standard.<sup>25</sup> The Court is charged with the responsibility of setting the parameters, or scope, of the inspection, in an order which has been described as “circumscribed with rifled precision.”<sup>26</sup>

Heeding the Court’s request at the conclusion of the trial, the Plaintiffs’ post-trial brief specifically delineates both the broad categories and examples of specific documents within each category that would be responsive to their April and November Demands. The Plaintiffs identify five categories of documents that they seek in order to advance the purposes identified in their demands. Four categories are directly calculated to ferret out corporate waste and mismanagement and will, to a lesser extent, bear on the valuation of shares. The last category seeks records solely designed to facilitate the calculation of the value of MCHC’s minority shares. These categories, and the specific documents within each category, will be discussed in the order presented in the Plaintiffs’ brief.

**1. Books and records necessary to evaluate the circumstances by which \$13,291,935 was advanced from MCHC to related parties.**

**A. Decision-making documents regarding advances:**

Internal corporate memorandums, e-mails, letters, minutes and resolutions, or other documents, from 1997 to present, which reflect the decision-making of MCHC and, if applicable, each

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<sup>25</sup> *Thomas & Betts Corp*, 681 A.2d at 1035.

<sup>26</sup> *Security First Corp.*, 687 A.2d at 570.

affiliate, with respect to any of the \$13,291,935 in “advances” from MCHC to such affiliate.

**B. Terms and conditions of Advances**

Promissory notes, loan agreements, summaries of terms and conditions, or other documentation of the \$13,291,935 in “advances” from MCHC to affiliates.

These documents, both as a broader category and as specifically delineated, are essential to and sufficient for determining the nature and character of these “advances” to affiliates. Only by viewing supporting documents, instead of only the line item total on a financial statement, can the Plaintiffs determine whether these transactions are acts of corporate waste or mismanagement. The decision-making documents will indicate whether the decision of the MCHC Board in granting the advances complied with the corporation’s by-laws and the attendant fiduciary duties. Documents reflecting the terms and conditions of the advances are necessary to determine whether the advances are fair to MCHC.<sup>27</sup> Because these documents and records are necessary and sufficient to further a proper purpose for a books and records demand, the Defendant must allow the Plaintiffs to inspect these documents.

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<sup>27</sup> The import of these documents is not limited to investigating acts of corporate waste and mismanagement. This information is also significant in valuing the shares of MCHC. For instance, the terms of these advances will determine their future value as assets of the corporation. If, however, they are not in the nature of a loan and have no repayment terms, their formal value as assets of MCHC is questionable.



**2. Books and records necessary to evaluate the extent to which \$17,000,000 in equipment has been transferred from MCHC to related parties and the circumstances of such transfers:**

**A. Decision-making documents relating to equipment transfers:**

Internal corporate memorandums, e-mails, letters, minutes and resolutions, or other documents, from 1997 to present, which reflect the decision-making of MCHC and, if applicable, each affiliate with respect to any transfer from MCHC to its related parties of any of the \$17,000,000 in equipment as shown in the financial statements, or authorization, approval or plan for the acquisition and disposition to related parties of the \$17,000,000 in equipment.

**B. Terms and conditions of equipment transfers:**

Invoices and/or other documentation setting forth the price or value of equipment purchased by MCHC, which was subsequently transferred to related parties, as well as sales agreements, loan agreements, transfer/assignments, bills of sale, summaries or other documentation of any transfer from MCHC to related parties of any of the \$17,000,000 in equipment.

**C. Specific equipment owned, transferred, or replaced by MCHC:**

Documents sufficient to show each cell site or switch owned, transferred, or replaced by MCHC, as well as information historically provided within the shareholder report.

For reasons similar to those above, I find that the Plaintiffs have demonstrated that the documents they seek relating to the transfer of equipment from MCHC to affiliates are necessary and sufficient to determine whether transfers of equipment did indeed occur and on what terms if they did. This, in turn, will help determine whether the MCHC

Board has engaged in acts of waste or mismanagement with regard to the equipment of MCHC. The terms of any transfer of equipment from MCHC to its affiliates may also have a bearing on the valuation of MCHC's shares.

The Plaintiffs have narrowed the scope of this request from originally seeking information regarding all equipment transfers to now requesting information relating to transactions with affiliates only. In their reply brief, they also agree to limit their request for information on equipment transfers to transactions within the past four years and excluding single item transactions for less than \$1000. Because the Plaintiffs have demonstrated that information regarding the transfer of equipment to affiliates is necessary and sufficient to further a proper purpose, I find that the Defendant must make available the records requested with the limitations as to date and amount noted above.

**3. Books and records necessary to evaluate agreements between MCHC and related parties and the terms and conditions of such agreements.**

**A. Decision-making documents regarding related party agreements:**

Internal corporate memoranda, e-mails, letters, minutes and resolutions, or other documents, from 1997 to present, which reflect the decision-making of MCHC and, if applicable, each affiliate, with respect to any agreements, arrangements, or understandings between MCHC and related parties, including the following agreements: (a) management and/or consulting services agreements; (b) agreements for the reimbursement of out of pocket expenses; (c) financing agreements; (d) facility

leases; (e) switching services agreements; (f) billing services agreements; and (g) roaming services agreements.

**B. Terms and conditions of related party agreements:**

Agreements, other documents reflecting an arrangement or understanding between MCHC and related parties, and invoices, payments, or promissory notes arising under such agreements, arrangements, or understandings, including: (a) management and/or consulting services agreements; (b) agreements for the reimbursement of out of pocket expenses; (c) financing agreements; (d) facility leases; (e) switching services agreements; (f) billing services agreements; (g) roaming services agreements; and (h) loan agreements.

Various agreements and transactions with the majority shareholder and affiliated entities provide opportunity for abuse—especially where such arrangements involve a large percentage of the corporation’s total expenses as they do here. Thus, this is yet another facet of potential corporate waste and mismanagement that the Plaintiffs are entitled to investigate through a books and records action. The documents requested are necessary to determine the scope and nature of any agreements between MCHC and its affiliates. The documents requested are needed in order for the Plaintiffs to determine whether MCHC has entered into agreements that are fair to the corporation and are not the product of self-dealing on the part of the Board. Moreover, the terms of the agreements are necessary for a proper valuation of MCHC’s shares because of their effect on the income stream of the corporation. Thus, these documents are necessary to address a proper

purpose for a books and records demand under § 220, and Plaintiffs are entitled to access to them.

**4. Financial records necessary to investigate the advances, equipment transfers, and related party agreements:**

**A. Ledger and Registers:**

General ledgers from 1997 to present, including (a) fixed assets; (b) loans to or advances from related parties; (c) other assets; (d) payments to related parties for services performed, regarding MCHC business, whether or not labeled as MCHC;

Fixed asset registers from 1997 to present, including asset acquisitions, dispositions, and depreciation expense regarding MCHC business, whether or not labeled as MCHC;

General ledgers from 1997 to present (the brief goes on to list 23 specific accounts that Plaintiffs seek).

Considering the nature of these documents or records and the testimony of the Plaintiffs' expert at trial, the Court is not persuaded that these records are essential for examining suspected acts of corporate waste and mismanagement. While these records, by themselves, may "assist"<sup>28</sup> in

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<sup>28</sup> The Plaintiffs attempt to justify their request for these documents by stating that they "will assist in the determination" of whether certain acts qualify as corporate waste. Op. Br. at 26. While the Court does not seek to penalize witnesses for imprecise testimony as a general rule, the Court notes that the Plaintiffs' expert testified with respect to these documents that "he would like to see" these general ledger entries. T.T. at 126. That which one "would like to see" is not always "necessary" to suit a given purpose. The labeling by the Plaintiffs or the Plaintiffs' expert of a particular document as "necessary" does not control the issue. The Court is required to evaluate, under the circumstances, whether the sought after document is necessary for the proper purposes of the shareholders. When the witness uses less than precise language, the Court's duty, i.e., to evaluate, under the circumstances, whether the sought-after document is necessary for the shareholders' purposes, remains. As the Court does not grant relief because the "magic"

the Plaintiffs' efforts, they have failed to show how these documents are not merely duplicative of the demands that I have granted above. The Court has found that the operative documents relating to the advances, equipment transfers, and agreements with affiliates were both necessary and sufficient to address the purpose for which the demand was made. Because the Plaintiffs have not shown that the general ledgers and registers reflect specific details of the transactions, the operative documents for the suspect transactions would be the best evidence of the care with which the decisions were made by the board and the ultimate terms of these transactions. For those reasons, I find that this type of evidence would be duplicative of that approved by the Court above and that the Plaintiffs have failed to prove that the evidence is necessary for their stated purpose. Thus, the Defendant is not required to produce the general ledger accounts and registers.

**5. Books and records necessary to determine the value of Plaintiffs' ownership interests:**

**A. Valuations conducted by MCHC (or related parties) or third parties:**

Records reflecting on the (i) "fair value" and/or the intrinsic value of MCHC; (ii) the "book value" of MCHC; (iii) internal valuation or cash flow projections of MCHC performed by MCHC or any related party, whether or not conducted in combination with the valuation of related party systems; (iv) operations projections of MCHC prepared by management

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words are used, the Court conversely does not deny relief for failure to use the "magic" words, provided, of course, that the requisite showing is otherwise accomplished.

and/or third party valuations of MCHC; (v) actions undertaken to pursue a public offering of MCHC shares and/or to create a market for its shares and/or to sell a controlling interest in MCHC.

Prior valuations of MCHC shares, including any valuation of Palmer Wireless' majority shares performed prior to Price's acquisition of such majority shares, whether performed by or for Goldman Sachs and/or Donaldson Lufkin.

## **B. Tax Returns**

Corporate tax returns of MCHC for 1997 through the present, or, if consolidated, corporate tax returns including MCHC finances since 1997.

In response to the April and November Demands, the Defendant provided the Plaintiffs with audited and unaudited financial statements for MCHC through November 2000. The Defendant, in response to the pending request for these documents, argues that the documents listed above either have already been produced or do not exist.<sup>29</sup> Regardless of whether the documents have already been produced or do not exist at all, I do not find that the Plaintiffs have shown that any valuations conducted by MCHC (or related parties) or by third parties are essential for them to value their shares. The testimony at trial indicated that the Plaintiffs' expert would be "interested" in seeing these other valuations but failed to show how they

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<sup>29</sup> Defendant's Post-Trial Brief at 10-11; Tr. Ex. 15; *see also supra* note 15 (discussing mootness).

were necessary to his independent valuation of MCHC's shares.<sup>30</sup> Thus, I do not find that any prior valuations are essential for the Plaintiffs to value their shares considering their access to audited and unaudited financial statements.<sup>31</sup>

With regard to the request for corporate tax returns, the Defendant points out, and the Court recognizes, that the Plaintiffs' post-trial request is broader in scope than their November Demand. In their demand, the Plaintiffs only requested MCHC's corporate tax returns. In their post-trial brief, however, they request tax returns for other entities that may have MCHC information embedded within them.

The necessity of the tax returns to a valuation of MCHC's shares is a difficult issue because the necessity for MCHC's returns was not clearly shown either at trial or in post-trial briefing.<sup>32</sup> Moreover, the Court is concerned by the attempt to enlarge the scope of the request after the trial.

In the past, however, this Court has allowed shareholders seeking to value their shares access to the corporation's tax returns.<sup>33</sup> Tax returns, and

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<sup>30</sup> T.T. at 138.

<sup>31</sup> Records reflecting "book value," cash flow projections, and operations projections of management should be made available for Plaintiffs' inspection because they are "essential" to valuation.

<sup>32</sup> "[T]here will be items on a tax return that may have value from a valuation perspective." T.T. at 126 (emphasis added).

<sup>33</sup> See, e.g., *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, Del. Ch., 685 A.2d 702 (1995), *aff'd*, Del. Supr., 681 A.2d 1026, 1033 (1996).

the information that they contain, can provide valuable insight into the corporation's affairs and, hence, can prove to be both useful and necessary in effectively valuing the minority shares. In addition, inspection of these documents, filed with Federal and state authorities, is not burdensome. For that reason, I find that the Plaintiffs are entitled to examine MCHC's corporate tax returns to the extent they exist. If, however, MCHC's tax information is embedded within the tax returns of other entities, I find that the Plaintiffs are allowed to examine the tax returns of those entities only to the extent that MCHC's financial information is specifically delineated in the returns.<sup>34</sup> Thus, the Plaintiffs are not entitled to non-MCHC information in the tax returns of other entities.

In addition to the documents discussed in categories 1-5 above, the Plaintiffs, in their April Demand, sought access to MCHC's stock ledger. To date, MCHC has provided a partial list of stockholders, but not the corporation's stock ledger. The list of stockholders is separate and distinct from the stock ledger.<sup>35</sup> Where a stockholder seeks access to the

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<sup>34</sup> While the Plaintiffs' demand letter only seeks access to MCHC's tax returns, I am not convinced that they are, therefore, proscribed from gaining access to MCHC's tax information included only in another entity's return. To find otherwise in this case would seem to elevate form over substance and unnecessarily foreclose inquiry into a whole category of MCHC's financial records merely because they are being used farther "upstream" in the ownership structure.

<sup>35</sup> See 8 *Del. C.* §§ 219 & 220.



corporation's stock ledger or list of shareholders, the burden is on the corporation to show that the stockholder has not followed the compulsory procedure or has an improper purpose.<sup>36</sup> MCHC has not shown any reason why the Plaintiffs should be denied access to the stock ledger and, thus, Defendant must make the stock ledger available to the Plaintiffs.

To this point, the Court has addressed the Plaintiffs' requests without regard to whether the Defendant has asserted that the records do not exist or have already been produced. Naturally, if the records to which the Court has found the Plaintiffs are entitled do not exist, the Defendant has no duty to do the impossible. Moreover, to the extent the documents have already been provided to the Plaintiffs, there is no need for duplicative disclosures.

### **C. Affiliated Entities**

I have found that the Plaintiffs have shown the necessity for inspection of three broad categories of books and records relating to their investigation of corporate waste and mismanagement. Those records deal with the "advances" to affiliates, the transfer of MCHC assets to affiliates, and agreements between MCHC and its affiliates. MCHC asserts that there are no supporting documents memorializing these items. Thus, the Plaintiffs ask the Court to order that these same items be provided if they are held by,

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<sup>36</sup> 8 *Del. C.* § 220(c).

and are considered documents of, an MCHC affiliate. For instance, an e-mail from Price on PrCW computers to the controller to transfer funds from MCHC to an affiliate might be considered a document of PrCW instead of MCHC, but it relates directly to a disputed transaction at the MCHC level.

Thus, I must consider the possibility that properly requested books and records are in the possession of, or maintained for the benefit of, MCHC, by Palmer Wireless or another of the entities of which Price is the sole director or otherwise in control.

An initial issue is whether the Court can order PrCW or any other affiliate to turn over documents or records they have concerning the disputed MCHC transactions and agreements.<sup>37</sup> For the Court to find in the affirmative, it must clear two hurdles. First, is it appropriate in this case to disregard or blur the lines between legally distinct corporate entities? Second, is it procedurally possible to order a non-party to the action to submit its books and records to an inspection by shareholders of another company?

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<sup>37</sup> Defendant does not argue that documents are immune from the reach of § 220 merely because they are in the possession of an affiliate. Defendant's Post-Trial Brief at 93. That acquiescence does not fully resolve the issue because (putting aside any question as to whether the documents exist) it is not clear if Defendant does rely upon a strict interpretation of whose document it is (MCHC or one of its affiliates).

This Court has addressed requests to include the books and records of subsidiary corporations in a § 220 action brought against the parent corporation.<sup>38</sup> Those subsidiaries were under the full control of the parent and the “value” of the subsidiaries accrued to the parent. Thus, in seeking to value the parent and, perhaps, in seeking to pursue other legitimate shareholder purposes, the relevance of the subsidiary’s books and records to those lawful considerations of the shareholders of the parent is apparent. Here, Plaintiffs have not shown, except to the extent noted below, that the books and records of the Price entities are relevant, or even helpful, to their stated purposes. For example, consolidated financial records do not, at least based on the record, show the contributions of MCHC. If the rest of the Price entities are enormously profitable and MCHC is a losing effort, or vice versa, the consolidated records will not assist Plaintiffs as to their legitimate shareholder purposes.

There is, however, a set of conditions which would justify some of the relief which Plaintiffs seek as to records held by other Price entities. One of the Plaintiffs’ concerns is the absence of any documents evidencing the “advances” or transfers made by MCHC to other Price entities. It may be

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<sup>38</sup> See *Landgarten v. York Research Corp.*, Del. Ch., C.A. No. 8417, mem. op., Berger, V.C. (Feb. 3, 1988); *Martin v. D.B. Martin Co.*, Del. Ch., 88 A. 612 (1913).

that MCHC does not have the documents, but it may also be that they exist elsewhere among the Price entities. If it is a document which MCHC could, in the normal course of business, be expected to possess but, because of the consolidated reporting or recording keeping framework implemented by Price, MCHC does not have, then the Plaintiffs should have access to it. The rights of shareholders secured by § 220 cannot be defeated simply by having another entity hold the records relating to MCHC which MCHC ordinarily would have. Thus, if there are documents in the possession or control of Palmer Wireless or the other Price-controlled entities to which MCHC is a party or which direct or record the transfer or disposition of its assets, including “advances,” and these documents would be subject to inspection under § 220 if they were in the possession of MCHC, then they are to be made available to the Plaintiffs. It may be that there are no documents that fit this standard. It may also be that there are some documents about which there may be legitimate questions as to whether or not they fit the standard. The Court, however, in a § 220 proceeding does not know exactly what books and records exist, and categorization, which always involves some degree of ambiguity, is inevitable.

The final issue is whether the Court has the power to ignore the separate corporate forms and direct the production of documents held by

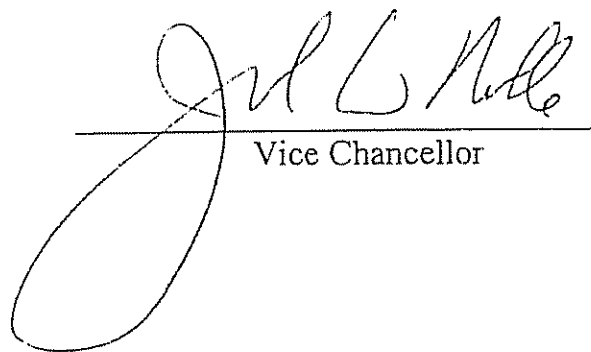
other corporations. It is not necessary to ignore the corporate form because all of the other Price corporations have only one director who is the same director. Price, as director of MCHC, has the duty to assure that MCHC complies with its § 220 obligations. By obtaining those documents that deal directly with MCHC, which he will have the power to do because of his multiple sole directorships, he simply is meeting his duties to MCHC in providing MCHC documents to MCHC shareholders, without any apparent risk of violating any duties that he may have to any of the other corporate entities. While there has been no showing that the Price corporate framework was established for the purpose of carrying out or furthering any improper activities, the corporate structure cannot be employed to shield from inspection those documents, assuming that they exist, to which Plaintiffs are entitled.

Plaintiffs are not entitled under § 220 to documents of the other corporations which may shed light upon their concerns if they are not documents to which MCHC is a party or if they are not documents which relate to the handling of MCHC assets. Shareholders' inspection rights under § 220 are necessarily less than the rights which they have if they are

seeking discovery under Court of Chancery Rule 34 or other comparable civil discovery rules.<sup>39</sup>

### III. CONCLUSION

For the reasons stated above, I find that the Plaintiffs have established proper purposes for their demands and that inspection of certain books and records is necessary to foster those proper purposes. Thus, they are entitled to inspect those books and records of MCHC. The scope of that inspection, however, is limited as noted in this Memorandum Opinion. Counsel shall confer upon and submit a form of Order reflecting the parameters established by this Memorandum Opinion.

  
Vice Chancellor

<sup>39</sup> See *Carapico v. Philadelphia Stock Exch., Inc.*, Del. Ch., C.A. No. 16764, mem. op. at 10 n.13, Lamb, V.C. (Sept. 27, 2000).