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Case No. 3443-VCP

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.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff, Norfolk County Retirement System ("Norfolk"), respectfully submits this Memorandum of Law in Opposition to the Motion of Jos. A. Bank Clothier, Inc. ("Jos. A. Bank" or the "Company") for Summary Judgment.

INTRODUCTION

In its summary judgment motion, Jos. A. Bank makes two arguments: (1) that it has already provided sufficient documents to plaintiff, *i.e.*, that the scope of what Norfolk seeks is too broad and (2) that Norfolk should be precluded from undertaking a *Section 220* investigation because Norfolk supposedly would be unsuccessful in some hypothetical future derivative action. Jos. A. Bank is wrong on both fronts as a matter of law.[1]

First, the inspection sought by plaintiff is tailored to ***plaintiff's stated purpose***, not to the stated purpose of the plaintiff in *Grimes. Grimes* and *Kaufman* stand for the unexceptional and settled proposition that when a *Section 220* plaintiff states a proper purpose, that plaintiff is entitled to get documents that are necessary and essential to the satisfaction ***of that plaintiff's stated purpose***. Contrary to what defendant argues, *Grimes* and *Kaufman* do not stand for the proposition that in all cases where a special litigation committee is appointed, a *Section 220* plaintiff is limited to the documents listed in *Grimes*. Such a result would be inconsistent with the statute and the case law that has developed interpreting the statute. Moreover, such a result would be "the exception that swallows the rule" – any books and records demand could be narrowed significantly simply by appointing a special litigation committee. Nothing in *Section 220* requires such a result.

Defendant is also wrong when it argues that the possibility of collateral estoppel in some hypothetical future derivative action would preclude a *Section 220* investigation here. Contrary to defendant's argument, collateral estoppel would only preclude a second derivative action if the claims in that second action were substantially similar to the claims in the first action. Plaintiff cannot know now whether the investigation it seeks would end up resulting in a derivative claim and, if so, what allegations

[1] While plaintiff agrees with defendant that there are no triable issues of fact here, as plaintiff demonstrates in its own motion, summary judgment should be granted here in favor of plaintiff.

might be in that derivative complaint. If, after being permitted to undertake a *Section 220* investigation, plaintiff chooses to file a new derivative action, defendant would certainly be free to attempt to argue collateral estoppel at that juncture.

BACKGROUND

The Complaint asserts the following three purposes:

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 customer 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.

Defendant's summary judgment motion does not dispute that these purposes are reasonably related to plaintiff's interests as a shareholder of Jos. A. Bank. Neither does the motion dispute that these purposes are proper pursuant to *Section 220*.[2]

The misconduct that plaintiff seeks to investigate is the subject of a securities fraud class action that is currently pending in the U.S. District Court for the District of Maryland (*Lefkoe v. Jos. A. Bank Clothiers, et al.,* Civ. No. WMN-06-1892). In that action, the defendants, which include Jos. A. Bank, have moved both to dismiss the action and for judgment on the pleadings. Both motions were denied. In denying the motion to dismiss, the court found that the plaintiffs had adequately alleged "that, on approximately 12 separate occasions, defendants 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." Sept. 10, 2007 Slip Op. at 11-12. The Maryland federal court further held that

[2] Defendant's summary judgment motion also does not dispute that plaintiff correctly followed the technical procedures required under *Section 220*.

the plaintiff had adequately alleged that defendants' statements and omissions "concealed the fact that the Company's inventories of Fall/Winter 2005 merchandise had swelled to unprecedented levels, forcing the Company to take drastic action to liquidate the merchandise." *Id.* at 12.

The books and records the Complaint here seeks are solely "Board Materials"[3] concerning:

A. Financial data reporting procedures and controls;

B. Inventory management procedures and controls;

C. Inventory tracking, auditing and reporting procedures and controls;

D. Inventory levels between June 1, 2005, and June 15, 2005;

E. Pricing strategies between June 1, 2005, and June 15, 2005;

F. Compliance or non-compliance with GAAP;

G. Auditing procedures and controls;

H. Quarterly and annual financial statements for fiscal years 2005 through present;

I. The Company's June 2006 Form 10-Q;

J. Any internal investigation concerning the above categories; and

K. Any governmental or regulatory investigation concerning the above categories.

Subsequent to the filing of the Complaint, defendants voluntarily provided to plaintiff a copy of the Special Litigation Committee Report and exhibits thereto, and certain minutes related thereto. These documents are arguably responsive to Request J.

ARGUMENT

I. THE SCOPE OF DOCUMENTS NORFOLK SEEKS IS APPROPRIATE

Defendant argues that by providing to plaintiff the Special Committee Report and minutes that it has somehow "mooted" this action. In essence, it is arguing that the scope of inspection that plaintiff

[3] The Complaint defines "Board Materials" to mean "all documents concerning, related to, provided at, considered at, discussed at, or prepared or disseminated in connection with any meeting of the Company's Board of Directors of any regular or specially created committee thereof, including all presentations, board packages, recordings, agendas, summaries, memoranda, transcripts, notes, minutes of meetings, drafts of minutes of meetings, exhibits distributed at meetings, summaries of meetings, or resolutions." Complaint ¶ 6A n.1.

seeks in this action – which is beyond the limited documents that defendant has provided – is too broad. However, the inspection sought here is appropriately tailored to address the wrongdoing that defendant does not dispute is properly alleged.

While Section 220 does not allow for a broad "fishing expedition," "'where a § 220 claim is based on alleged corporate wrongdoing . . . the stockholder should be given enough information to effectively address the problem . . .'" Melzer *v. CNET Networks, Inc.*, 934 A.2d 912, 918 (Del. Ch. 2007) (quoting *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 115 (Del. 2002)). Generally, courts have "'wide latitude in determining the proper scope of inspection,' and . . . must 'tailor the inspection **to *the stockholder's stated purpose***.'" *Id.* (emphasis added) (quoting *Security First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 569 (Del. 1997)).

A. *Grimes* and *Kaufman* Do Not Limit the Scope of Production Here to the Documents Defendant Has Already Produced

Defendant would like to "tailor the inspection" here not to Norfolk's stated purpose, but to the stated purpose in *Grimes*, which is different from the present case. In *Grimes*, the plaintiff's stated purpose was to investigate: "(i) the formation, investigation and report of the Special Committee appointed by DSC to investigate a pre-suit demand the plaintiff made on June 5, 1996; and (ii) the DSC board's decision to accept the Special Committee's recommendation to reject the plaintiff's pre-suit demand." *Grimes v. DSC Communications Corp,* 724 A.2d 561, 563 (Del. Ch. 1998). Consistent with prior Supreme Court precedent, the Court in *Grimes* tailored the scope of production to those documents that are "essential to achieving [plaintiff's] stated purpose as required by *Section 220.*" *Id.* at 567. Thus, the Court found that "the right to obtain corporate records for [plaintiff's stated] purpose of determining whether or not a demand was improperly refused focuses on the committee process itself and extends at least to reports or minutes, reflecting the corporate action." *Id.* (quotations omitted). Thus, given the specific purpose *in that particular case*, the Court held that "plaintiff is 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." *Id.*

(footnote omitted.) The court concluded: "Ordinarily, these basic documents should suffice for the purposes of establishing or raising reasonable grounds for suspicions about a special committee's independence, good faith and due care," (*id.*), plaintiff's stated purpose.

In *Kaufman v. CA, Inc.,* 905 A.2d 749 (Del Ch. 2006), the plaintiff's purpose in filing her *Section 220* action was to determine: "whether any or all of the Individual Officers and/or Directors have breached fiduciary duties and wasted corporate assets by a) causing the Company to pay all the consideration in connection with the resolution in August 2003 of certain security and ERISA class action litigation . . . and b) participating and/or aiding and abetting the obstruction of a government investigation . . . ." *Id.* at 751.

The Court began its analysis by reviewing the well-settled standards for a books and records action:

> The standard for a books and records demand under *Section 220* is well known. As this court has explained, Delaware law allows a stockholder a statutory right to inspect the books and records of a corporation so long as certain formal requirements are met, and the inspection is for a proper purpose. Moreover, relief under *Section 220* is limited only to the inspection of books and records that are necessary and essential to the satisfaction ***of the stated purpose***.

Id. at 753 (emphasis added).

After reviewing *Grimes*, the Court concluded:

> The present motion can be decided on the same principles [as in *Grimes*]. *The defendant has received from CA a wide range of highly probative documents, including lightly redacted notes of all board meetings from the entire period in which any misconduct could have occurred, internal documents laying out CA's legal strategy, WLRK's talking points to present to the government, and even summaries of interviews conducted with central figures in the fraud . . . . In compliance with* Grimes*, therefore, the plaintiff has been given a wide range of basic documents that should provide her with a substantial basis to investigate potential misconduct at CA.*

Id. at 754 (emphasis added).

Thus, *Grimes* and *Kaufman* stand for the unexceptional and settled proposition that when a *Section 220* plaintiff states a proper purpose, that plaintiff is entitled to get documents that are necessary and essential to the satisfaction ***of that stated purpose***. In *Grimes*, that stated purpose was "to inquire into the independence, good faith and due care of the Special Committee." *Grimes*, 724 A.2d at 567. In

Kaufman, the stated purpose was "to investigate potential misconduct at CA." *Kaufman*, 905 A.2d at 754. In both cases, the Court merely applied the law to the particular stated purpose in that case and determined the proper scope of production. Neither case stands for the proposition that when a company's board appoints a special committee that any *Section 220* plaintiff will then be entitled to only the documents outlined in *Grimes*, regardless of the *Section 220* plaintiff's stated purpose. Such a conclusion is inconsistent with both the clear language of the statute and the law that has developed interpreting that statute.

B. The Specific Documents Plaintiff Seeks Are Necessary and Essential to the Satisfaction of Plaintiff's Stated Purpose

Contrary to the implication of defendant's motion that plaintiff is on some kind of "fishing expedition" and seeks to undertake a broad and burdensome inspection,[4] a review of the documents that plaintiff *actually* seeks shows requests that are not burdensome, but are narrowly tailored to plaintiff's stated purpose. Thus, while the Complaint requests 11 categories of documents, ¶ 6, ***all of the requests*** are limited to "Board Materials." It is probable that Jos. A. Bank's Secretary has at his or her fingertips all such Board Materials and they can easily be produced to plaintiff. Moreover, the categories of documents plaintiff seeks are, as required, tailored to plaintiff's purpose. Thus, to investigate the wrongdoing that is alleged in the securities fraud action pending in the Maryland federal court, plaintiff seeks Board Materials concerning the Company's inventory levels, pricing strategies, accounting, and auditing, and any investigation concerning these issues. These are the exact issues that are at the center of the securities fraud suit that led plaintiff to file the present books and records action.

II. THE IMAGINED MERITS OF A HYPOTHETICAL FUTURE DERIVATIVE ACTION DO NOT DETERMINE WHETHER OR NOT PLAINTIFF IS ENTITLED TO UNDERTAKE A *SECTION 220* INVESTIGATION

Defendant makes the circular argument that plaintiff is not entitled to make a factual investigation of corporate wrongdoing because plaintiff does not yet have a factual basis to challenge that wrongdoing

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[4] *See, e.g.,* Def. Opening Br. at 1 ("reams of additional documents"); *id.* at 15 ("freewheeling investigation of all conceivable underlying documents in the corporation's possession"); *id.* at 16 ("wide-open investigation"); *id.* at 18 ("massive document inspection").

in some hypothetical future derivative action. However, plaintiff's right to undertake an investigation under *Section 220* is independent of any future derivative action plaintiff may or may not choose to file. In fact, the Delaware Supreme Courts suggests that plaintiffs bring books and records actions prior to attempting to file a derivative action to use the "'tools at hand' to obtain the necessary information before filing a derivative action." *Schoon v. Smith*, 953 A.2d 196, 208 n.47 (Del. 2008). Moreover, neither plaintiff nor the Court can know what might be pled in this hypothetical future derivative action until plaintiff is allowed to undertake the investigation it seeks by this action.[5]

The Delaware Supreme Court has made it clear that whether or not a plaintiff would ultimately be successful in some hypothetical future derivative action does not guide the results of a *Section 220* action where a shareholder seeks books and records to investigate corporate wrongdoing. Thus, in *Saito*, the Court of Chancery found that the plaintiff's purpose was proper but limited the scope of the investigation because the plaintiff would not have had standing to pursue a derivative action with allegations relating to the time before the plaintiff purchased the company's stock. The Supreme Court reversed this determination finding that standing in some hypothetical future derivative action was irrelevant to the scope of the investigation:

> Although we recognize that there may be some interplay between the two statutes, we do not read § *327* as defining the temporal scope of a stockholder's inspection rights under § *220*. The books and records statute requires that a stockholder's purpose be one that is "reasonably related" to his or her interest as a stockholder. The standing statute, § *327*, bars a stockholder from bringing a derivative action unless the stockholder owned the corporation's stock at the time of the alleged wrong. If a stockholder wanted to investigate alleged wrongdoing that substantially predated his or her stock ownership, there could be a question as to whether the stockholder's purpose was reasonably related to his or her interest as a stockholder, especially if the stockholder's only purpose was to institute derivative litigation. But stockholders may use information about corporate mismanagement in other ways, as well. They may seek an audience with the board to discuss proposed reforms or, failing in that, they may prepare a stockholder resolution for the next annual meeting, or mount a proxy fight to elect new directors. None of those activities would be prohibited by § *327*.

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[5] Defendant's attempted attack on Norfolk's designee and its investment managers falls flat. The testimony that defendant cites, on pages 9-10, does nothing more than establish that Norfolk relied upon the advice of counsel and that absent an investigation, they do not have sufficient information to form an opinion about whether a fraud was committed at Jos. A. Bank – the very reason why plaintiff's investigation is necessary. Moreover, defendant does not argue that Norfolk's stated purposes in its demand letter and its Complaint – both of which were authorized by Norfolk – are not proper purposes.

Saito v. McKesson HBOC, Inc., 806 A.2d 113, 117 (Del. 2002); *accord Kaufman v. Computer Assocs. Int'l, Inc.*, 2005 Del Ch. LEXIS 192, at *9 (Del. Ch. Dec. 21, 2005) ("Fundamentally, the right to proceed under *Section 220* to inspect books and records exists independently of any claim the stockholder might ultimately choose to bring.").

The same rationale applies here as in *Saito*. Here, defendant has conjured up a hypothetical future derivative action and argues that such a hypothetical action would be barred by collateral estoppel. Then, defendant argues that because supposedly no derivative action could be brought, that this somehow means that plaintiff's *Section 220* action must fail. However, defendant chooses to ignore that plaintiff's second purpose is merely to "assess" the Board's ability to impartially consider a derivative demand, and plaintiff's third purpose is "[t]o take appropriate action in the event the members of the Company's Board of Directors did not properly discharge their fiduciary duties." Complaint ¶ 7B-C. The Complaint neither specifies that plaintiff will definitely file a derivative action, nor if plaintiff decides to take "appropriate action," what that action might be. Additionally, if the Court allows plaintiff to undertake the investigation that it seeks, such an investigation might result in the conclusion that, in fact, there was no corporate wrongdoing and, therefore, no further action of any kind need be taken.[6]

Moreover, the cases defendant cites do not stand for the proposition that *any* derivative action that plaintiff might end up bringing would be barred by collateral estoppel, as defendant implies, but only an action with substantially the same allegations as the prior derivative action that was dismissed. In fact, defendant's motion is misleading when it cites *West Coast Management* for the proposition that under recent federal case law "collateral estoppel bars all subsequent plaintiffs from relitigating demand futility," (Def. Br. at 18), implying that the Court agreed with that proposition, and defendant's motion incorrectly states, "This Court has adopted those recent federal cases." Id. In fact, the opposite is true: In

[6] Moreover, even if plaintiff's sole purpose was to obtain information for a derivative suit, which is not the case here, whether or not that suit would ultimately be successful does not necessarily determine the scope of the investigation. *See Saito,* 806 A.2d at 117.

the footnote to this expression in *West Coast Management*, V.C. Lamb disagrees with the rationale of those very federal cases:

> Equitable considerations render dubious the majority position on this issue. *Preventing subsequent individual plaintiffs from bringing potentially meritorious suits based on additional information gained in a section 220 demand would undercut the purpose of the statute and the policy concern articulated by the Delaware Supreme Court that plaintiffs should employ section 220 before filing suit.* ***While a prior suit by another plaintiff with similar allegations of demand futility may bar a second plaintiff from filing the same suit, if the second plaintiff makes substantially different allegations of demand futility based on additional information, issue preclusion, from both a logic and fairness standpoint, would not apply***.

West Coast Mgmt. & Capital, LLC v. Carrier Access Corp., 914 A.2d 636, 643 n.22 (Del. Ch. 2006) (emphasis added). Similarly, in *Career Education*, which is also relied upon by defendant, (Def. Br. at 18-19), this Court held that a second derivative action was precluded because the second complaint contained "essentially the same allegations and claims" as the first action. *In re Career Educ. Corp. Deriv. Litig.,* 2007 Del. Ch. LEXIS 184, at *2 (Del. Ch. Sept. 28, 2007); *see also id.* at *48-49 (concluding that the first court "did consider demand excusal in relation to all of the plaintiffs' claims, including those for insider trading, based on all the allegations in the [first] Complaint, which included everything averred in this case"); *id.* at *46 ("similarities between the insider trading claims . . . support application of the doctrine of issue preclusion").

Here, plaintiff does not intend to undertake an investigation merely to file a second action with "essentially the same allegations and claims" as the first action, which was dismissed because the plaintiff in that case failed to plead demand futility with specificity. Just as it cannot yet be known what the investigation sought in this action will uncover, if anything, so it also cannot yet be known whether such an investigation would lead to the filing of a second derivative action and what might be alleged in that action.

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CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that Defendant's motion for summary judgment be denied.

Date: October 3, 2008

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