



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

**PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Norfolk County Retirement System (“Plaintiff”), a stockholder of defendant Jos. A. Bank Clothiers, Inc. (“Jos. A. Bank” or the “Company”), hereby submits this Motion for the entry of an Order granting summary judgment pursuant to Court of Chancery Rule 56 in its favor on the demand as set forth in its Complaint (the “Complaint” or “Compl.”) to compel the inspection of certain of the Company’s books and records pursuant to 8 *Del. C.* § 220.<sup>1</sup>

**BACKGROUND**

1. The Company and several of its senior officers, including its Executive Chairman and CEO, are defendants in a federal securities fraud class action litigation pending in the United States District Court for the District of Maryland, captioned as *Lefkoe v. Jos. A. Bank Clothiers, Inc., et al.*, C.A. No. WMN-06-1892, and arising from an alleged fraudulent scheme to make material misstatements respecting the Company’s business performance and inventories to investors (the “Securities Action”). The federal

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<sup>1</sup> The Complaint is attached as Exhibit 1 to the Transmittal Affidavit of Brian D. Long, Esquire, In Support Of Motion for Summary Judgment, dated September 10, 2008 (“Long Aff.”), filed herewith.

court has rejected both a motion to dismiss *and* for judgment on the pleadings made by the Company and the other defendants, twice finding that the operative complaint in the Securities Action (Long Aff., Ex. 6) satisfies the rigorous pleading requirements of the Private Securities Litigation Reform Act of 1995. *See* Compl. Ex. E; Long Aff., Ex. 2.

2. In support of their motion for judgment on the pleadings, the Securities Action defendants argued that the fact that a self-described “special litigation committee” of the Company’s Board of Directors (the “Committee”) declared the specifically pled Securities Action to be “without merit” (and that the Committee had similarly failed to take action in the past in response to potential officer misconduct) provides the defendants with an affirmative defense to liability. The federal court rejected this argument, and chose to treat the purported “defense” simply as a denial of liability. Long Aff., Ex. 3 at ¶ 1. Discovery has commenced in the Securities Action. *See id.* at ¶ 4.

3. After Plaintiff learned of the specifically pled allegations of wrongdoing in the Securities Action – as well as the fact that a derivative action filed by shareholders who had not made a Section 220 demand before filing suit or amending their complaint had been dismissed for failure to sufficiently plead demand futility – Plaintiff sought books and records from the Company to independently investigate whether certain directors and/or officers had engaged in misconduct injurious to the Company. On November 27, 2007, Plaintiff sent a letter to Jos. A. Bank requesting to review certain books and records related to the alleged wrongdoing and the Board’s role and activities with respect thereto. *See* Complaint Ex. A-1.

4. Initially, other than a report of the Committee, the Company refused to provide *any* materials to Plaintiff. Accordingly, on January 3, 2008, Plaintiff filed its Complaint seeking to compel the Company to comply with its obligation to provide the requested books and records. Subsequently, the Company provided Plaintiff limited additional documentation – exhibits to the Committee’s report and minutes regarding the formation of the Committee

5. As discussed below, there are no disputed issues of fact respecting the proper purpose of Plaintiff’s Complaint, and each of the Company’s purported affirmative defenses raises purely legal issues that fail as a matter of law.<sup>2</sup> Accordingly, Plaintiff respectfully requests the Court to enter an Order granting its Motion for Summary Judgment.

### **ARGUMENT**

6. Plaintiff is entitled to summary judgment because there are no genuine issues of material fact in dispute and it is entitled to judgment as a matter of law. *Scureman v. Judge*, 626 A.2d 5, 10 (Del. Ch. 1992). Section 220 provides that Plaintiff is

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<sup>2</sup> Plaintiff served discovery on the Company after it interposed several affirmative defenses based upon the conclusions of the Committee, which was convened to consider a demand made by the same shareholder who filed a federal derivative complaint that was dismissed for failure to adequately plead demand futility. Defendants moved this Court to enter a protective order and to quash Plaintiff’s subpoenas on the Committee’s members. On July 18, 2008, the Court granted those motions, but without prejudice to Plaintiff’s ability to renew them, depending on the outcome of the parties’ anticipated cross-motions for summary judgment. As set forth herein, the Company’s reliance on the Committee’s conclusions as affirmative defenses in this case is wholly without merit as a matter of law. Consequently, a ruling in Plaintiff’s favor would obviate the need for any further litigation of this case. If, however, the Court does not rule in Plaintiff’s favor and this action is set for trial, Plaintiff reserves the right to, and will, renew its requests for additional discovery regarding Defendant’s purported affirmative defenses.

entitled to inspect the Company's books and records if "(1) it is a stockholder, (2) . . . it has complied with the section respecting the form and manner of making demand for inspection of such documents, and (3) the inspection [Plaintiff] . . . seeks is for a proper purpose."

7. No material issue of fact exists as to the first two elements of the statute. Plaintiff has indisputably established that it is a Jos. A. Bank shareholder. *See* Compl. Ex. A-2. While the Company has raised technical compliance with Section 220 as its "Second Affirmative Defense" (Long Aff. Ex. 4), the Company's interrogatory responses establish that its "form" defense is limited to a challenge of the "proper purpose" element of the statute. *See* Long Aff., Ex. 7 at 8.

8. At dispute is the Company's assertion that Plaintiff lacks a "proper purpose." This "defense" raises purely legal issues capable of resolution as a matter of law in Plaintiff's favor.<sup>3</sup> Plaintiff filed this action in order to investigate potential corporate mismanagement and to determine whether there is a basis to file a shareholder

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<sup>3</sup> Any argument the Company may make regarding the level of knowledge possessed by Plaintiff's representatives concerning the wrongdoing underlying Plaintiff's books and records demand is unavailing, and has no consequence whatsoever in determining Plaintiff's access to the demanded books and records. Nowhere does the language of Section 220 preclude a stockholder from relying upon the advice and investigation of its counsel in seeking books and records or prosecuting a Section 220 demand. Moreover, Plaintiff here is not seeking certification as a class representative (nor is it required to). Even if it were, however, the record before the Court reflects that Plaintiff would more than satisfy the adequacy requirement set forth in Court of Chancery Rule 23(a)(4). *See In re: TD Banknorth S'holders Litig.*, C.A. No. 2557-VCL, 2008 Del. Ch. LEXIS 102, at \*10 (Del. Ch. July 29, 2008). In *TD Banknorth*, this Court held that "In order for a class representative to satisfy the [adequacy] requirement, 'a rudimentary understanding of the claims, facts, and issues is adequate.'" *Id.* This standard is not "onerous," and even in the class action setting, a "named plaintiff's understanding and control of the litigation has been held to be largely insignificant." *Id.* (quoting *O'Malley v. Boris*, C.A. No. 15735, 2001 Del. Ch. LEXIS 11 (Del. Ch. Jan 11, 2001)).

derivative action. This is a purpose that Delaware courts have not only recognized, but affirmatively endorsed.

9. A shareholder making a Section 220 demand does not have to prove that corporate officers engaged in mismanagement, but need only make a “credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing.” *Security First Corp. v. U.S. Die Casting and Dev. Co.*, 687 A.2d 563, 567 n.3, 568 (Del. 1997). The “‘credible basis’ standard is the ‘lowest possible burden of proof’ in Delaware jurisprudence.” *Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 n.19 (Del. Ch. 2007) (quotation omitted). Thus, Plaintiff can satisfy its burden of proof if it “present[s] ‘some evidence’ to suggest a ‘credible basis’ from which a court can infer” issues of potential corporate wrongdoing. *Seinfeld v. Verizon Commc’ns, Inc.*, 909 A.2d 117, 118 (Del. 2006).

10. The Complaint and the evidentiary documents incorporated into it amply meet Plaintiff’s minimal burden of proof. As set forth in two decisions by a federal district court, the Securities Action complaint includes specific allegations (many based on the Company’s own public filings) that, on approximately twelve separate occasions, defendants – including the Company’s most senior corporate officers – “affirmatively misrepresented inventory issues and omitted from public statements their knowledge of the Company’s excessive levels of inventory over the class period, its need to steeply discount inventory, and the resulting harm to sales of core merchandise and the Spring 2006 line.” Long Aff., Ex. 2 at 14 (decision rejecting defendants’ motion for judgment on the pleadings in the Securities Action); Long Aff., Ex. 6. The Securities Action

complaint likewise pleads specific and compelling facts leading to a strong inference that the defendants made these multiple, material misstatements with the intent to defraud. Long Aff., Ex. 2 at 14-15; Long Aff., Ex. 6.

11. The Company does not dispute that the repeated material misstatements to investors specifically alleged in the Securities Action complaint provide a facially credible basis for a shareholder to investigate potentially actionable mismanagement or other misconduct by corporate fiduciaries. The Company, however, contends that the basis for the Complaint has been obviated because (a) the Committee absolved corporate defendants from liability; (b) the federal court dismissed a prior filed shareholder derivative action; and (c) the Complaint is barred by “laches.” Each of these affirmative defenses raise purely legal issues and fail as a matter of law.

12. *First*, the Company contends that the Complaint is “barred”<sup>4</sup> because of the findings of the Committee, which purportedly concluded that the claims asserted in both the federal court derivative action and the Securities Action (which has been upheld against two dispositive motions) “were without merit.”<sup>5</sup> The law is to the contrary.

13. In the Securities Action, the Company erroneously asserted that the mere fact that the Committee had determined not to take action against the defendants therein provided the Company with a defense to fraud liability. Long Aff., Ex. 2 at 5. Now the

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<sup>4</sup> Defendant’s Amended Answer to Plaintiff’s Verified Complaint Pursuant to *Del. C. § 220 To Compel Inspection of Books and Records*, dated February 13, 2008 (the “Answer”, Long Aff., Ex. 4) ¶ 36.

<sup>5</sup> *Jos. A. Bank Clothiers, Inc.’s Motion for Protective Order*, dated April 18, 2008 (the “Protective Order Motion”, Long Aff., Ex. 5), at ¶ 20.

Company (equally erroneously) asserts that the Committee's activities prevent a shareholder from reviewing corporate books and records.

14. The Company's argument in this case is based on a fundamental confusion of a derivative action with a demand for documents pursuant to Section 220, which is an individual right of a stockholder that "[f]undamentally . . . exists independently of any claim the stockholder might ultimately choose to bring" in the future. *Kaufman v. Computer Assocs. Intern.*, C.A. No. 699-N, 2005 Del. Ch. LEXIS 192, at \*9 (Del. Ch. Dec. 21, 2005). As this Court has explained repeatedly, a stockholder document inspection demand proceeding is *not* a fiduciary duty action on behalf of a company; rather, it is a mechanism for a holder to conduct due diligence and consider, among other things, whether such an action *should* be brought. *See Kaufman*, 2005 Del. Ch. LEXIS 192, at \*14; *see also Security First Corp.*, 687 A.2d 567 n.3 (Delaware law "encourage[s] the use of Section 220 [as an] information-gathering tool in the derivative context"); *Romero v. Career Educ. Corp.*, C.A. No. 793-N, 2005 Del. Ch. LEXIS 112, at \*\*8-10 (Del. Ch. July 19, 2005) (permitting Section 220 action to proceed following appointment of special litigation committee), *reargument denied*, 2005 Del. Ch. LEXIS 172 (Del. Ch. Nov. 4, 2005).

15. Plaintiff believes – based on facts made public to date – that there likely is a substantial basis to proceed on behalf of the Company against the Board for the misconduct alleged in the Securities Action. Indeed, it is precisely in order to conduct its due diligence – in the manner endorsed and encouraged by numerous decisions of this Court – that Plaintiff has filed this Complaint. Should Plaintiff, after reviewing the

records the Company has refused to provide to date, choose to file a derivative action *and* should the Company thereafter choose to oppose the hypothetical proceeding, the defendants *might* then attempt (successfully *or* unsuccessfully) to assert the activities of the Committee as a defense. *Kaufman*, 2005 Del. Ch. LEXIS 192, at \*14. But, as this Court recognized in *Kaufman*, it is premature to consider that hypothetical in connection with a Section 220 action. *Id.*

16. To the extent that the Company is suggesting that the Committee somehow has the authority to police or limit, let alone prevent, Plaintiff from exercising its statutory inspection rights, Jos. A. Bank is on the wrong side of Delaware law once again.

17. In *Kaufman*, a special litigation committee sought to stay the production of materials in response to a stockholder's Section 220 request, reasoning that the Section 220 proceeding could risk interfering with the committee's then-ongoing consideration of a stockholder demand with respect to the same subject matter. The committee argued – much like the Company here – that, because Delaware law may permit a properly constituted independent board committee to control derivative litigation, it should permit the committee to control stockholder Section 220 document demands as well.

18. The Court rejected the committee's argument reasoning that – while a Section 220 proceeding might properly be limited on a showing that it would actually interfere with the active workings of a special litigation committee – “courts have generally allowed Section 220 actions to proceed despite the presence of even a well constituted committee.” *Id.* at \*9 (citing cases). Following this well-established rule, the

Court permitted the plaintiff in *Kaufman* to proceed with her Section 220 demand during the pendency of an active special committee investigation, reasoning that the burden on the company was light. *Id.* at \*13.

19. The rejection of the Company's affirmative defense follows *a fortiori* from the holding in *Kaufman* and the decisions cited therein. According to the Company's pleadings before this Court, the Committee has completed its review and rendered its decision not to proceed with actions against the officers and directors who allegedly participated in the fraud scheme. Accordingly, *unlike* in *Kaufman*, there is not even a theoretical risk that permitting Plaintiff to exercise its right as a stockholder to review Company books and records will interfere with a board inquiry. Furthermore, the burden of compliance on the Company is all but non-existent. Plaintiff is seeking materials respecting inquiries conducted by outside law firms and the Committee's consideration thereof that are likely maintained in one or more easily accessible locations and readily copied. In sum, neither the governing law nor any claim of burden can justify the Company's attempt to forestall Plaintiff from exercising its statutory right to review corporate materials.

20. The Court of Chancery's subsequent ruling in *Kaufman v. CA Inc.*, 905 A.2d 749 (Del. Ch. 2006) ("*Kaufman II*") does not limit the scope of documents Plaintiff can receive. By the time the Court of Chancery decided the Motion to Compel filed by the plaintiff in *Kaufman II*, that case had developed an extremely divergent factual and procedural history to this case. In *Kaufman II*, the defendant had already produced "considerable documentation," (*id.* at 750), that consisted of a "wide range of

documents.” *Id.* at 751. Because the defendant had already produced so many documents, the Court was only faced with the issue of whether to force the defendant to produce an additional fifty-four documents sought by the plaintiff, as well as unredacted versions of certain “key documents” that had already been produced. Accordingly, the Court in *Kaufman II* never faced the issue of whether the mere presence of a special committee report precluded the production of documents to investigate potential mismanagement.<sup>6</sup> Instead, in refusing the plaintiff’s request for the discrete set of additional documents, the fact that the defendant had already produced a “wide range of highly probative documents” formed a significant part of the Court’s decision. *Id.* at 754. (In denying the plaintiff’s request for limited, additional documents, the Court stated “the plaintiff has been given a wide range of basic documents that should provide her with a substantial basis to investigate misconduct at [the defendant]. Moreover, [the defendant] has offered to produce voluminous quantities of other documents....”) *Id.*

21. The Court of Chancery’s decision in *Grimes v. DSC Commc’ns Corp.*, 724 A.2d 561 (Del. Ch. 1998), cited in *Kaufman II*, likewise neither limits Plaintiff’s access to documents nor the scope of what Plaintiff is entitled to receive. In *Grimes*, the plaintiff did not make his books and records demand until after he already had made two demands on the board of the defendant, the first of which requested that the Board rescind the compensation package awarded to that company’s chief executive officer. After the board refused that demand, the plaintiff filed a derivative lawsuit in the Court of Chancery. Subsequently, the Court granted a motion dismissing that complaint for

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<sup>6</sup> The defendant in *Kaufman II* conceded the propriety of the plaintiff’s demand. *Id.* at 753.

failure to state a claim on which relief could be granted, and for failure to make a pre-suit demand. *Id.* at 564.

22. Further differentiating this case from *Grimes*, the plaintiff in that case subsequently made a second demand on the Board of the defendant.<sup>7</sup> *Id.* In response, the defendant formed a special committee to investigate the allegations underlying the demand. Subsequently, that committee recommended that the plaintiff's demand be rejected, which recommendation the board accepted. *Id.* The plaintiff in *Grimes* responded by demanding certain books and records pursuant to Section 220 relating to the "formation, investigation and report of the Special Committee and the board's decision to accept the Special Committee's recommendation." *Id.* The plaintiff stated that his purpose was to "determine the independence of the Special Committee and whether the Special Committee and Board have complied with Delaware law in their analysis and rejection of the Demand." *Id.* at 564-565. The defendant in *Grimes* then produced certain documents, apparently numbering somewhere around 2800, but refused to produce the Special Committee's report or any documents accompanying it. *Id.* at 565.

23. After determining that the plaintiff's purpose was proper, the Court of Chancery addressed the scope of documents to be produced in the context of an investigation into a special litigation committee's independence and efficacy. In doing so, the Court of Chancery articulated the scope of production it deemed appropriate under those circumstances, stating that those documents "should suffice for the purposes of

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<sup>7</sup> In the context of Plaintiff's discussion of *Grimes*, defendant refers to DSC Communications, Inc., the defendant in the books and records action.

establishing or raising reasonable grounds for suspicions about a special committee's independence, good faith, and due care." *Id.* at 567.

24. The notion that *Grimes* should limit the availability or scope of this production sought in this case is unfounded. Not only was the plaintiff in *Grimes* in a unique and different posture than Plaintiff, the stated purpose for seeking documents in *Grimes* was markedly different, as was the type of documents that the plaintiff was seeking. Indeed, one might argue that the plaintiff in *Grimes* was several steps ahead of Plaintiff here, having already made several demands on the defendant's board. Here, Plaintiff is merely investigating potential wrongdoing. As set forth herein, credible evidence exists that such wrongdoing occurred. Plaintiff has not filed a derivative suit. Plaintiff has not made any demand on the Board. Indeed, depending on the information in the documents to which Plaintiff legally is entitled, Plaintiff may never do so. All that Plaintiff is asking for now is the chance to determine what next steps, if any, it should take in light of multiple rulings by a federal district court that significant wrongdoing likely occurred at the Company. Accordingly, to limit the scope of any production here based on what was produced in *Grimes* under different circumstances would be contrary not only to the applicable law, but also the principles underlying Section 220, and thus against the public policy of Delaware. The Committee report is simply irrelevant to Plaintiff's inquiry, and there is no reason, or precedent, for linking the Committee report to Plaintiff's books and records demand at this early stage, when Plaintiff is merely investigating wrongdoing. Such linkage, if any, should not even be considered until

Plaintiff has made a demand on the Board, or commences a derivative suit. *Grimes*, thus, is inapposite.

25. *Second*, the Company raises the legal defense that the Complaint is barred by *res judicata* and issue preclusion, apparently because a derivative action filed by another stockholder was dismissed by a Maryland federal court for failure adequately to plead demand futility. *See* Long Aff., Ex. 4 at ¶ 35. This Court has held that issue preclusion may apply where a derivative action was dismissed on demand grounds *and* a plaintiff in a subsequent identical derivative action fails, among several other things, to allege that the initial stockholder plaintiff provided inadequate representation to the Company. *See In re Career Educ. Corp. Deriv. Litig.*, Consol. C.A. No. 1398-VCP, 2007 Del. Ch. LEXIS 184 (Del. Ch. Sept. 28, 2007). This is not a derivative action. Plaintiff filed the complaint to conduct an investigation that the initial derivative plaintiffs failed to undertake in contravention of the “repeated admonitions” of this Court, and that may have caused them inadequately to represent the Company’s interests.<sup>8</sup> The Court should not permit the federal plaintiff’s inadequate representation to prejudice Plaintiff’s legitimate statutory inspection rights under Delaware law.<sup>9</sup> Indeed, crediting

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<sup>8</sup> *Guttman v. Huang*, 823 A.2d 492, 504 (Del. Ch. 2003) (“repeated admonitions of the Delaware Supreme Court and [Chancery Court have directed] derivative plaintiffs to proceed deliberately and use the books and records [inspection provision] to gather the materials necessary to file a solid complaint”).

<sup>9</sup> In *In re Career Educ.*, the Court specifically noted that the dismissed federal derivative complaint “[u]ndoubtedly” contained facts lifted from the Delaware complaint which included facts obtained in a *prior* books and records demand. *In re Career Educ.*, 2007 Del. Ch. LEXIS 184 at \*34. Such is not the case here. The federal court was highly critical of plaintiff’s failure to plead specific particularized facts. Long Aff., Ex. 8 at 8-9. Indeed, the adequacy of the representation of the federal plaintiff is called into question

the Company’s preclusion defense here would prove “unfair” and fly in the face of the policy of this State to encourage shareholders to conduct diligent inquiries before seeking to assert derivative claims. *See West Coast Management & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 643 n.22 (Del. Ch. 2006).

26. *Finally*, the Company asserts that the Complaint is barred by the doctrine of laches, apparently based on a supposed “delay” in making the books and records request. *See Long Aff.*, Ex. 4 at ¶ 34; *see also Long Aff.*, Ex. 5 at ¶ 14. Once again, the Company finds itself at odds with the governing law. Laches requires proof of, among other things, (a) an unreasonable delay by the plaintiff in bringing the claim; and (b) prejudice to the defendant arising from such delay. *In re Tenenbaum*, 918 A.2d 1109, 1123 (Del. 2007). The undisputed facts fail to support either requisite element. Plaintiff has not remotely dallied in filing the Complaint. The federal court issued both its first decision upholding the Securities Action complaint and its decision rejecting the defectively pled derivative action in September, while Plaintiff here requested books and records a month later. The Company does not – and cannot – establish that it was prejudiced by not being asked to produce the books and records at issue earlier. To the contrary, the Company has itself been delaying the process unnecessarily while having, at the same time, to produce documents in the Securities Action.

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by the fact that counsel failed to make use of the statutory “tools at hand” by seeking corporate books and records in drafting even their amended complaint, which the federal court ultimately dismissed.

**CONCLUSION**

For the reasons stated herein, Plaintiff respectfully requests the Court to enter a judgment in Plaintiff's favor and Order Jos. A. Bank to produce all of the materials Plaintiff requested in its Complaint.

Dated: September 10, 2008

RIGRODSKY & LONG, P.A.

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