IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NORFOLK COUNTY RETIREMENT SYSTEM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 3443-VCP
	)	
JOS. A. BANK CLOTHIERS, INC.,	)	
	)	
Defendant.	)	

OPENING BRIEF OF DEFENDANT JOS. A. BANK CLOTHIERS, INC. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In this Section 220 action, Plaintiff Norfolk County Retirement System ("Norfolk") seeks to inspect a wide range of books and records of Defendant Jos. A. Bank Clothiers, Inc. ("the Company"), ostensibly to evaluate a possible derivative suit based on alleged wrongdoing in connection with a quarterly announcement in June 2006. Norfolk is pressing this Section 220 claim despite the facts that (i) another shareholder filed a purported derivative action challenging the same underlying conduct, which was dismissed for failure to plead particularized allegations of demand futility, (ii) that same shareholder subsequently made a pre-suit demand, which was duly investigated by a Special Litigation Committee ("SLC") and found to be meritless, (iii) the Company has provided Norfolk with the SLC's Report, the exhibits thereto, the minutes of the meeting of the Board of Directors approving formation of the SLC, and the minutes of the meetings of the SLC, and (iv) Norfolk's corporate representative testified that he has no basis to challenge the good faith, independence or thoroughness of the SLC's investigation.

The question for determination on summary judgment, therefore, is whether a Section 220 plaintiff is entitled to inspect reams of additional documents when an independent SLC has already investigated the allegations, and the plaintiff has no articulated basis to attack the independence of the SLC or of a Board which has been adjudicated to be capable of responding to a demand. The answer to that question is no.

As this Court indicated at the July 18, 2008 hearing, the precedents of *Grimes v. DSC Communications Corp*., 724 A.2d 561 (Del. Ch. 1998), and *Kaufman v. CA, Inc*., 905 A.2d 749 (Del. Ch. 2006), support the conclusion that the Company has fully

discharged its responsibilities by producing the SLC's Report and related documents. It is Norfolk's burden to articulate a reasonable need for additional documents, and Norfolk has not done so. (*See* July 18, 2008 Tr. at 7-8, attached as Exhibit A hereto.)

The SLC Report, the exhibits thereto, the Board minutes creating the SLC, and the minutes of the SLC have all been provided to Norfolk and are now part of the summary judgment record.[1] Because Norfolk has not come forward with any evidence of any reasonable need to inquire further, the Company is entitled to judgment as a matter of law.

STATEMENT OF FACTS

A. The Company and Its Earnings History

As detailed in the SLC Report, the Company's shareholders have enjoyed seven consecutive years of increased annual earnings per share under its current management team. (*See* SLC Report at 55.) During the past six years, the Company's quarterly earnings per share have exceeded its earnings in the prior year's comparable quarter for 23 out of 24 quarters. (*Id*.) The only exception to this pattern of increasing quarter-over-quarter earnings was the first quarter of 2006. (*Id*. at 52 and 56.) In that quarter, the Company made a great deal of money -- $5.86 million -- but earned about $876,600, or 6¢ per share, less than it had in the first quarter of 2005. (*Id*. at 52, and Ex. 26.) That single quarter of slightly reduced quarterly earnings was a temporary dip; the Company went on to achieve record earnings of more than $43 million in 2006. (*Id*.; s*ee also* SLC

[1] The SLC Report and the exhibits thereto are attached as Exhibit A to the Transmittal Affidavit of Sean Brennecke ("Brennecke Aff") and are referenced hereafter as "SLC Report at __, Ex. __". *See also* Brennecke Aff. Ex. B (Minutes of the SLC) and Brennecke Aff. Ex. D (August 4, 2008 cover letter from James Dunbar to Carl Stine).

Report at 47, and Ex. 14.) It is that temporary dip in earnings that Plaintiff seeks to investigate in this Section 220 action for the purpose of filing a derivative suit.

As discussed below, that earnings dip has already been the subject of civil lawsuits and investigations.

B. The Securities Class Action

On June 8, 2006, after the Company announced its first quarter 2006 results, the Company's stock dropped by 29%. (*See* SLC Report at 8, and Ex. 1.) In response, on July 24, and August 3, 2006, two securities class action lawsuits were filed in the U.S. District Court for the District of Maryland and consolidated before Judge William N. Nickerson (the "Securities Class Action"). (*Id*. at 2 and 8, and Ex. 2; 220 Complaint at pp. 5-6.) The Securities Class Action alleges that the drop in earnings was caused by mismanagement. (*See* SLC Report at 2, and Ex. 2 at pp. 1-4; 220 Complaint at pp.6-7) Specifically, it was alleged that senior management attempted to conceal excessive inventory by conducting liquidation sales and issuing allegedly false and misleading statements concerning the Company's financial affairs. (*Id*.) Those statements were false, the federal plaintiffs allege, because they omitted the Company's alleged knowledge of excessive levels of inventory in December 2005 through June 2006. (*Id*.) Plaintiffs also allege that those statements falsely reassured investors that the Company's gross profit margins would increase throughout the final two quarters of 2005 and into the first quarter of fiscal 2006. (*Id*.) Finally, plaintiffs allege that the Company's inventory was impaired and was not fairly stated on its financial statements. (*Id*.)

C. The Prior Derivative Action

In addition, on August 11, 2006, Glenn Hutton ("Hutton") filed a shareholder derivative action in the U.S. District Court for the District of Maryland alleging that the Company's Board of Directors had breached its fiduciary duties to the Company in connection with the same conduct alleged in the Securities Class Action. (*See* SLC Report at 8, Ex. 4.) A second derivative action was filed on August 28, 2006, (*id*. at 8, Ex. 5), and the actions were consolidated before Chief Judge Benson Everett Legg on October 20, 2006 (the "Derivative Action"). (*Id*. at 8, and Ex. 4.)

The plaintiffs in the Derivative Action did not make a demand on the Board before filing their lawsuit, claiming in their complaint that demand would be futile because all the Company's Directors lacked independence. (*See* SLC Report at 9.) On September 13, 2007, Chief Judge Legg dismissed the complaint in the Derivative Action because it did not include any "particularized allegations creating a reasonable doubt that a majority of the directors would be disinterested or independent in considering a shareholder demand," and, therefore, demand was not excused. (*Id*. at 9, and Ex. 6.)

The Derivative Plaintiffs did not appeal. Instead, Hutton, through his attorneys, sent a demand letter to the Company's Board, demanding that it establish a special litigation committee ("SLC") "to take action to fully investigate and remedy, inter alia, potential breaches of fiduciary duty by certain current and/or former officers and directors of the Company…" (*See* SLC Report at 10, and Ex. 7.) The demand letter alleged that the Board "falsely portrayed the Company's increasing product sales and inventory and management practices, including the buildup of inventory levels and pricing strategies as the basis for increased profit margins and profits." (*Id*.) The

"inventory problems" and "price markdowns" were alleged to have occurred in the first quarter of 2006. (*Id*.)

D. The Investigation by the SLC

In response, on September 25, 2007, the Company's Board appointed a SLC, and gave the SLC full authority to independently investigate the claims alleged by Hutton, and to take all appropriate action. (*Id*. at 6 and 10, and Ex. 8.) The members of the SLC, Directors William E. Herron, Sidney H. Ritman, and Andrew A. Giordano, are not members of the Company's senior management and are among the Board members that Judge Legg held to be capable of impartially investigating and pursuing the derivative demand. (*Id*. at 6 and 11-12.)

The SLC held its first meeting on October 4, 2007. (*See* SLC Report at 12.) At that meeting, the SLC interviewed and retained the law firm of Kramon & Graham, P.A. ("K&G") to represent its interests. (*Id*.) Hutton's counsel subsequently informed K&G and the SLC that all of the allegations that her client believed should be investigated by the SLC were included in the Securities Class Action complaint filed on February 2, 2007. (*Id*. at 16-17.)

Over the next 16 weeks, the SLC interviewed over 40 current and former Company employees and outside professionals (*See* SLC Report, Ex. 17), and held 11 meetings to review the investigation's progress. (*Id*. at 7.) It also reviewed numerous documents, including approximately 5,000 emails, the April 14, 2005 10K (SLC Report, Ex. 12), the June 7, 2006 10Q (*id*., Ex. 13), the April 12, 2006 10K (*id*., Ex. 14), the CEO's 10b5-1 Plan, the Forms 4 filed by the Company's CEO, store expansion schedules and progress reports, audit letters, management letters, spreadsheets, financial

projections, marketing event calendars, and organizational charts. (*See* SLC Report at 17-18.) The SLC interviewed all members of the Company's senior management, current and former employees with knowledge of inventory and sales issues, store managers, Company planners, and eventually many of the persons identified by the Class Action plaintiffs as having knowledge of facts relating to their claims. (*Id*. at 18, and Ex. 17.)

The SLC also analyzed an investigation performed by Wilmer Hale and Ernst & Young on behalf of the Company's Audit Committee in March 2006, which was focused on an anonymous allegation that the value of the Company's inventory had been materially misstated. (*Id.* at 15-16, 39-40.)

On February 7, 2008, the SLC issued its Report, and the next day advised Hutton's counsel that the SLC had rejected Hutton's demand. (*See* Brennecke Aff. Ex. C.) The SLC concluded in pertinent part that:

- The Company's inventory was never impaired.
- No one at the Company who was in a position to know whether the inventory was excessive thought that it was; and, in fact, the inventory was not excessive.
- The sales and promotions used by the Company to motivate customers to buy were not drastic or different in nature or frequency from sales and promotions used by the Company in prior or subsequent years.
- The Company's management did not lie to the public or withhold information from it. The Company made clear in its reports that it was building inventory in 2005, and explained its reason for doing so. The Company's press releases and public statements, both during and after the first quarter, were accurate and honest. The Company gave no earnings guidance for the quarter, and it had no legal duty to do so. Even if it had, it is clear from internal correspondence that management believed until nearly the end of the quarter that the Company would meet its earnings goals. Earnings in the first quarter were impacted adversely by unexpected and unusual expenses, and the customers' preferences for discounted Fall/Winter merchandise, but management correctly believed that the dip in earnings would be temporary. In fact, 2006 turned out to be

> a record year for the Company in all respects, notwithstanding the first quarter results. The Company's internal documents matched its public disclosures, and the SLC found no evidence that any member of the Company's management had engaged in any fraudulent behavior.

(*See* SLC Report at 3-4.)

The SLC also determined that the real reason for the earnings dip in the first quarter of 2006 was that, in addition to unexpected expenses that impacted earnings, as stated by Company management on June 8, 2006, "gross profits declined primarily as a result of increased customer demand for Fall merchandise, resulting in less demand for the year-round core merchandise." (*See* SLC Report at 47, and Ex. 41.) The SLC found, however, that the dip in earnings in the first quarter was an exception and that senior management was correct in its broader assessment:

> Mr. Ullman told the analysts that [the Company] expected earnings per share to increase in the second quarter and to result in a double digit increase for fiscal 2006. He was proven to be modest in his predictions, with earnings per share increasing by more than 20%.

(*Id*. at 52, and Ex. 43.) Thus, regardless of whether or not the market overreacted or misinterpreted the information released by the Company, the SLC concluded that senior management "acted honestly and appropriately in preparing and releasing [the Company's] financial disclosures." (*Id*. at 54.)

The SLC found that there was simply no factual validity to the allegations of wrongdoing alleged in the Derivative Action or the Securities Class Action, which form the basis of Hutton's demand:

> "[t[he proposed lawsuit is entirely without merit. The SLC found very little support for the facts claimed in either the Derivative Suit or the Class Action, and found overwhelming evidence to the contrary. The core allegations made by Hutton, et al. – that the Fall/Winter inventories were dramatically excessive, that [the Company] ordered liquidation sales to rectify the situation, impairing the value of the inventory and depressing

> earnings – are untrue. Based upon all the facts shown in the investigation, it is clear that [the Company] never deemed its inventory excessive and never conducted liquidation sales. It is the SLC's considered judgment that the lawsuits filed by Hutton and Lefkoe are based upon false premises, and are supported only by the unfortunate drop in the stock price on June 8, 2006."

(*See* SLC Report at 54-55.)

E. The Section 220 Demand

On November 27, 2007, Norfolk submitted its Section 220 demand - nearly eighteen months after the earnings announcement in June of 2006 that brought on the derivative and securities lawsuits, and well after the SLC had been formed and its investigation of the alleged wrongdoing was under way (the "Demand"). (*See* Complaint at ¶4.) On January 3, 2008, Norfolk filed this action.

Norfolk's 220 Complaint relies almost exclusively on the Securities Class Action complaint for its allegations of wrongdoing, (*see* Complaint at ¶¶14-25), and its stated purposes for the inspection are virtually identical to the subject matter of the Derivative Action, the Securities Class Action, and the SLC investigation:

> A. To investigate potential wrongdoing, mismanagement, and breaches of fiduciary duties by the members of the Company's Board of Directors or others in connection with the events, circumstances, and transactions underlying the Company's June 2006 Form 10-Q, including, among other things, the events surrounding the Company's announcements that Jos. A. Bank's gross profits had declined (by 16% as compared with the prior year period) as a result of increased consumer demand for fall merchandise, resulting in less demand for year-round core merchandise;
>
> B. To assess the ability of the Company's Board of Directors to impartially consider a demand for action (including a request for permission to file a derivative lawsuit on the Company's behalf) related to the items described in this demand; and

C. To take appropriate action in the event the members of the Company's Board of Directors did not properly discharge their fiduciary duties.

(*See* Complaint at ¶¶7 A, B & C.)

Shortly after Norfolk filed its Complaint, the SLC concluded its investigation, determined that the allegations of wrongdoing associated with the temporary one-quarter earnings dip were without merit, and that it was not in the Company's best interest to pursue an action on the allegations. (*See* SLC Report at 54-56.) The Company has provided Norfolk with a copy of the SLC Report, the exhibits thereto, the minutes of the meetings of the SLC, and the minutes of the Company's Board approving the creation and functioning of the SLC. (*See* Brennecke Aff. Ex. D.)

F. Admissions of Norfolk and Its Advisors

The Company has deposed Norfolk's corporate designee and the representatives of its investment managers. (*See* Connelly, Corrado and Mui Depositions, attached as Exhibits E, F and G to Brennecke Aff.) Norfolk's corporate designee, Joseph Connelly, testified that he was only made aware of the SLC Report the day before his deposition. (*See* Brennecke Aff Ex. E at 31-4.) Mr. Connelly also testified that the only event that precipitated the 220 demand was the drop in stock price in June of 2006 and that he had no reason to believe that the SLC investigation of that earnings announcement and subsequent earnings dip was not pursued in good faith or that the SLC members were not independent:

Q: What happened between the first quarter earnings announcement in June of '06 and November 27, 2007, to convince you that it was important to send this demand letter to Joseph A. Bank?

A: Advice of Counsel.

Q: Are you aware of any events that occurred during that, what, 17 month period that caused you to send this demand letter to Joseph A. Bank?

A: A drop in stock price.

Q: And the drop in stock price occurred when, sir?

A: I believe it was in June of 2006.

Q: So during the ensuing 17 months, did anything other than a drop in stock price that occurred in June 2006 happen to convince you that it was important to send [the demand letter]?

A: No.

Q: Are you aware of any facts today that would lead you to believe that the company's board is not capable of conducting an independent, thorough, good faith investigation of allegations relating to its earnings announcement in first quarter of 2006?

A: No.

(*Id*. Ex. E at 38-39.)

Representatives of Norfolk's investment advisors testified that they had no reason to believe there was fraud involved in the underlying earnings announcement. (*See* Brennecke Aff. Ex. F at 57-64, Ex. G at 37-40.)

ARGUMENT

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Del. Ch. Ct. R. 56(c). Summary judgment will be granted if there is an absence of evidence to support the non-moving party's case, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), such as when a stockholder seeks inspection of corporate books and records without presenting "some evidence to suggest a credible

basis from which a court can infer that mismanagement, waste or wrongdoing may have occurred." *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 118 (2006) (internal quotations omitted). Similarly, a stockholder inspection can be denied as a matter of law if the stockholder wishes to pursue a future derivative action but has no legal basis to do so. *See, e.g., West Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636 (Del. Ch. 2006) (inspection denied where future derivative action barred by issue preclusion as to demand futility); *Polygon Global Opportunities Master Fund v. West Corp*., 2006 Del. Ch. LEXIS 179, *17-20 (Oct. 12, 2006) (inspection denied where future fiduciary duty action barred by lack of standing).

As discussed below, the posture of this Section 220 action renders it suitable for summary disposition. Norfolk is pursuing a stockholder inspection in aid of a purported future stockholder derivative action notwithstanding the indisputable facts that (i) another shareholder derivative action challenging the same conduct was dismissed for lack of demand futility, (ii) that same shareholder then made a demand on the Company's Board that was rejected following an investigation by an SLC, (iii) Norfolk has been provided with the documents necessary and sufficient to evaluate the work of the SLC, including the SLC's Report, the exhibits thereto and the minutes of the SLC, and (iv) Norfolk has not come forward with any evidence to challenge the independence or good faith of the SLC or the reasonableness of its investigation, or any evidence to suggest that a future derivative action can possibly withstand a motion to dismiss.

I. THE COMPANY HAS MOOTED NORFOLK'S SECTION 220 DEMAND BY PRODUCING THE SLC'S REPORT, THE EXHIBITS THERETO, THE MINUTES OF THE SLC, AND THE MINUTES CREATING THE SLC.

The "credible basis" standard for stockholder inspections is reflective of the larger principle that a stockholder inspection will only be compelled if, and to the extent that, stockholder wealth is enhanced by compelling an inspection in such circumstances:

> Investigations of meritorious allegations of possible mismanagement, waste or wrongdoing, benefit the corporation, but investigations that are indiscriminate fishing expeditions do not. ***At some point, the costs of generating more information fall short of the benefits of having more information***. ***At that point, compelling production of information would be wealth-reducing, and so shareholders would not want it produced***. Accordingly, this Court has held that an inspection to investigate possible wrongdoing where there is no credible basis, is a license for fishing expeditions and thus adverse to the interests of the corporation.

Seinfeld, 909 A.2d at 122-23 (internal quotations and footnotes omitted) (emphasis added).

"It is not enough for a section 220 claim, however, merely to satisfy the proper purpose and credible evidence prongs of the test." *Polygon Global Opportunities Master Fund*, 2006 Del. Ch. LEXIS 179, *9. If the stockholder already possesses "all necessary, essential, and sufficient information" for its proper purpose, no inspection will be compelled. *Id.* at *2; *see id.* at *9; *see also Security First Corp. v. U.S. Die Casting and Dev. Co.*, 687 A.2d 563, 569 (Del. 1997) ("The plaintiff bears the burden of proving that each category of books and records is essential to the accomplishment of the stockholder's articulated purpose for the inspection.").

This Section 220 case has proceeded to the phase where any compelled production of additional documents by the Company would be "wealth reducing" and not

in the interests of stockholders. The Company has responded to Norfolk's demand by producing the Report of the SLC, the exhibits thereto, the minutes thereto, the Board minutes creating the SLC, and the response of the SLC to the stockholder who previously demanded that the Board file suit over the same events that Norfolk wishes to investigate. Norfolk already possesses the information that this Court has deemed sufficient for purposes of deciding whether to pursue a stockholder derivative action. Discovery in this case reveals no credible basis for further investigation into facts that have already been investigated. Any additional production of documents is unjustified, as it would be tantamount to an improper fishing investigation.

"[W]hen a books and records action is brought with the goal of evaluating a possible derivative suit, the books and records that satisfy the action are those that are required to prepare a well-pleaded complaint." *Kaufman*, 905 A.2d at 753. In this case, any future derivative complaint will confront imposing roadblocks as a consequence of prior derivative litigation addressed to the same underlying events. First, a federal court has already ruled that the Company's Board was capable of responding to a pre-suit demand. Second, the Board did respond to a demand, by establishing a fully empowered SLC that found the allegations of wrongdoing to be wholly baseless. Consequently, any future derivative complaint will likely be met not only with the standard defenses of failure to make demand pursuant to Rule 23.1, but also collateral estoppel as to demand futility, and the tendering of the SLC Report as an independent basis to terminate the litigation. Norfolk will not be writing on a blank slate.

In this context, the operative question is whether Norfolk already possesses the documents necessary and sufficient to address the defenses that an independent Board has

already appointed an independent SLC that has determined that any further litigation is not meritorious and not in the best interests of the Company. The precedents of this Court answer that question emphatically in the affirmative.

A stockholder who makes a demand that is refused is entitled to file a Section 220 action "to obtain the relevant corporate records, such as reports or minutes, reflecting the corporate action and related information in order to determine whether or not there is a basis to assert that demand was wrongfully refused." *Grimes v. Donald*, 673 A.2d 1207, 1218 (Del. 1996). In related subsequent litigation, this Court clarified that the plaintiff, Grimes, was "entitled to receive copies of the Special Committee's report, minutes of the meetings of the Special Committee and minutes of any meeting of the board of directors relating to the creation or functioning of the Special Committee, including any meeting of the board of directors at which the recommendation of the Special Committee was considered or approved." *Grimes v. DSC Communications Corp.*, 724 A.2d 561, 567 (Del. Ch. 1998).

This Court reasoned in *Grimes* that "these basic documents should suffice for purposes of establishing or raising reasonable grounds for suspicions about a special committee's independence, good faith and due care." *Id.* Vice Chancellor Lamb continued, "Thus, I conclude that the plaintiff is not entitled to receive or examine copies of other documents not directly relating to the Special Committee's conclusions and recommendations unless he can articulate a reasonable need to inquire further after

review of those basic documents." *Id.*[2]

These same "basic documents" have been provided to Norfolk. Norfolk has articulated no reasonable need to inquire further.

The demand refused context of *Grimes* is analogous to the litigation posture here. In both contexts, a special litigation committee had investigated the underlying allegations. In both contexts, the essential inquiry is whether the special litigation committee, acting in the place of the Board of Directors on behalf of the corporation, had properly discharged its responsibilities. In any situation where a special litigation committee has issued a report supporting a determination not to pursue derivative litigation, a stockholder is not allowed to proceed with a derivative action as if the special litigation committee and its report did not exist. Nor is the stockholder entitled to conduct its own freewheeling investigation of all conceivable underlying documents in the corporation's possession. Rather, the stockholder is confined to examination of the special litigation committee's report and related documents. Those are the documents that Norfolk already possesses.

The logic of *Grimes* was ratified recently in *Kaufman*, 905 A.2d at 749. *Kaufman* was a Section 220 action that arose in the context of a special litigation committee's concurrent investigation of apparent wrongdoing that had already resulted in three former

[2] The *Grimes* Court further noted that its conclusions were "broadly consistent with decisions of this Court in defining the scope of allowable discovery in the analogous context of a motion by a special litigation committee to dismiss or settle properly instituted derivative litigation." *Id.* *Grimes* quoted Chancellor Allen's observation in *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, 1997 Del. Ch. LEXIS 4 (Jan 28, 1997), that the "committee *report and accompanying documents* should provide a sufficient basis for plaintiff . . . to determine whether the investigation was done in good faith and in an informed manner and whether the conclusions reached can be thought fair." *Id.* at *3, *quoted in Grimes*, 724 A.2d at 568 (emphasis added in *Grimes*).

senior executives pleading guilty to criminal charges. *See id.* at 751. The corporation produced several categories of documents in response to the Section 220 demand. The stockholder pressed for certain additional documents, such as interview summaries and memoranda created in connection with a prior Audit Committee investigation. *Id.* at 752.

The *Kaufman* Court decided the question based on "the same principles" articulated in *Grimes*. *Id.* at 754. The Court reasoned that the documents sought "fall well outside the traditional reach of Section 220 as articulated in *Grimes*," and that the corporation had already provided the stockholder with "a wide range of basic documents that should provide her with a substantial basis to investigate potential misconduct at CA." *Id.* at 754. The Court noted that the plaintiff could not explain why the remaining documents were "either necessary or essential to her proper investigative purpose." *Id.* at 755.

The same situation exists here. Norfolk has never tried to explain why the "basic documents" provided by the Company are not essential and sufficient for Norfolk's purposes, or why any need exists for production of any particular category of additional documents. Instead, Norfolk has operated under the false assumption that it can pursue a wide-open investigation of alleged wrongdoing without regard for the facts that the SLC already conducted such an investigation, and that its Report was given to Norfolk. Indeed, Norfolk's counsel waited until the day before the deposition of Norfolk's corporate representative to tell him that the SLC had conducted an investigation and that the SLC had concluded that there was no factual support for any claims of alleged wrongdoing. (Brennecke Aff. Ex. E at 33-34.) Norfolk's corporate representative freely

admitted that he was not aware of any facts casting doubt on the independence, good faith or thoroughness of the SLC's investigation. (*Id.* at 34-35.)

In sum, the Company has already fully satisfied any obligation it may have to produce documents in response to Norfolk's Section 220 demand. As this Court observed at the oral argument on July 18, 2008: "the [*Grimes*] Court is saying . . . as to whether you get something beyond all of that, you would need to come forward with a reasonable basis, reasonable grounds for suspecting the special committee's independence, good faith and due care. It sounds as though right now you have no basis for doing that." (Ex. A at 26.)

II. NORFOLK IS NOT ENTITLED TO ANY INSPECTION OF DOCUMENTS BECAUSE NORFOLK HAS NO FACTUAL BASIS TO CHALLENGE THE INDEPENDENCE OF THE BOARD IN ANY FUTURE DERIVATIVE ACTION.

As noted above, a stockholder inspection can be denied as a matter of law if the stockholder wishes to pursue a future derivative action but has no legal basis to do so. *See, e.g.*, *West Coast Mgmt. & Capital, LLC*, 914 A.2d 636 (inspection denied where future derivative action barred by issue preclusion as to demand futility); *Polygon Global Opportunities Master Fund*, 2006 Del. Ch. LEXIS 179, *17-20 (inspection denied where future fiduciary duty action barred by lack of standing).

Here, Norfolk has no legal or factual basis to overcome the prior adjudication by Chief Judge Legg of the United States District Court for the District of Maryland that a majority of the members of the Company's Board of Directors are independent and capable of analyzing a pre-suit demand. Nor can Norfolk overcome any future effort to file a derivative action without making a pre-suit demand, the outcome of which is already foreordained by virtue of the SLC's investigation of the same underlying

conduct. In these circumstances it makes no sense to allow Norfolk to impose on the Company the burden of a massive document inspection into the events of 2005 and 2006. Norfolk has no credible basis to potentially show that a majority of the Board is disabled from considering a pre-suit demand.

Chief Judge Legg dismissed the prior derivative action because the Amended Complaint contained no "particularized allegations" creating a reasonable doubt that a majority of the Board was disinterested and independent for purposes of making a decision on a pre-suit demand. (SLC Report Ex 6 at 6.) The Court observed that the Amended Complaint did "not come close to providing the well-pleaded acts to suggest a reasonable inference that a majority of the directors consciously disregarded their duties over an extended period of time that are necessary to create a risk of substantial liability." (id at 7.) (internal quotation omitted).

"[R]ecent federal case law . . . holds that collateral estoppel bars all subsequent plaintiffs from relitigating demand futility." *West Coast Management & Capital, LLC,* 914 A.2d at 643 (citing *Leboyer v. Greenspan*, 2006 WL 2987705, at *1 (C.D. Cal. Oct. 16, 2006), *Henik ex rel. LaBranche & Co. Inc. v. LaBranche*, 433 F.Supp.2d 372, 381 (S.D.N.Y. 2006), and *In re Sonus Networks, Inc. S'holder Deriv. Litig.*, 422 F.Supp.2d 281, 294 (D. Mass. 2006)). This Court has adopted those recent federal cases and held that a derivative plaintiff "may be precluded from relitigating the issue of demand futility" if the moving party can demonstrate the following elements respecting the prior federal decision: "(1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) the issue must have been actually litigated, (3) the determination of the issue must have been essential to the final judgment, and (4) the

party against whom the estoppel is invoked must be fully represented in the prior action." *In re Career Education Corp. Deriv. Litig.*, 2007 Del. Ch. LEXIS 184, *34-35 (Sept. 28, 2007) (internal quotation omitted). More specifically, this Court held that a federal court's dismissal with prejudice for failure to plead demand futility on a *Caremark* claim bars relitigation of that same issue when the same factual allegations were before the federal court, even though the federal plaintiff had not filed a Section 220 action. *Id.* at *34 n.58, *36.

Here, Norfolk provides no basis for adducing new allegations of lack of independence as to a majority of the Board for a knowing failure to exercise oversight respecting the unanticipated decline in earnings for a single quarter. Certainly, the SLC Report contains no basis for any such allegations.

In the absence of any credible basis for new allegations of lack of independence as to a Board majority, Norfolk will be estopped from relitigating demand futility, which is itself sufficient reason to bar any inspection of documents premised on a potential future derivative action. *See West Coast Management*, 914 A.2d 636.

CONCLUSION

For all the foregoing reasons, Defendant Jos. A. Bank, Clothiers, Inc. respectfully requests that the Court enter judgment in its favor and dismiss Norfolk's Complaint with prejudice.

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