IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANK D. SEINFELD,	:	
	:	
Plaintiff-Below, Appellant,	:	No. 624, 2005
	:	
v.	:	On Appeal from
	:	Court of Chancery
VERIZON COMMUNICATIONS, INC.,	:	C.A. No. 1100-N
	:	
Defendant-Below, Appellee,	:	

PLAINTIFF'S OPENING BRIEF

BIGGS AND BATTAGLIA

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NATURE OF THE PROCEEDINGS

This is an appeal from a grant of summary judgment dismissing a stockholder's petition brought pursuant to 8 *Del. C.* §220. The suit was commenced on February 15, 2005, following defendant's rejection of plaintiff's written demand for an inspection of designated books and records with supporting reasons, submitted pursuant to §220, along with proof of plaintiff's beneficial ownership of 3,884 shares of defendant's stock. He also owned 400 shares of record. (A-45)

Defendant appeared, answered and sought discovery, which included document production and a video taped deposition of Plaintiff. (A-40-75) Thereafter, both sides moved for summary judgment. (A-76;111) In its Opinion of November 23, 2005 the Chancery Court denied plaintiff's motion and granted defendant's cross motion. The opinion is attached hereto as Exhibit A and will be referred to as "Op". Plaintiff duly appealed.

SUMMARY OF THE ARGUMENT

1. Plaintiff had good cause to seek documents from Defendant. In support of his demand, plaintiff submitted the showing that defendant had three chief executive officers: Messers. Seidenburg, Babbio and Lee. During 2000 through 2002, they received a total compensation of $205 million. This extraordinary amount of compensation, was based upon option grants, the value of which was computed by using the same factors valuing options listed by defendant, in its financial statements included in its 10K filing with the Securities Exchange Commission. To have three chief executive officers running one enterprise and having each receiving such extraordinary compensation is unusual. The compensation arose from option grants, but the contracts with Seidenberg, Babbio and Lee contained no express authorization for option grants given subsequent to the contract.

2. Plaintiff further alleged and showed that two of the employment agreements under which the compensation had been paid, had been amended to permit option grants as part of the long term bonus plan just prior to defendant seeking approval of the option and bonus plans from shareholders.

3. Plaintiff had no actual evidence that in fact wrongdoing had taken place. This Court had previously held that for a proper purpose, all a plaintiff had to show was some evidence of possible mismanagement. The Court below emphasized evidence and effectively

required plaintiff to prove actual mismanagement, contrary to this Court's holding.

4. To require that in public companies the petitioning shareholder have evidence of wrongdoing, as the Chancery Court did, before allowing any sort of examination, is effectively a non-starter. If a plaintiff had evidence there would be the traditional lawsuit. The public shareholder will have no evidence unless there is a "whistle blower" or a video cassette. Indeed, if evidence is required, and the public shareholder has such evidence, why would he or she need a §220 examination? By requiring evidence, the shareholder is prevented from using the tools at hand.

STATEMENT OF FACTS

The facts are simple and not subject to dispute:

Plaintiff has been a beneficial owner of Verizon shares since 1994. He owns beneficially 3884 shares. (A-6) Also, he is a record shareholder, owing 400 shares. (A-18) He became concerned that the compensation of the three chief officers of Verizon received in the years 2000, 2001 and 2002 was approximately $72 million, $80 million and $53 million respectively, both in direct salary and value of option grants. (A-7) The bulk of the compensation came from option grants and were valued by computing the factors listed by Verizon in its 10K filing with the Securities and Exchange Commission. The available public documents reflected the employment agreements of the three executives and the compensation paid appeared to be far in excess of the minimum requirements to be paid the three executives; and the options granted appear to be in violation of the agreements, as well, because the agreements either limited the amount of options, or provided for no options at all. (A-8-9)

In light of the public records and the apparent extreme excessive compensation paid, plaintiff wished to use "the tools at hand", and served an appropriate demand for inspection of documents under 8 Del.C. §220, submitting proof of his ownership. (A-12-19) The demand contained a detailed explanation of its purpose and

requested the specific documents necessary for plaintiff to achieve that purpose.

That demand was summarily denied by Verizon, without any explanation. (A-21) Thereafter, plaintiff filed the instant action and complied with defendant's discovery demands, producing all of the documents he had and appearing for a videotaped deposition. (A-40)

ARGUMENT

I. PLAINTIFF HAS STANDING, HAS FULLY COMPLIED WITH THE STATUTE AND HAS MADE OUT A PRIMA FACIA CASE FOR THE INSPECTION HE SEEKS.

A. Standard and Scope of Review.

There were no factual disputes in the Court below. Instead, the issue below involved the application of law to agreed upon facts. Plaintiff submits that the issue before this Court involves an interpretation of the law and that the standard of review should therefore be *de novo*. Cf. *Brehm v. Eisner*, Del.Supr. 746 A.2d 244 (2000); *Thomas & Betts Corporation v. Leviton Manufacturing Co., Inc.*, Del.Supr. 681 A.2d 1026 (1996).

B. Standing to make Claim.

Plaintiff, as a beneficial and record owner of Verizon shares, has standing under 8 *Del. C.* §220 to seek the discovery of certain records. The statute provides, in pertinent part:

> (a) As used in this section:
>
> * * *
>
> (2) "Stockholder" means a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person, . . .

The statute further provides:

> * * * In every instance where the stockholder is other than a record holder of stock in a stock corporation or a member of a nonstock corporation, the demand under oath shall state the person's status as a stockholder, be accompanied by documentary evidence of

> beneficial ownership of the stock, and state that such documentary evidence is true and correct copy of what it purports to be. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder.

Plaintiff made an appropriate demand, submitted documentary evidence of his beneficial ownership and the reason for his demand. He also testified to his record ownership of 400 shares of Verizon.

C. Plaintiff Has Met The Statutory Standard.

Plaintiff meets the standards set forth in the statute. His desire to determine whether corporate waste, self-dealing and breach of loyalty have occurred is considered to be related to his stock ownership and is a proper purpose under the statute. See, *Nodana Petroleum Corporation v. State*, 50 Del.76, 123 A.2d 243 (Del.Supr., 1956); *Saito v. McKesson HBOC, Inc.*, Del.Supr. 806 A.2d 113 (2002); *Henshaw v. American Cement Corporation*, Del.Ch. 252 A.2d 125 (1969); *Skoglund v. Ormand Industries, Inc.*, Del.Ch. 372 A.2d 204 (1976); *Freund v. Lucent Technologies, Inc.*, Del.Ch. 2003 Del.Ch. LEXIS 3 (2003); *Dobler et al v. Montgomery Cellullar Holding Co., Inc.*, Del.Ch. 2001 Del.Ch. LEXIS 126 (2001).

At bar, plaintiff has shown a credible basis based upon the public documents at hand. He does not have to prove that in fact waste, self-dealing or breach of loyalty occurred. *Dobler*, id.; *Sahagen Satellite Technology Group LLC v. Ellipse, Inc.*, 791 A.2d 794 (Del. Ch. 2000).

Plaintiff consistently testified that he, as a public shareholder, did not know on what basis the Verizon board acted to award the compensation and what Messrs. Lee, Babbio and Seidenburg did to deserve that compensation. (A-33,34,62) Indeed, he and none of the other shareholders know why the employment contracts were amended to permit Lee, Babbio and Seidenburg to participate in the Long Term Bonus Option Plan on the eve of the amendments of those plans. (A-145)

The Chancery Court dismissed the action because it found that plaintiff had no evidence to show that the executives were not entitled to the options or that the amendments were intended solely "to improperly benefit them ...". It found that plaintiff had only suspicions. (Op.-8)

This Court has held that a plaintiff must demonstrate "some evidence of possible mismanagement" to establish a proper purpose under §220 *Security First Corp. v. U.S. Die & Casting & Dev. Co.*, 108 A.2d 563, 568 (Del.Ch. 1997), quoting *Helman Mgmt Servs. v. A.&S. Consultants, Inc.*, 525 A.2d 160, 161 (Del.Ch. 1987). Moreover, this Court also held that a stockholder is not required to prove wrongdoing, but he can meet his burden by "documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing". *Security First Corporation* id. at 565. Logic demonstrated that the total compensation paid to three chief executive officers was extraordinary and was paid pursuant to

contracts amended to permit such compensation shortly before the plans under which such payments were permitted, were themselves, amended.

Where this court, in *Security First Corp.*, emphasized the word "*possible*," the Chancery Court emphasized the word "evidence" and substituted it with the word "actually." In essence it applied a standard of actual mismanagement. The Chancery Court did not address the standard of "possible mismanagement" and instead incorrectly required the plaintiff to prove actual evidence. *See Security First*, 687 A.2d at 568 (holding "a stockholder is not required to prove by a preponderance of the evidence that waste and mismanagement are actually occurring.") (internal citations omitted.) For example, the Chancery Court held "Plaintiff fail[ed] to reveal any substantial factual basis to support the alleged mismanagement or waste."

The Court below also relied on Plaintiff's deposition testimony. Plaintiff respectfully submits that reliance is misplaced. A stockholder of a large publicly traded company often cannot have personal knowledge of mismanagement. He has to be able to infer from publicly filed documents as in the case at bar. See, *Thomas & Betts Corp., supra* at 1031. See also, *Security First Corp.*, Del. Supr., 687 A2d 563 (1997) which rejected a defendant's claim that testimony of a key shareholder witness was insufficient as follows:

> The failure of Plaintiff's key witness to articulate certain "magic words" while testifying at trial is not fatal to a §220 action."

Id. At 567.

The facts at bar are a prime example of "possible mismanagement". Verizon is the product of the merger of Bell Atlantic and GTE. Lee had served as the Chairman and as the CEO of GTE, Seidenberg had served as the CEO of Bell Atlantic, and Babbio had served as president and chief operating officer of Bell Atlantic. As a result of the merger, Verizon had not one, but two, CEOs (Seidenberg and Lee). Moreover, Babbio became Verizon's vice chairman and president. These three individuals received compensation, totaling $205 million.

Moreover, Seidenberg's contract was amended on June 20, 2000. Babbio's contract was amended on November 1, 2000; and Lee's contract was amended December 5, 2000.

The Babbio contract provided that he was to be given a long term bonus opportunity not to be less than 500% of his then current base salary. He was also to be given an annual short term bonus, not to exceed 200% of his annual salary. This was in addition to getting a performance share retention unit grant of 100,000 Verizon shares.

The Lee contract provided that he was to be given a long term bonus opportunity of not less than 800% of his then current salary and a short term bonus opportunity of not less than 250% of his

then current salary, in addition to getting a performance share retention unit grant of 150,000 Verizon shares. (A-51)

The Seidenberg contract provided that he was to receive an annual grant of options equal to, or greater than, 2.5 multiplied by the key executive's base salary then in effect, as well as being eligible to participate in all other benefit and compensation plans.

The short term bonus plan provided for cash payments. The three chief executive officers received their option grants under the long term bonus plan. The long term bonus plan, under which the "option compensation" in options was paid, was amended in January 2001, to permit, *inter alia*, the participation in the plan by the chief executives.

The Chancery Court's ruling erects an insurmountable barrier for the minority shareholder of a public company. This Court and the Chancery Court have instructed shareholders to utilize §220 as one of the tools at hand. Yet, the Chancery Court at bar, in requiring evidence makes a §220 application a mirage. If the shareholder had evidence, a derivative suit would be brought. Unless there is a whistle blower, or a video cassette, the public shareholder, having no access to corporate records, will only have suspicions. Is the shareholder to undertake pretrial discovery in this §220 proceeding to gather the evidence to justify his suspicions? Obviously, a court would not allow it. Thus, he will

never have evidence. Plaintiff submits that if the suspicions seem reasonable and logical based on public filings, as at bar, then such a shareholder should have the limited right to see limited records at his own expense.

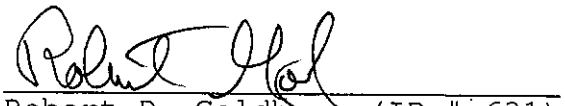
The Chancery Court has, from time-to-time, permitted small, closely held, entities to be subject to §220 examination with only a suspicion as a basis See, e.g., *Sutherland v. Dardenelle Timber Co.*, Del.Ch, (Glasscock, Master) 2005 WL 3272125 (Nov. 18, 2005).

Plaintiff submits that in a case involving public companies, minority shareholders who have access only to public documents and without a whistle blower or corporate documents should be permitted to have limited inspection based upon suspicions, reasonable beliefs, and logic arising from public disclosures.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below be reversed and plaintiff be permitted his §220 examination.

BIGGS AND BATTAGLIA

By: 

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