



**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: January 26, 2006
Decided: April 28, 2006

Sean J. Bellew, Esquire
David A. Felice, Esquire
Cozen O'Connor
1201 N. Market Street, Suite 1400
Wilmington, DE 19801

Steven L. Caponi, Esquire
Elizabeth A. Wilburn, Esquire
Blank Rome LLP
1201 N. Market Street, Suite 800
Wilmington, DE 19801

Re: *Jeffrey M. Norman v. US MobilComm, Inc.*,
Civil Action No. 849-N

Dear Counsel:

This action is before the Court on Plaintiff's motion for attorneys' fees in a books and records case brought under 8 *Del. C.* § 220. Plaintiff, Jeffrey Norman, filed this action on November 16, 2004 seeking access to Defendant, US MobilComm Inc.'s ("USM"), books and records. At the end of a one-day trial, I stated that I was inclined to rule in Norman's favor and grant broad relief; I reserved decision, however, and invited post-trial briefing on the proper scope of the anticipated production of documents. The parties later settled the case and entered into a stipulated order and final judgment. Norman now seeks to recover his costs and attorneys' fees. For the reasons stated, I grant Norman's request for costs and deny his request for fees.

I. BACKGROUND

Beginning in October 2002 Norman sent USM several requests for books and records. USM produced some information, but Norman found its response to his requests unsatisfactory and filed suit against it under 8 *Del C.* § 220 on November 16, 2004.

Norman's demand letter seeks to inspect USM's books and records "to determine whether [USM] acted properly in disposing of assets of the Company, whether the Company acted properly in distributing proceeds from sale transactions and otherwise to assess the propriety of management decisions."¹ USM moved to dismiss Norman's complaint on December 20, 2004, asserting that it did not allege mismanagement or facts establishing a credible basis from which the Court could infer the possibility of mismanagement.² Instead of filing an opposition to USM's motion to dismiss Norman filed an Amended Complaint pursuant to Court of Chancery Rule 15(aaa).

USM responded by filing another motion to dismiss (the "Second Motion to Dismiss") on February 16, 2005. It again argued that Norman had no basis to support even a suspicion that USM acted improperly.³ Further, the Second Motion to Dismiss asserted that Norman included unsupported allegations in the Amended Complaint

¹ Compl. Ex. A (the "Demand Letter") at 2.

² Def.'s Mem. of Law in Supp. of it's Mot. to Dismiss at 1.

³ Def.'s Mem. of Law in Supp. of it's Second Mot. to Dismiss at 1.

designed to cast aspersions upon David Elkin, USM's president, and that those allegations could not cure the deficiencies of the Demand Letter.

Shortly thereafter USM voluntarily produced approximately 350 pages of documents. Norman considered the production inadequate and sent USM a detailed deficiency letter on March 11, 2005.⁴ In that letter Norman claimed to have the following three purposes for inspecting USM's books and records: (1) to investigate mismanagement; (2) to determine whether assets were properly transferred; and (3) to determine whether any distribution or dividends should have been paid given the sales of assets. Norman later sent USM several letters requesting a response to his March 11, 2005 letter.⁵ Although no one at USM responded to Norman in writing, they allegedly engaged in telephone conversations about the March 11, 2005 letter⁶ and produced an

⁴ Opening Br. in Supp. of Pl.'s Mot. for Att'ys' Fees and Costs ("POB") Ex. C. Defendant's answering brief and Plaintiff's reply brief on the motion for attorneys' fees and costs are referred to as "DAB" and "PRB," respectively.

⁵ *See, e.g.*, POB Exs. D (3/29/05 letter), E (6/30/05 letter), F (7/12/05 letter), and G (8/19/05 letter).

⁶ Tr. at 42. Citations in this form are to the transcript of the argument on Plaintiff's motion for attorneys fees held on January 26, 2006. Citations in the form "T. Tr. at ____" are to the transcript of the trial held on August 23, 2005.

additional 117 pages of documents on April 13, 2005⁷ and 300 pages of documents on May 3, 2005.⁸

After hearing argument, I denied USM's Second Motion to Dismiss on June 17, 2005. Trial was held on August 23, 2005. At the end of trial I did not issue a ruling, but advised the parties that "I'm very much inclined to be granting the 220 relief in pretty broad form."⁹

Thereafter the parties agreed to settle this matter and, on September 30, 2005, entered into a stipulated order and final judgment (the "Order and Judgment"). As a result, USM gave Norman over 4,000 pages of additional documents as well as electronic accounting records and spreadsheet files. Plaintiff subsequently filed the present motion for attorneys' fees and costs, requesting \$5,760.38 in costs and attorneys' fees of at least \$45,000.00.

⁷ DAB Ex. G.

⁸ DAB Ex. H. These two productions included USM's tax records going back to 1997. Tr. at 37.

⁹ T. Tr. at 221.

II. ANALYSIS¹⁰

A. Standards

This Court has broad discretion to award attorneys' fees.¹¹ Normally, however, parties bear their own attorneys' fees pursuant to the American Rule.¹² An exception exists in equity when it appears that a party, or its counsel, has proceeded in bad faith, has acted vexatiously, or has relied on misrepresentations of fact or law in connection with advancing a claim in litigation. There is not a single standard of bad faith that gives rise to an award of attorneys' fees; rather, bad faith turns on the particular facts of each case.¹³

¹⁰ In briefing and at argument Norman cited several perceived inconsistencies between what USM had said before and during the 220 action, and Norman's reading of various documents produced in response to the 220 requests. As I stated at the argument (Tr. at 20-21), I consider it counterproductive and a waste of limited judicial resources for the Court to entertain a plaintiff's arguments for attorneys' fees in a Section 220 action based on its post hoc, detailed comparison of a defendant's allegations against what the plaintiff gleaned from the face of documents produced in that action. To the extent material inconsistencies appear to exist and are borne out in discovery in a subsequent derivative or class action, the plaintiff can seek appropriate relief in the context of that action. Consequently, on jurisprudential grounds, I find that the purported inconsistencies identified by Norman do not warrant an award of attorneys' fees in this case. This finding is without prejudice to Norman's ability to seek relief for the alleged inconsistencies in an action on the merits of the underlying allegations of corporate mismanagement and waste.

¹¹ *Carlson v. Hallinan*, 2006 WL 771722, at *22 (Del. Ch. Mar. 21, 2006).

¹² *McNeil v. McNeil*, 798 A.2d 503, 514 (Del. 2002).

¹³ *Carlson*, 2006 WL 771722, at *22.

“A subset of this ‘bad faith’ exception is that attorneys’ fees may be awarded if it is shown that the defendant’s conduct forced the plaintiff to file suit to secure a clearly defined and established right.”¹⁴ “This Court does not invoke the bad faith exception lightly and imposes the stringent evidentiary burden of producing clear evidence of bad faith conduct on the party seeking an award of fees.”¹⁵

B. Costs

The Court of Chancery is authorized under 10 *Del. C.* § 5106 to “make such order concerning costs in every case as is agreeable to equity.” Court of Chancery Rule 54(d) provides:

Except when express provision therefor is made either in a statute or in [the Court of Chancery Rules], costs shall be allowed as of course to the prevailing party unless the Court otherwise directs. The costs in any action shall not include any charge for the Court’s copy of the transcript of the testimony or any depositions.

In this case the parties do not dispute that Norman prevailed in the litigation and USM therefore should pay Norman’s costs.¹⁶ Consequently, I will award costs in the requested amount of \$5,760.38.

¹⁴ *McGowan v. Empress Entm’t, Inc.*, 791 A.2d 1, 4 (Del. Ch. 2000).

¹⁵ *Carlson*, 2006 WL 771722, at *23.

¹⁶ Tr. at 3-4.

C. Attorneys' Fees

Plaintiff asserts that he should receive attorneys' fees because he had a clear right to certain documents. In particular, Norman contends that USM never challenged his valuation purpose, which is well recognized as a proper purpose, and that due to the sufficiency of his pleadings he also had a clear right to documents to investigate corporate mismanagement and waste. He further asserts that he should receive attorneys' fees because USM acted in bad faith by raising a merits defense to the 220 action and by promising documents which it failed to produce. I will address each of these arguments in turn.

1. The valuation purpose

Norman asserts that he should receive attorneys' fees because USM knew that Norman had a proper valuation purpose for inspecting its books and records and never challenged that purpose. USM responds that it continually challenged all aspects of Norman's case and that Norman did not state a valuation purpose in his Demand Letter or the Amended Complaint. In particular, USM asserts that Norman's Demand Letter only states that he seeks to inspect USM's books and records dating back to 1997 to determine the propriety of various actions of the Company and management's decisions generally, which implies a purpose of investigating potential waste or mismanagement. Further, USM asserts that Norman did not even raise the issue of obtaining documents for a valuation purpose until he answered USM's Second Motion to Dismiss.

Norman's Demand Letter stated that he sought to inspect USM's books and records to determine whether the Company "acted properly in disposing of assets of the Company, whether the Company acted properly in distributing proceeds from sale transactions and otherwise to assess the propriety of management decisions."¹⁷ As I observed at the argument, I do not believe this statement in the Demand Letter fairly apprised USM that Norman was asserting a valuation purpose.¹⁸

According to Norman, he also asserted a valuation purpose in his March 11, 2005 deficiency letter. That letter identified three purposes for investigating USM's books and records: (1) to investigate mismanagement; (2) to determine whether assets were properly transferred; and (3) to determine whether any distribution or dividends should have been paid based on the sales of assets. I again question whether this statement reasonably provides notice of a valuation purpose. In any event, Norman contends that USM never responded to this deficiency letter. I disagree.

First, USM asserts that it had telephone conversations with Norman or his representatives regarding the March 11, 2005 deficiency letter. Norman does not appear to contest this statement. Second, and more importantly, USM produced documents to Norman on April 13 and May 3, 2005. In my opinion, therefore, USM's failure to

¹⁷ Compl. Ex. A.

¹⁸ See Tr. at 7-8.

respond formally in writing to the March 11, 2005 letter does not signify bad faith warranting an award of attorneys' fees.¹⁹

Also both of USM's motions to dismiss contested the sufficiency of Norman's entire case, including any reliance on a valuation purpose. Norman has not shown that USM filed either of these motions in bad faith. Indeed, the fact that Norman amended his complaint after the first motion to dismiss suggests that the motion had at least some merit. The Second Motion to Dismiss challenged the entire 220 action and, at argument on Norman's pending motion, I rejected the contention that the Second Motion to Dismiss was made in bad faith.²⁰

Nor has Norman presented clear evidence that any of the actions USM took after I denied its Second Motion to Dismiss constitutes bad faith conduct. In fact, at the pretrial conference I expressed doubt as to which side would win. In particular I stated "at this point, I can't tell which side . . . has [] the better of this. And it sounds like the most efficient thing we can do is . . . go forward."²¹ I reaffirmed this position at the beginning

¹⁹ Furthermore, contrary to Norman's assertions, USM directly contested the validity of his valuation purpose in its reply brief in further support of its Second Motion to Dismiss at pages 7-9.

²⁰ Tr. at 23-27. At argument Norman also asserted that USM's counsel had admitted that Norman's pleadings could satisfy any pleading standard under the sun. Tr. at 24-25. I rejected this argument because USM's counsel made that comment in a different context, namely, as to a contention that no matter what the Amended Complaint said, Norman could not overcome the deficiencies in his Demand Letter. Tr. at 25.

²¹ DRB Ex. J (Pretrial Conf. Tr. at 12).

of trial.²² Thus, Norman has not shown that he had a clear right to all the documents he requested based on the alleged valuation purpose or that USM acted in bad faith in opposing his requests. Consequently, I will not award him attorneys' fees on that ground.

2. Norman's purpose to investigate waste and mismanagement

Plaintiff further asserts that he should receive attorneys' fees because he had a clear right to the requested documents to investigate corporate waste and mismanagement. USM disputes that premise.

It is well settled that an investigation of corporate waste and mismanagement is a proper purpose for the inspection of books and records under Section 220.²³ This does not mean, however, that a stockholder who demands books and records for the purpose of investigating corporate waste and mismanagement has a clear right to those documents.

McGowan provides an example of a plaintiff who had a clear right to documents in a Section 220 case. In *McGowan* a *director* requested the company's books and records. The company promised to produce specific documents on numerous occasions, but failed to do so.²⁴ In concluding that the director had a clear right, the court noted that a director's rights to inspect books and records are virtually unfettered.²⁵ There is no

²² T. Tr. at 26.

²³ *Security First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997).

²⁴ *McGowan*, 791 A.2d at 5.

²⁵ *Id.*

requirement that a director make a written demand for inspection. Moreover, if a company refuses a director's request for documents, the company has the burden to prove "that the inspection such director seeks is for an improper purpose."²⁶

Norman does not serve as a director of USM; consequently, he had to send a demand letter to USM and had the burden of proving the existence of a proper purpose for his request. Unlike a director, a stockholder, such as Norman, frequently encounters challenges to his purpose for a Section 220 demand. Therefore, I do not consider *McGowan* supportive of Norman's claim for fees.

I also find that USM had a good faith basis for resisting Norman's Section 220 action. The issues presented at trial involved whether Norman had a proper purpose for his requests and whether the scope of those requests was appropriate in the circumstances of this case. Although I ultimately concluded Norman had a proper purpose, I did not reach a firm decision on that issue until after I heard the evidence at trial. In addition, on numerous occasions I expressed concern over the breadth of Norman's requests. At argument on the motion for attorneys' fees I stated that Norman "had incredibly broad requests, probably the broadest I've ever seen, everything since 1997 . . . the way it's written, it would cover the sale of a chair, the sale of an old TV, everything."²⁷ Thus, in my opinion, Norman had not established a clear right to the requested documents for the

²⁶ 8 *Del. C.* § 220(d).

²⁷ Tr. at 50-51.

purpose of determining whether USM engaged in corporate waste or mismanagement until late in the litigation, if at all.

3. Did USM promise to produce documents and fail to do so?

Norman also accuses USM of bad faith for allegedly having promised to produce documents and then failing to do so.²⁸ Based on those failures, he contends USM should pay his attorneys' fees. USM replies that it never agreed to produce specific documents and did not make any misrepresentations to the Court.

Again, the *McGowan* case provides an example of a court awarding attorneys' fees due to counsel breaking their promise to produce a document.²⁹ Although the *McGowan* court granted attorneys' fees based in large part on plaintiff's clear right to the documents in question, the opinion also discussed in detail several promises defendant made, and broke, to produce specific documents. In particular, defendant wrote two letters promising to produce the minutes of the company's board meetings to McGowan, who served on the company's board of directors. In one letter the defendant's attorney stated, "I acknowledge that I still owe you minutes for 1999 which I will get to you at my

²⁸ In his brief Norman relies on a letter written by *his* counsel for this proposition. POB at 8 (citing Ex. G). Similarly at argument Norman's counsel asserted that USM promised on at least two occasions to produce responsive documents to him concerning the fewer than 50 licenses the Company once owned. Because I am not aware of any reliable, clear and unambiguous evidence to prove that assertion, I find it unpersuasive. Tr. at 18-19.

²⁹ *McGowan*, 791 A.2d at 3.

earliest convenience this week.”³⁰ Despite that promise the defendant never produced the board minutes. The court held plaintiff “has shown by clear evidence that [defendant] acted in subjective bad faith, both before and after this § 220 action was filed, by falsely promising to produce corporate records that [plaintiff] was clearly entitled to inspect.”³¹

In this case not only did Norman not have a clear right from the outset to inspect the USM books and records he requested, but also USM never promised to produce specific documents that it failed to produce. Therefore, *McGowan* is distinguishable. Furthermore, USM produced documents on multiple occasions before trial and I am not aware of any instance in which USM intentionally misrepresented material facts to the Court. Thus, I will not award attorneys’ fees on USM’s failure to produce documents as quickly or completely as Norman considered necessary.

4. Did USM improperly litigate the merits of the waste and mismanagement allegation?

Finally, Norman claims he is entitled to attorneys’ fees because USM engaged in a merits defense to defeat his purpose of investigating suspected waste or mismanagement. Specifically, Norman contends that “despite a prior recognition of the sufficiency of Plaintiff’s allegations concerning mismanagement and clear record evidence demonstrating a basis to suspect such mismanagement, the Company nonetheless resisted further production based on its belief that Plaintiff would be defeated at a trial on the

³⁰ *Id.*

³¹ *Id.* at 5.

merits.”³² USM denies having presented a merits defense to Norman’s waste or mismanagement purpose.

This Court has looked with disfavor on a company attempting to litigate the merits of alleged misconduct underlying a claimed purpose for inspecting books and records in a 220 action.³³ In fact, the Court has characterized a company’s merits defense to a stockholder’s stated purpose as “inequitable and subversive of Section 220.”³⁴ A company engages in a merits defense when it seeks to rebut the plaintiff’s allegations as to purpose by arguing that the alleged conduct never occurred or was proper.

Based on my review of the record, I do not believe USM engaged to any material extent in an improper merits defense to any of Norman’s claimed purposes for inspecting USM’s books and records. Thus, I will not award attorneys’ fees on that basis.

³² Pl.’s Reply Br. in Further Supp. of his Mot. for Att’ys’ Fees and Costs at 12 – 13.

³³ *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at *6.

³⁴ *Id.*

III. CONCLUSION

For the reasons stated I grant Norman's request for costs and deny his request for attorneys' fees.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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