



Delaware Chancery Court Denies a Shareholder's Request for the Company's Books and Records Based Upon an Improper Purpose

By [Karen Spaulding](#)

What did this minority shareholder in a privately held E&P limited liability company do when he wanted to recover the future development value of his shares now, but the company was not for sale? He requested the granular records of Murex Petroleum Corporation (Murex), which are typically placed in a data room by an E&P company when it attempts to sell its assets, and when all the requested data was not forthcoming, he filed a Complaint in Delaware Chancery Court (*Julie W. Kessel and Donald A. Kessel v. Murex Petroleum Corp.*, C.A. No. 2018-0820-MTZ). When the Vice Chancellor found his stated purposes under Delaware law to be a pretense or a “ruse,” she denied his request for granular valuation records sought in the Complaint.

2018 Demands for Records – 8 Del. C. § 220 (Section 220)

Donald Kessel and Julie Kessel (jointly owning approximately 1/3 of the shares in Murex) requested the granular valuation books and records of Murex, a Delaware corporation, under Section 220 in March and August 2018. Delaware law allows for shareholders to request certain information from the company, provided they do so for a proper purpose. Their stated purposes for requesting these records were, among others, to (1) enable the Kessels to value their minority shares, and (2) purchase more shares from other minority shareholders or sell their shares to Murex or unknown third-party purchasers.

Including its counsel in the response from the outset, Murex provided a significant portion of the records requested by the Kessels in March because it determined that each was necessary and essential for these stated purposes. However, by August 2018 Murex became concerned that these requests were being made for an improper purpose, i.e., the Kessels, with the assistance of their investment banking firm, Stifel, were attempting to value Murex to find a potential purchaser. However, at no time was Murex seeking a purchaser. After consultation with its valuation expert, Neil Beaton of Alvarez & Marsal, Murex declined to produce any additional requested records believing they were not necessary or essential to the Kessels' stated purposes.

November 2018 Complaint

Once Murex declined to produce the granular valuation records requested by Stifel on behalf of the Kessels in August 2018, the Kessels filed a Complaint in Delaware Chancery Court. Murex answered the Complaint arguing that their stated purposes were not proper and were a pretext for their improper purpose to shop Murex for sale, and, in the alternative, Murex had produced all necessary and essential records as required by Section 220. During the litigation and prior to the trial, Murex continued to provide updated records which it felt were necessary and essential to the

Kessels' stated purposes.

Don Kessel started Murex in 1996 with Waldo Ackerman, its President. After leaving Murex in early 2016, and subsequently being removed from its Board after refusing to execute a Non-Compete Agreement, Mr. Kessel instituted his Plan to acquire Murex in 2016, and when that Plan failed, he modified his Plan which involved financial investment banker, Stifel Investments, marketing Murex for sale. Stifel required Murex's granular valuation records, i.e., those demanded in the Kessels' Complaint, in order to confirm the true value of this mostly Bakken asset in order to locate a purchaser to acquire Murex. Any Board and shareholder decision to sell Murex now would result in a much larger share price than the quarterly share price calculated by Murex's Board pursuant to the formula set forth in the By-Laws.

2019 Delaware Chancery Court Trial

Karen Spaulding and Andrew Glenn of Beatty & Wozniak's litigation practice group represented Murex at the bench trial before Vice Chancellor Zurn commencing September 30, 2019, with the assistance of local Delaware counsel Brett Fallon and Albert Carroll, Morris James LLP, on the pre- and post-trial briefs.

The evidence elicited at trial by Murex's counsel supported its pretext defense that Mr. Kessel sought Murex's confidential and proprietary valuation documentation for the sole and improper purpose of marketing Murex as a whole and not for his purported stated purposes to value his shares to sell them or buy more. The evidence was clear that at no time did Stifel ever market the Kessels' minority shares to a third-party purchaser, because that was not Mr. Kessel's plan. Murex also presented evidence that Ms. Kessel joined in Mr. Kessel's plan, arguing that neither was entitled to the requested documents listed in the Complaint.

In the alternative, Murex's expert witness testified that Murex had produced all necessary and essential records that the Kessels needed to value their shares in order to either sell them or purchase more. Thus, Murex argued that no further records needed to be produced even if the court found either of the Kessels had met the burden of proof of a proper purpose under Section 220.

The parties filed post-trial briefs in lieu of closing arguments, and the Court heard oral argument on December 18, 2019.

2020 Decision by Vice Chancellor Zurn

In her oral telephonic ruling on March 27th, which was attended by [Law 360](#), the Court agreed with Murex that Mr. Kessel sought Murex's books and records for an improper purpose and his stated purposes were a "ruse." V.C. Zurn denied Mr. Kessel's request for any additional books and records.

The Court found that Ms. Kessel did not adopt Mr. Kessel's plan, although she supported it, but had a proper purpose in seeking Murex's books and records because her Murex shares were her main source of income, which she sought to value given her usual practice of selling shares regularly for living expenses.

V.C. Zurn then discussed the scope of the records produced by Murex compared to the additional

request for granular records in the Complaint and held that Murex had produced all essential and necessary documents. However, the Court required Murex to produce its lease list, originally produced in March 2018 in pdf format, as an excel spreadsheet, because that is the electronic format in which the lease list is maintained by the business.

CONCLUSION

In corporate cases, including these Delaware Code books and records cases, counsel can assist the company from the outset to ensure compliance with the law. While this litigation process took well over a year, the Company produced all necessary and essential records before the lawsuit even arose, and it was vindicated by the Vice Chancellor's decision.

For additional information on this Delaware litigation and trial, or any other commercial or corporate litigation matter, please contact [Karen Spaulding](#).