

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MARY LIM,	:	
	:	
Plaintiff,	:	
	:	
v	:	Civil Action
	:	No. 5529-CC
THE POWERWISE GROUP, INC., a	:	
Delaware corporation,	:	
	:	
Defendant.	:	

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Chancery Courtroom No. 1
Court of Chancery Courthouse
Georgetown, Delaware
Monday, November 1, 2010
2:40 p.m.

- - -

BEFORE: HON. WILLIAM B. CHANDLER III, Chancellor.

- - -

RULING OF CHANCELLOR CHANDLER

CHANCERY COURT REPORTERS
34 The Circle
Georgetown, Delaware 19947
(302) 856-5645

1 APPEARANCES:

2 FRANCIS G. X. PILEGGI, ESQ.
3 AUSTEN C. ENDERSBY, ESQ.
4 Fox & Rothschild LLP
5 for Plaintiff

6 RICHARD PHILLIP ROLLO, ESQ.
7 MARGOT F. ALICKS, ESQ.
8 Richards Layton & Finger PA
9 for Defendant

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1 THE COURT: Frankly, as 220 cases go,
2 this one has been rather obstreperous and hard-fought
3 on both sides. Be that as it may, the principles and
4 rules that guide Section 220 and that, therefore,
5 guide my decision are not controversial.

6 220 makes it very clear that a
7 stockholder -- and here there is no dispute that
8 Miss Lim is a stockholder -- is entitled to make a
9 demand to inspect books and records of a company in
10 which that stockholder holds an interest, so long as
11 that request or that demand for inspection is based on
12 a proper purpose; and that the documents that are
13 sought or to be inspected are identified with some
14 specificity; and that if there is an allegation that
15 the purpose is to investigate a wrongdoing or fraud or
16 management or waste, that the stockholder articulate
17 some credible basis -- those are the magic words,
18 credible basis -- for the demand; and that the
19 documents that are sought be necessary and essential
20 for the stockholder to investigate for that proper
21 purpose.

22 Now, in this case, Miss Lim, who is
23 indisputably a stockholder of PowerWise, has
24 articulated two different purposes for her inspection

1 demand. One purpose is to value her stock ownership
2 interest in PowerWise.

3 The second purpose is to investigate
4 potential wrongdoing or mismanagement and to attempt
5 to determine whether or not she could file some
6 derivative complaint, I suppose, that would comply
7 with Rule 23.1, that is, would be able to allege with
8 some particularity whether or not the directors of
9 PowerWise were interested or conflicted in a manner
10 that would cause them not to be objectively able to
11 determine whether an action should be brought on
12 behalf of the company for some alleged loss or
13 malfeasance or wrong.

14 Now, that's the predicate for applying
15 220, and all of our 220 law is addressed to those
16 fundamental elements of the test: Stockholder status,
17 a proper demand, a proper purpose, the scope of the
18 demand, and the essentiality or sufficiency of the
19 records sought to provide the needed inspection.

20 To repeat, here, there is no dispute
21 that Miss Lim is a stockholder. There is no dispute
22 that I've heard that she made a proper demand under
23 220, that is, a written demand under oath, et cetera.
24 So the real battleground has been drawn over the

1 purpose that Miss Lim has identified, and secondarily,
2 to whether the scope of the demand is really excessive
3 and unnecessary to provide her with what she needs.

4 The company, PowerWise, has, in fact,
5 provided Miss Lim with a significant amount of
6 information; in particular, the private placement
7 memorandum which fills the better part of a three-ring
8 binder and was provided to Miss Lim, I think, during
9 the course of this litigation. So the company's
10 position really is that that's adequate and sufficient
11 information for her to go about determining the value
12 of her shares.

13 Now, Miss Lim's position, in contrast,
14 is that she can't really rely specifically and solely
15 on the private placement memorandum; that there are
16 additional documents and records of information that
17 she would need, more precisely, that her expert would
18 need, because Miss Lim quite honestly and candidly has
19 indicated that she would not be able to even use that
20 information herself, because of her lack of formal
21 training or education, to determine whether it bears
22 in some material and meaningful way on the valuation
23 metrics that would apply to this company, along with
24 the information that's already in the private

1 placement memorandum. That's where the battleground
2 lines are drawn.

3 Having said all that, let me make a
4 couple of independent observations. One very obvious
5 one is that Miss Lim is the only witness who has
6 testified in this case. She's the only live witness
7 who has come before the Court with respect to the
8 demand and the nature of it and her purpose, and she's
9 been in front of me for a few hours today. And I've
10 observed her carefully, and I've listened to her
11 testimony carefully, and I've watched her demeanor as
12 she has testified during examination in direct and
13 examination in cross by Mr. Rollo.

14 First, there is nothing that I heard
15 Miss Lim say that causes me to have concerns or doubts
16 about her trustworthiness or credibility with respect
17 to the testimony she's offering to me. I accept her
18 testimony as sincere, genuine, and credible testimony.

19 It's clear to me that Miss Lim made
20 this investment for personal reasons; that she at this
21 point is deeply concerned about the value of her stock
22 and the potential loss of her investment in part or in
23 whole. I'm willing to accept all of that as credible
24 and believable.

1 There has been some discussion about
2 whether or not Miss Lim's lack of experience, is the
3 way I'll put it, lack of experience in valuing a firm,
4 or in valuing the stock of a firm, whether a privately
5 held firm like this company or a publicly held firm
6 that she might otherwise have invested in, is somehow
7 indicative of the fact that she doesn't need this
8 information. And I understand that argument and I
9 understand the point of it, but I really can't accept
10 it.

11 First, I'm not aware of really any
12 principle in our law that would suggest that
13 stockholders making 220 demands have to be skilled in
14 reading financial statements, or profit and loss
15 statements, proxy statements, or anything. There is
16 no real requirement that they have any degree of
17 financial savvy. They can be complete neophytes and
18 still be entitled under our law to inspect books and
19 records.

20 It may well be in such cases that they
21 have to have some assistance to be able to even
22 understand the records that they're asking to inspect.
23 So that's why 220 provides very clearly for the Court
24 to impose stipulations or limitations on the access

1 that the stockholder has to the information.

2 They may have to sign and will have to
3 sign very often a confidentiality agreement or
4 stipulation that they agree that the information
5 that's provided is to be held in complete confidence
6 and cannot be used for any other purposes, and that
7 any expert or any advisor that they wish to have
8 review those documents to assist the stockholder must
9 also execute that confidentiality agreement or
10 stipulation in order to have access to the documents
11 to assist the stockholder.

12 So with respect to the claim that,
13 somehow, Miss Lim's naivete, if you will, with respect
14 to the valuations and so on is indicative of a lack of
15 good faith or a lack of bona fides with respect to her
16 request, I really can't accept that premise or that
17 argument.

18 Likewise, with respect to -- and I
19 understand Mr. Rollo's point here -- with respect to
20 Miss Lim's lack of any present intention to sell her
21 stock or lack of any future intention to sell her
22 stock, or lack of any present or future intention to
23 buy any more stock in PowerWise, it doesn't, at least
24 in my mind, in this case, detract from or undermine

1 the good faith I believe she's exhibited in trying to
2 understand and learn more about PowerWise's operation
3 so that she can do -- or her experts can help her do a
4 calculation of the precise value of the company.

5 And so that lack of intention to sell
6 or buy stock, now or in the future, does not denigrate
7 from her present good faith intentions to try to
8 understand the valuation metrics and pricing scheme
9 for PowerWise so that she will know the precise
10 situation that her personal investment is in at this
11 particular stage in this company's life.

12 So having said all that, I'll turn
13 specifically to my decision under 220 for this
14 request.

15 I'm going to grant Miss Lim's request
16 for inspection, and I'm going to use the Exhibit No.
17 65, because I think this really lays it out. There
18 are actually, I believe, 12 different categories under
19 Exhibit 65, Joint Exhibit 65. I'm only going to grant
20 11 out of the 12 categories for inspection purposes.

21 And I'll go through those because I
22 want to ask Mr. Pileggi and Mr. Rollo to provide a
23 form of order for me to sign, but I'll go through it
24 slowly so that you can follow along for purposes of my

1 ruling.

2 First, I'm ordering production for
3 inspection and copying those documents or records
4 which will clarify the loss that has actually occurred
5 in 2009. Now, PowerWise actually agrees to do this.
6 Mr. Rollo represented that they were willing, able and
7 ready to provide clarification about the discrepancy
8 in the loss for 2009. So I'm ordering it, but it
9 sounds to me like that was more or less stipulated to,
10 in any event.

11 Secondly, I am going to order that
12 PowerWise produce for the years 2007, 2008, and 2009,
13 its federal and state income tax returns, including
14 schedules, exhibits and attachments, because I think
15 those do go to the question of Miss Lim's ability to
16 calculate what the potential operating results of this
17 company actually are and be able to make comparisons
18 to what is said about the company's operations and
19 projected future under the private placement
20 memorandum. And those could well help Miss Lim
21 ascertain more definitively her value of her stock
22 investment in PowerWise. So I will order that
23 category of documents.

24 Third, I will direct the production

1 for inspection and copying of minutes of the boards
2 and directors meetings or shareholder meetings from
3 January 2008 up to the present. These minutes will be
4 produced subject to the limitation that they're to be
5 limited to discussions of either past or future stock
6 issuances, past or future pricing metrics for stock
7 issuances of PowerWise, all of which, if there are
8 supporting documents in connection with those minutes
9 regarding those future pricings or present pricings of
10 the stock of PowerWise, those documents might as well
11 be produced along with the minutes.

12 The next category, on the bottom of
13 Page 1 of the three pages, is the category that I'm
14 not ordering production. That's valuation reports in
15 the last three years. The representation is the
16 company has no valuation reports. Based on that
17 representation of record to the Court, I'm not going
18 to order the production of something that does not
19 exist.

20 Moving on to the second page of the
21 three pages, I'm going to order the production for
22 inspection and copying documents that concern the
23 price of stock shares that were most recently issued
24 and sold by PowerWise, and precisely how that price

1 calculation for those recently sold shares was
2 calculated, which obviously goes to the question of
3 Miss Lim's ability to determine the value of her own
4 interests.

5 Next, documents regarding the issuance
6 of additional shares that are planned, if any. If
7 there are none planned, then obviously, there would be
8 no documents to be produced for inspection and
9 copying. But if future issuances are planned, then
10 any documents concerning them, either in minutes of
11 meetings or in reports or memos concerning the future
12 issuance of additional shares, must be produced for
13 the same valuation reason.

14 Next, 6th, by my category, 6th
15 category would be documents regarding the Smart Energy
16 settlements. Any documents, that would be reports,
17 memos, meeting minutes, that concern the Smart Energy
18 settlement I think clearly relate to or could
19 potentially reflect on the stock valuation for
20 PowerWise. To the extent that you're pricing stock or
21 other assets of the company in order to enter into a
22 settlement, that would bear directly on one's ability
23 to value one's own interest in the company.

24 7th, documents regarding potential

1 markets or existing markets that the company is
2 targeting for product development or product sales.
3 That information relates to PowerWise's future
4 expected cash flows and would, therefore, be important
5 for any expert to be able to calculate potential value
6 of stock in the company.

7 Category 8, distribution agreements,
8 and Category 9, manufacturing agreements. For similar
9 reasons, these documents would bear on future
10 projected cash flow, potential revenue streams for
11 PowerWise, and they would, therefore, relate to stock
12 pricing or stock valuation metrics.

13 In addition, I'm ordering as part of
14 this production that any board minutes and/or special
15 committee meeting minutes related to either the
16 manufacturing agreement or distribution agreement
17 between PowerWise and Smart Savings be produced as
18 part of that production for inspection.

19 10th, documents regarding estimates of
20 projected sales, including volumes and margins for
21 such sales. Again, those documents, to the extent
22 they exist and only if they do exist, should be
23 produced for inspection as they relate to any expert's
24 ability to calculate future cash flows of the company

1 in order to value the company and, derivatively, the
2 stock in the company.

3 Finally, 11th, documents regarding
4 each product of the company, and whether different
5 products are at different stages of development, and
6 whether or not a particular product is pending
7 certification or has already obtained certification to
8 be sold in the marketplace. Those questions, any
9 expert would want to know in order to determine
10 whether or not projected future cash flows from the
11 sale of those products is meaningful or real and would
12 bear directly on any potential direct calculation of
13 firm value and, therefore, stock value.

14 Any production ordered of the 11
15 categories that I've just mentioned will be pursuant
16 to a confidentiality agreement that will be entered
17 into between the company and Miss Lim and any expert
18 that Miss Lim intends to rely upon to assist her in
19 her determination of stock value.

20 Counsel, that's my ruling. If there
21 are questions, I realize you're probably going to want
22 to look at the transcript of this, and I appreciate
23 that, but if there are any immediate applications that
24 you can think of, I'll entertain them now.

1 MR. PILEGGI: Your Honor, I was just
2 going to ask if we could suggest some possible
3 timeline, timetable.

4 THE COURT: For?

5 MR. PILEGGI: For the production. We
6 should be able to agree to it among ourselves.

7 THE COURT: I think you should. If
8 you can't, write to me and suggest to me what you
9 think is a reasonable timeline. I'll look at that and
10 probably split the difference or something like that.

11 MR. PILEGGI: Thank you, Your Honor.

12 THE COURT: Anything else?

13 MR. ROLLO: Just one point of
14 clarification on the final category concerning the
15 descriptions of products and documents and whatnot.
16 The other categories, you made reference to minutes
17 and things along those lines, we have the PPM out
18 there giving some of this description.

19 In terms of the nature of the
20 documents that you think need to be produced in that
21 context, I know Your Honor said status of
22 certification. Is it summaries?

23 I'm assuming we're not talking about
24 e-mails, things along those lines, based on Vice

1 Chancellor Lamb's prior comments, but can you give us
2 examples of the type of documents that you thing might
3 be appropriate?

4 THE COURT: My thought was the company
5 ought to have some type of descriptions, for marketing
6 purposes or for internal development purposes,
7 descriptions of a particular product, whether it's in
8 a -- even if we've simply got a patent pending or
9 whether we've got a patent granted and we're ready to
10 go into preproduction, and descriptions of that
11 product and what its intended uses are.

12 And if there are then further
13 elaborations on, this is a product that we think would
14 have particular use in South America or Asia or some
15 other part of the world, these are the markets we
16 think we out to explore and develop for this
17 particular product, then I think that that would be
18 what I was envisioning when I mentioned those types of
19 products, the certifications, strategies and stage of
20 development.

21 So not every e-mail, Mr. Rollo, that
22 might go back and forth about a particular product.
23 Does that help at all?

24 MR. ROLLO: It absolutely does.

1 THE COURT: If you run into
2 difficulties, I'm not hard to reach. Again, get on
3 the phone and call me. I'd be happy to take your call
4 and try to help you work out any issues.

5 MR. PILEGGI: Thank you, Your Honor.

6 MR. ROLLO: Thank you, Your Honor.

7 (Trial concluded at 3:00 p.m.)
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CERTIFICATE

I, JEANNE CAHILL, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 17 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 1st day of November, 2010.

/s/ Jeanne Cahill

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 160-PS
Expiration: Permanent