

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

WILLIAM DOERLER, ERWIN )  
HARBAT, THOMAS REDMAN, JOHN )  
SHERIDAN, and EARL TINDALL, )  
 )  
Plaintiffs, )  
 )  
v. ) *Civil Action No. 7640-VCG*  
 )  
AMERICAN CASH EXCHANGE, INC., )  
 )  
Defendant. )

**MEMORANDUM OPINION**

Date Submitted: January 11, 2013

Date Decided: February 19, 2013

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Defendant.

GLASSCOCK, Vice Chancellor

## I. OVERVIEW

The Plaintiffs, stockholders of American Cash Exchange, Inc. (“ACE”), have brought this Action under § 220, seeking access to certain books and records of ACE. As their proper purposes, the Plaintiffs assert that they wish to value their stock and to investigate possible breaches of fiduciary duty. The Plaintiffs have presented credible evidence that the controlling stockholders of ACE have engaged in self-interested transactions with the corporation. This evidence is sufficient for the Plaintiffs to receive books and records specifically related to the credible allegations of self-dealing with the corporation. Still, the universe of documents the Plaintiffs have requested is overbroad. Therefore, I have limited the inspection to books and records related to the insider transactions.

## II. BACKGROUND FACTS<sup>1</sup>

### A. *The Parties*

Plaintiffs William Doeler, Erwin Harbat, Thomas Redman, John Sheridan, and Earl Tindall are stockholders of Defendant American Cash Exchange, Inc. (“ACE”).<sup>2</sup> Redman was also the former Chief Financial Officer of ACE until his

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<sup>1</sup> The Background Facts are derived from the facts the Defendant admitted in the Plaintiff’s Complaint, as well as facts presented at the evidentiary hearing which were uncontradicted. The Plaintiffs introduced several facts during the hearing, through testimony of Mr. Redman, which have not been contested by the Defendants. Though Mr. Redman’s intentions may be questionable, I have taken these facts as true for the purposes of this action, which is summary in nature.

<sup>2</sup> Compl. 1, June 20, 2012.

resignation in June 2011. ACE is a Delaware corporation with its principal executive offices in Pennington, New Jersey.<sup>3</sup>

*B. ACE's Business and Operations*

ACE holds patents on technology that enable individuals without bank accounts to execute domestic and cross-border cash remittances.<sup>4</sup> The patented technology has the potential to be a valuable asset, because it “allows for cash remittances in a safer, more efficient and convenient manner than currently provided” in the marketplace.<sup>5</sup> ACE markets this technology as “Poni.” Despite Poni’s potential, ACE has brought in virtually no revenue for the past ten years and has suffered significant losses from operations each year since its inception.<sup>6</sup> ACE has limited working capital and many outstanding creditors, including the IRS, New Jersey Division of Employer Accounts, and several former employees.<sup>7</sup> Many of these debts have remained unpaid and due for several years.<sup>8</sup>

Nevertheless, ACE’s disclosures to its stockholders have remained hopeful. In Investor Updates spanning from 2009 to 2012, ACE made optimistic projections for growth and financial performance. For example, in May 2009, ACE disclosed

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<sup>3</sup> *Id.* at ¶¶ 2, 3.

<sup>4</sup> *Id.* at ¶ 5.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at ¶ 8.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

that it “expect[ed] Poni to be available in 10,000 stores by the end of 2009.”<sup>9</sup> In January 2010, ACE projected that it would be profitable in 2010.<sup>10</sup> In May 2011, ACE said that it had “made considerable progress with several [U.S.] chains.”<sup>11</sup> The Plaintiffs allege that several of these representations were inaccurate, and such inaccuracy is a basis for investigating present mismanagement at the company.

### *C. ACE’s Accounting and Disclosure Issues*

The Plaintiffs contend that ACE’s disclosures to the stockholders have been materially misleading because they were often based on insufficient or unreliable data. For example, In June 2011, ACE distributed an “exponential sales curve” to its investors that was based on insufficient data; the sales curve came at a time when the most sales per day was nine sales, yet the chart plotted a curve taking sales up to 50 per day by the end of that month.<sup>12</sup> In August 2011, ACE wrote that “In 2011, we plan to grow from zero chain stores to likely more than 20,000.”<sup>13</sup> Neither prediction, apparently, was realized. Furthermore, the Plaintiffs allege that ACE has omitted material facts from its disclosures to the stockholders. For example, ACE disclosed the existence of a large contract with ScotiaBank, a Canadian bank, that was touted as a future source of revenue.<sup>14</sup> This contract was

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<sup>9</sup> *Id.* at 10.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Trial Tr. 37:4-17.

<sup>13</sup> Compl. ¶ 10.

<sup>14</sup> Trial Tr. 32:19-33:8.

negotiated by ACE's CEO and controlling stockholder, Donald C. Licciardello ("Licciardello"). However, ACE omitted to disclose to the stockholders that the contract would only be profitable to ACE if ACE was able to meet certain minimum revenue quotas.<sup>15</sup> These quotas were purportedly impracticable for ACE to meet, so the disclosure of the contract's strong prospects was misleading.<sup>16</sup>

The Plaintiffs have also offered evidence of an incorrectly reported contract with InCom. Plaintiff, and former CFO, Redman testified:

There was an InCom distribution deal which was highly touted for some period of time. But in fact, as I got into it, I learned that the InCom distribution agreement had a requirement that the company maintain sales of a particular ATM access card in Mexico and that, in fact, the company was in violation of that InCom distribution agreement coincidentally on the day it got signed and forever forward. So we were touting, you know, this agreement, but nobody was telling, "Well, yes, but InCom doesn't have no [sic] responsibility because, in fact, the company is in violation of that agreement." It's a critical term that nobody, you know, cares to discuss.<sup>17</sup>

The Plaintiffs contend that this contract had the potential to be very profitable for ACE, but never realized any profits because ACE was unable to perform under the terms of the agreement.<sup>18</sup> Additional items incorrectly reported by ACE include ACE's late filings of its taxes for 2011 (and an associated fee)<sup>19</sup> and ACE's failure

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 34:19-35:15.

<sup>18</sup> *Id.* ("It was a little before my time, but it was a big deal. It had the potential to be a big deal. It's not a big deal if you can't meet the terms of the agreement.").

<sup>19</sup> *Id.* at 38:4-10.

to report a liability for payments due under a settlement with a former creditor.<sup>20</sup> Finally, the Plaintiffs allege that ACE is incorrectly classifying some of its employees as consultants instead of employees, leading to potential liabilities.<sup>21</sup>

*D. ACE's Insider Transactions with its Controlling Stockholders*

Licciardello is ACE's president and CEO.<sup>22</sup> Together with his family members, Licciardello holds approximately 60% of ACE's equity on a fully diluted basis.<sup>23</sup> The remaining common stock is held by approximately 60 stockholders, including the Plaintiffs.<sup>24</sup>

On December 26, 2006, the Licciardellos transferred ownership of the family residence to ACE.<sup>25</sup> Transferring the home to ACE was an event of default under the mortgages on the home, and the mortgages were in arrears when transferred to ACE.<sup>26</sup> Redman explained the purpose of this transfer as the following:

[Licciardello] took a loan out to purchase stock in the company in 2006. The loan agreement at that time required that he repay the loan by the end of 2006. It was, I believe, a \$2 million note. He did not repay the note and instead put the house to the company, so it was a repayment of a note that he had become obligated to because he

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<sup>20</sup> *Id.* at 39:1-18.

<sup>21</sup> *Id.* at 41:20-42:5.

<sup>22</sup> Compl. ¶ 7.

<sup>23</sup> *Id.* at ¶ 6.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at ¶ 13.

<sup>26</sup> *Id.*

bought stock on a basis that was not available to others, which was a borrower from the company.<sup>27</sup>

The Plaintiffs contend that the Licciardellos live at the home rent-free and use the company to fund the Licciardellos' lavish lifestyle. ACE contends that this transfer was done for the good of the company's balance sheet, and that the Licciardellos reside in the home rent-free, in lieu of salaries. The Plaintiffs allege that the company's valuation of the home on the balance sheet at historical value, \$4 million, is misleading in light of fair market value, which, according to Plaintiffs, is much lower.

The Plaintiffs have also alleged that Licciardello uses the company as a personal ATM. As Redman testified:

The accounting that is done for the company has always been comingled-- [sic] Licciardello cash and company cash. There is no separation, and that separation was resisted strongly by Mr. Licciardello. I tried to do it. He insisted no he couldn't. I wanted to just – can't we just give you a certain amount of cash every month. No, it can't do that because people are after me for my personal cash. So I have to take it at the ATM day-by-day and so forth.<sup>28</sup>

This undocumented usage of company cash is in addition to alleged "loans" made to the Licciardellos by ACE. As of December 31, 2010, the total amount outstanding to the Licciardellos was \$354,000.<sup>29</sup> As of August 2011, the

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<sup>27</sup> Trial Tr. 83:10-18.

<sup>28</sup> *Id.* at 44:13-21.

<sup>29</sup> Compl. ¶ 24.

Licciardellos took out a further \$80,000 in loans from ACE.<sup>30</sup> The Plaintiffs allege that ACE is in distress and does not have the flexibility of providing such large loans to its controlling stockholders.<sup>31</sup> Furthermore, the Plaintiffs allege that the Licciardellos have no means of repaying the loans.<sup>32</sup>

*E. Redman's Involvement in ACE*

Redman became involved in ACE in 2008, doing accounting and auditing work for the company.<sup>33</sup> In August 2009, Redman became ACE's CFO.<sup>34</sup> Redman and his wife invested \$310,000 in ACE.<sup>35</sup> In his capacity as CFO, Redman witnessed, and may have been a party to, some of the mismanagement at ACE. During the trial, the Defendant highlighted that Redman was aware of many of the Plaintiff's claims of mismanagement while he worked for ACE.<sup>36</sup> The parties contest why Redman resigned from ACE in June 2011. Redman contends that he left because he did not feel comfortable certifying that ACE was solvent for 2012 as the CFO.<sup>37</sup> In contrast, ACE alleges that Redman was unsatisfied with his compensation.<sup>38</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at ¶ 25.

<sup>32</sup> *Id.* at ¶ 26.

<sup>33</sup> Trial Tr. 28:4-14, 48:4-7.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 27:16-17.

<sup>36</sup> *E.g., id.* at 48:4-12 (noting that Redman did not object to the family's home being valued on the company's financial statements for \$4 million in 2008 or 2009).

<sup>37</sup> *Id.* at 58:1-6.

<sup>38</sup> *Id.* at 60:10-61:2.



Since resigning from ACE, Redman has contacted other stockholders and creditors of ACE. Redman contends that he contacted these parties because they have all “suffered” financial losses in connection with ACE.<sup>39</sup> It is appropriate for Redman to contact stockholders as part of the stockholder franchise. However, Redman’s purpose in contacting creditors is somewhat unclear. In one such communication to an ACE creditor, Redman alleged that Mr. Licciardello “has spent much of the money raised to maintain his lavish lifestyle rather than on the company and its creditors.”<sup>40</sup>

ACE alleges that Redman has a plan to discredit ACE to “bring some form of lawsuit or involuntary bankruptcy proceeding” against ACE.<sup>41</sup> ACE produced an email, sent by Redman to a group of ACE’s stockholders and creditors on May 30, 2012, that said the following:

The [books and records] complaint will seek to compel disclosure of the requested information. If we get the information, we will be able to file in Bankruptcy Court through petitioning creditors. More likely, when we don’t receive the information, we will proceed with seeking to have a receiver named for the Company, so that we can approach bankruptcy from this angle. . . .

The basis for our strategy is that the only worthwhile part of the Company is the technology. We cannot “destroy” the Company because effectively it does not exist: there are no sales or other revenues and no good will value to ruin – Don has already done [that]. Nothing good or positive has ever happened that would now be hurt by disclosing what we know about Don and the Company.

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<sup>39</sup> *Id.* at 62:12-14.

<sup>40</sup> *Id.* at 63:18-20; Trial Ex. 19.

<sup>41</sup> Trial Tr. 66:20-21.

We also continue to cautiously work the business side. Following is a brief discussion about how our plan differs from Don's and how we plan to fit the legal and business sides together in the future. Jerry Leonard, one of our group, asked the questions in preparation for his discussion with a senior exec at Citibank this past weekend.<sup>42</sup>

The email then went on to outline the business strategy that the stockholder-creditor group would execute with Citigroup—if the group gained control of ACE—to get Poni back on track.<sup>43</sup> Redman then posed the question “Why would Citi step into this rat’s mess with Don?” and answered that Citi would not.<sup>44</sup> Then Redman reiterated his belief that realizing any value from ACE would be conditioned on removing Licciardello from control:<sup>45</sup>

We will fully resolve the situation in one of two ways, either: (i) we are successful in removing Don from the Company through bankruptcy action, appointment of a receiver, application of moral turpitude provisions in investment documents, or otherwise; or (ii) we will form a new company unrelated to Don and reach agreement with Don to obtain full rights to the Poni technology for the uses contracted with Citibank. We have been pursuing both approaches and will resolve on one basis or the other in the near term. We would not contract with Citi until that time but it will not be long.<sup>46</sup>

At trial, when questioned about this email and whether he planned to bring an involuntary bankruptcy proceeding, Redman was noncommittal:

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<sup>42</sup> Trial Ex. 10, at 1-2.

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.*

<sup>45</sup> At trial, Redman claimed that the idea of removing Licciardello from control had “never entered his mind.” Trial Tr. 77:9-20. I find that testimony lacks credibility, given that his email expressly mentions removing Licciardello from the company.

<sup>46</sup> Trial Ex. 10, at 3.

[W]e had considered a number of options, and we were still considering a number of options. Had we decided on a bankruptcy action, we would probably be in bankruptcy court right now. We are seeking to understand the situation well enough to go -- to take whatever steps are most appropriate. Obviously, bankruptcy is a very, you know, nasty and difficult path to take, you know, for a shareholder.<sup>47</sup>

Redman denied that his purpose, at the time of making the books and records demand, was to gain information to be used in an involuntary bankruptcy proceeding.<sup>48</sup> Instead, Redman alleged that the books and records were to be used to determine which strategy, of multiple potential strategies, the group should select.<sup>49</sup> However, Redman admitted that the group was still considering bankruptcy.<sup>50</sup>

#### *F. The Stockholder Demand Letters*

The stockholders submitted multiple demand letters to ACE requesting certain of its books and records. ACE initially rebuffed these demands by asserting non-substantive challenges to the format of the demand letters. The Plaintiffs corrected these deficiencies, and sent an additional demand letter on May 24, 2012. In response, ACE turned over some of the requested books and records, but declined to turn over others. The remaining, contested documents comprise the following:

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<sup>47</sup> Trial Tr. 68:1-8.

<sup>48</sup> *Id.* at 70:23-71:7.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 71:4-6 (“We will take the action we believe to be the best for the circumstances, and it may very well be bankruptcy.”).

1. ACE's general ledger;
2. ACE's business agreements;
3. ACE's accounts receivable records; and
4. ACE's accounts payable records.<sup>51</sup>

This Opinion addresses each of the Plaintiffs' requests in turn.

### III. ANALYSIS

“Where the stockholder seeks to inspect the corporation's books and records, other than its stock ledger or list of stockholders, such stockholder shall first establish that: (1) Such stockholder is a stockholder; (2) Such stockholder has complied with this section respecting the form and manner of making demand for inspection of such documents; and (3) The inspection such stockholder seeks is for a proper purpose. . . .”<sup>52</sup> If the stockholder wants more than the stock ledger and list of stockholders, the burden is on the stockholder to present “some evidence” of a “credible basis” that it has a proper purpose, such as possible mismanagement or wrongdoing.<sup>53</sup> The stockholder is not required, however, to prove by a preponderance of the evidence that waste or mismanagement is actually occurring.

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<sup>51</sup> Pre-trial Stip. 2, Dec. 4, 2012.

<sup>52</sup> 8 *Del C.* § 220.

<sup>53</sup> *Id.*; *Seinfeld v. Verizon Commc'n Inc.*, 909 A.2d 117, 118 (Del. 2006).

*A. Proper vs. Improper Purposes:*

“Once a stockholder establishes a proper purpose under § 220, the right to relief will not be defeated by the fact that the stockholder may have secondary purposes that are improper. The scope of a stockholder’s inspection, however, is limited to those books and records that are necessary and essential to accomplish the stated, proper purpose.”<sup>54</sup> Any secondary purpose or ulterior motive that the stockholder may have will not bar a § 220 action unless the ulterior purpose is also the stockholder’s primary purpose.<sup>55</sup> “[E]ven though the purpose of the inspection may be proper in the sense that it is reasonably related to the person’s interest as a stockholder, it must also not be adverse to the interests of the corporation. To this extent a stockholder’s right of inspection is a qualified right depending on the facts of the particular case.”<sup>56</sup> The mere possibility that the plaintiff may use the information obtained to harm the corporation is not grounds for withholding or restricting the right of inspection.<sup>57</sup> “An examination of books and records to ascertain the condition of corporate affairs and the propriety of certain actions is a proper purpose even though the one who seeks inspection may be hostile to management.”<sup>58</sup>

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<sup>54</sup> *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002)(internal citations omitted).

<sup>55</sup> *See Helmsman Mgmt. Servs., Inc. v. A & S Consultants, Inc.*, 525 A.2d 160, 164, 166 (Del. Ch. 1987).

<sup>56</sup> *Skoglund v. Orman Indus., Inc.*, 372 A.2d 204, 207 (Del. Ch. 1976).

<sup>57</sup> *Souras v. AdmiraltyEnter., Inc.*, 386 A.2d 674, 682-83 (Del. Ch. 1978).

<sup>58</sup> *Henshaw v. Am. Cement Corp.*, 252 A.2d 125, 129 (Del. Ch. 1969).

In response to stockholder's demand to inspect corporation's books and records, the Court will compel production only of those books and records that are essential and sufficient for shareholder to effectuate his or her purpose.<sup>59</sup> But where an inspection for corporate mismanagement is requested, “[the] right should not be limited to those transactions and conditions which have been heretofore brought to their attention and which have aroused their suspicions.”<sup>60</sup> Instead, the inspection should extend “to the corporate minutes and financial records in general during the period into which they seek to inquire . . . .”<sup>61</sup> It is the Court of Chancery’s responsibility to ensure that the plaintiff has tailored his demand to the inspection to documents that are reasonably required to satisfy the purpose of the demand. Where a plaintiff has shown evidence of wide-ranging mismanagement or waste, a more wide-ranging inspection may be justified.<sup>62</sup> Nevertheless, the stockholder must tailor his demand to documents that are necessary and essential to his proper purpose.

*B. The Books and Records Requested and the Purposes Asserted*

The Plaintiffs have asserted two bases on which they seek to inspect the books and records of ACE. First, the Plaintiffs seek documents related to the valuation of their shares. The Plaintiffs have already been given documents that

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<sup>59</sup> *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 1995, 685 A.2d 702, *aff’d*, 681 A.2d 1026.

<sup>60</sup> *Skoglund*, 372 A.2d at 211.

<sup>61</sup> *Id.*

<sup>62</sup> *Freund v. Lucent Techs, Inc.*, 2003 WL 139766, at \*5 (Del. Ch. Jan. 9, 2003).

would traditionally fulfill this goal. However, the Plaintiffs assert the need for additional documents to value their shares because of ACE's history of inaccurately disclosing contracts and liabilities to its stockholders. Significantly, the Plaintiffs do not wish to investigate the specific transactions that have been inaccurately disclosed—for example, the InCom contract—but seek instead *all current* contracts of ACE, which they contend ACE *might* similarly be reporting, inaccurately, to its stockholders. To the extent the Plaintiffs have stated a proper purpose, however, their request is overbroad. For example, the Plaintiffs have requested “ACE’s business agreements,” with no limitation on which agreements are necessary and essential to their purpose. The Plaintiffs have not suggested that a particular type or category of contracts is essential. They have not suggested that agreements with a particular retailer or supplier is particularly relevant to valuing their shares. Nor have the Plaintiffs provided me with any indication of whether contracts of a certain value (i.e., \$10,000) would be material to valuing their shares. In each of the Plaintiff’s books and records requests, the Plaintiffs have failed to put limitations on each category of documents requested. Thus, the Plaintiffs have asked for *all records* from 2011 and 2012 that have a bearing on ACE’s business relationships: ACE’s general ledger, business agreements, accounts receivable records, and accounts payable records.<sup>63</sup> The Plaintiffs have

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<sup>63</sup> Pre-trial Stip. 2.

failed to tailor their requests in any way. Therefore, each of these requests is overbroad.

In addition to valuing their shares, the Plaintiffs also seek to investigate corporate wrongdoing. They have presented some credible evidence that the assets of ACE and its controlling stockholders, the Licciardello family, have been commingled. Furthermore, the Plaintiffs have asserted that Licciardello uses ACE cash as personal cash. Investigating the extent of this conduct is a proper purpose. Therefore, the Plaintiffs are entitled to inspect any documents that are necessary and essential to investigating the self-dealing transactions. Each of the Plaintiffs' requests will be discussed in more detail below.

#### 1. ACE's Contracts

The Plaintiffs argue that, given ACE's history of misrepresentations and inaccurate reporting, there is a chance that ACE is misrepresenting the status of its current contracts.<sup>64</sup> The Plaintiffs do not trust the company's disclosures because of the company's past misrepresentations regarding ScotiaBank and InCom. The Defendant offered no evidence to rebut the allegations of material omissions with respect to the ScotiaBank and InCom contracts, and I find that the Plaintiffs have

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<sup>64</sup> See, e.g., Trial Tr. 34:12-17; *Id.* at 91:1-9 (“Mr. Licciardello has a history firstly of not recording an extremely material liability such that it would have [sic]. Had he recorded the liability, it's very likely that none of us would be here today in fact. And you know, he has this history of not disclosing and misrepresenting. So I don't trust that -- and plaintiffs don't trust generally that, you know, this idea that we can just trust the summary of what's out there is accurate.”).



presented credible evidence that wrongdoing with respect to representations concerning these contracts to stockholders and the public likely occurred.

The Plaintiffs' purpose is *not* to further investigate these two contracts, or the other misrepresentations they allege, however. Instead, to evaluate corporate wrongdoing and/or value their stock, they seek *all* of ACE's business agreements and contracts, to allow them to make a Dragnet-style search for misconduct or misvaluation. This is patently overbroad and would be a burden on the company. It is true that, in cases where evidence of widespread mismanagement has been presented, the Court may order a broader inspection of documents.<sup>65</sup> Nonetheless, the Plaintiffs had the duty to tailor their requests to documents that are necessary and essential to fulfilling their proper purposes. There has been no such tailoring here. Since the Plaintiffs have not identified any class of documents in which prior disclosure problems are likely to have persisted, I am unable to determine whether the documents sought are necessary to the purposes stated. Therefore this demand is rejected.

The Plaintiffs, however, have also presented credible evidence that ACE is commingling its assets and cash with its controllers. Disclosure of any contracts that ACE (or its subsidiary ACA) has entered into with its controlling stockholders

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<sup>65</sup> See *Freund*, 2003 WL 139766, at \*5.

is necessary for the Plaintiffs to discover the full extent of these transactions.<sup>66</sup>

Therefore, I order ACE to allow the Plaintiffs to inspect any of its contracts entered into between ACE and any ACE-related party, including members of the Licciardello family and ACE's subsidiary, ACA.<sup>67</sup>

## 2. General Ledger

Second, the Plaintiffs have requested a copy of ACE's general ledger showing all activity from 2011 to 2012. As their purpose for needing this information, the Plaintiffs have pointed to the Licciardellos' use of the company as a personal cash source. The Plaintiffs have produced credible evidence that the Licciardellos have done so in the past. In *Tanyous v. Happy Child World, Inc.*, a stockholder's commingling of company assets with his personal assets was a

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<sup>66</sup> At trial, the Plaintiffs alleged that a new \$300,000 receivable has recently come onto ACE's books from an ACE subsidiary, ACA. The Plaintiffs want to see why this loan was made to the subsidiary and whether the subsidiary has any means of paying back the receivable. ACA has limited revenue, so the Plaintiffs suspect that the \$300,000 loan to an affiliate is unrecoverable. These allegations were neither voiced in the Complaint nor the Plaintiffs' Pre-trial Stipulation. Therefore, I do not consider these allegations to be an independent basis for the Plaintiffs' to inspect ACE's contracts or accounts receivable. Nonetheless, the Plaintiffs speculate that the Licciardellos may be using ACA as their new cash source, because it appears that loans to the Licciardellos from ACE have been declining. Trial Tr. 31:6-14 ("[W]e noted that the cash advances declined pretty dramatically to Mr. Licciardello and his wife and were concerned about the accounting for that and whether -- it's difficult to know whether the pieces have been correctly set out, if we don't have access to understand where at least some of the bigger pockets where some of those bad guys might be hiding."). In light of ACE's large, outstanding loans to the Licciardellos, the production of the contract governing the loans to ACA (if such a contract exists) is necessary to investigate whether there is a legitimate purpose of the loans to ACA, or if ACA has become a new source of commingled funds for Licciardello.

<sup>67</sup> See *supra* note 64 and accompanying text.

sufficient purpose to allow for the disclosure of the general ledger.<sup>68</sup> This Court reasoned that the general ledger was necessary to allow the plaintiff stockholder to determine how its investment in the company had been used.<sup>69</sup> In that case, the manager of the company, who was also a stockholder, admitted to using the plaintiff's investment for personal uses.<sup>70</sup>

ACE has not produced any evidence refuting Redman's testimony that Licciardello uses ACE's cash, on a daily basis, as if it were his own personal cash. Therefore, the stockholders' interest in determining the extent of that commingling, and perhaps conversion, is equally important here. Access to the general ledger is necessary and essential to determining whether and to what extent the Licciardellos are continuing to use ACE's cash as their own. As a result, ACE's general ledger should be provided to the Plaintiffs.

### 3. ACE's Detailed Accounts Receivable and Accounts Payable

In addition to the general ledger, the Plaintiffs seek access to all of ACE's detailed records for its accounts receivable and accounts payable. The Plaintiffs assert that they need access to ACE's detailed accounts payable to determine the full extent of ACE's liabilities to its creditors. As evidence for this purpose,

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<sup>68</sup> *Tanyous v. Happy Child World, Inc.*, 2008 WL 2780357, at \*7 (Del. Ch. July 17, 2008).

<sup>69</sup> *Id.* (“[T]here is evidence that Medhat transferred funds from the HCW accounts to his personal bank accounts and that he may have moved certain funds from HCW to HKA (the newer business he operates with Mariam). As such, Tanyous has more than satisfied *Seinfeld's* requirements, and, accordingly, he is entitled to inspect the books and records of HCW.”).

<sup>70</sup> *Id.* at 4.

Plaintiff and former CFO Redman testified that ACE's financial statements do not reflect some contingent and vested liabilities that Redman believes should be accounted for.<sup>71</sup> Generally, a stockholder would have some evidence that mismanagement is occurring and need access to the books and records to plead mismanagement with particularity in a derivative suit. Here, in contrast, the Plaintiffs purport to already *know* that ACE is not representing liabilities correctly on its balance sheet. Thus, the Plaintiffs already have information sufficient for their purpose, to the extent that purpose involves mismanagement. For reasons already given,<sup>71</sup> the request for *all* detailed records supporting the general ledger is overbroad.

In contrast, the Defendant has presented evidence that the Plaintiffs' primary purpose in seeking this information is to gain the names of ACE's creditors.<sup>72</sup> This information would then be used to contact the creditors and attempt to bring an involuntary bankruptcy proceeding against ACE. The Defendant has produced an email sent by Redman to a group of stockholders discussing the group's strategy moving forward concerning ACE.<sup>73</sup> It is possible that the Plaintiffs' primary

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<sup>71</sup> Pl.'s Post-Trial Mem. Law 7-8, Jan. 8, 2013 (citing such liabilities as possible fines for late tax filings, a settlement relating to the repayment of a loan, and possible losses arising out of employment-related claims that may arise).

<sup>72</sup> See Trial Ex. 10.

<sup>73</sup> See *id.* ("The [books and records] complaint will seek to compel disclosure of the requested information. If we get the information, we will be able to file in Bankruptcy Court through petitioning creditors. More likely, when we don't receive the information, we will proceed with seeking to have a receiver named for the Company, so that we can approach bankruptcy from

purpose in seeking the payables information is to bring an involuntary bankruptcy proceeding.<sup>74</sup> I need not decide, however, whether a stockholder's goal of banding with creditors to file a bankruptcy action is a proper stockholder purpose under these facts because the Plaintiffs have not established that these documents are necessary to their purposes they *have* stated.

The Plaintiffs have not introduced credible evidence regarding why the detailed payables or receivables are needed for either valuing the stock, or investigating possible ongoing inaccurate disclosures. Therefore, the Plaintiffs' request for all of ACE's detailed accounts payable and accounts receivable is denied. Nonetheless, due to the evidence of self-dealing, I order ACE to provide the Plaintiffs access to any documents concerning the related-party transactions that concern amounts ACE owes to the Licciardellos, or the Licciardellos, ACE.

#### IV. CONCLUSION

In conclusion, I have determined that the Plaintiffs have presented credible evidence of a proper purpose in receiving ACE's general ledger and certain

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this angle. . . . We will resolve the situation in one of two ways, either: (i) we are successful in removing Don from the Company through bankruptcy action, appointment of a receiver, application of moral turpitude provisions in investment documents, or otherwise; or (ii) we will form a new company unrelated to Don and reach agreement with Don to obtain full rights to the Poni technology for the uses contracted with Citibank. ”).

<sup>74</sup> Redman's goal appears to have been to remove the Licciardellos from power through bankruptcy proceedings. Thus, it does not appear that the Plaintiffs want to liquidate the company through a bankruptcy action. Rather, they want to remain stockholders, without the influence or involvement of the Licciardellos. *See id.* It is only in Redman's second scenario—if the bankruptcy action failed to wrest control from Licciardello—that Redman proposed forming a new company to purchase the technology.

detailed accounts receivable and payable, as a result of its controlling stockholder's commingling of assets with the corporation. Second, I have determined that the Plaintiffs are entitled to receive a limited subset of ACE's contracts—those concerning ACE's transactions with its controllers—as a result of the alleged commingling. The Plaintiffs should submit a revised form of order consistent with this opinion. The parties should advise me if a protective order is necessary.