



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.)

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

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PRELIMINARY STATEMENT

The opposition of plaintiff Norfolk County Retirement System (“Norfolk”) to the motion for summary judgment of Jos. A. Bank Clothiers, Inc. (“the Company”) is most notable for what it does not say:

- It does not identify any purpose for Norfolk’s proposed inspection other than filing a derivative suit based on the allegations set forth in the federal securities complaint.
- It does not make use of the report of the Special Litigation Committee (“SLC”) or any of the other documents provided to Norfolk to dispute the independence, good faith or thoroughness of the SLC’s investigation.
- It does not identify any reason why the SLC’s business judgment not to pursue any claims arising from the allegations set forth in the federal securities class action should not be binding on the Company and its shareholders.
- It does not explain how the prospective derivative suit claims it wishes to investigate and pursue are different from the claims that already have been investigated and discredited by the SLC.
- It does not identify how any argument for demand futility it might make in the future could possibly escape the preclusive effect of Judge Legg’s decision in the first derivative suit that the Company’s Board is independent and capable of considering a derivative demand.

- It does not identify any disputed issue of material fact that would preclude summary judgment in favor of the Company.

The only basis on which Norfolk attempts to escape summary judgment is its claim that this case somehow is not governed by this Court's prior decisions in *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561 (Del. Ch. 1998), and *Kaufman v. C.A., Inc.*, 905 A.2d 749 (Del. Ch. 2006) ("*Kaufman II*"). That attempt is to no avail. *Grimes* and *Kaufman II* impose significant limits upon a prospective derivative plaintiff's inspection rights under Section 220 when the plaintiff has already received the "basic documents" related to an investigation by an independent board committee. Norfolk has already received the documents to which it is entitled under these cases, and it has failed to identify any factual or legal basis under which it is entitled to additional documents. Accordingly, this Court should enter summary judgment in favor of the Company.

ARGUMENT

Norfolk spends most of its brief trying to limit the holdings in *Grimes* and *Kaufman II* to the facts of those cases, and claiming that the purpose for its proposed inspection in this case distinguishes this case from *Grimes* and *Kaufman II*. (See Pl's. Ans. Br. at 4-6.) What Norfolk fails to do, however, is tell the Court how the purpose of its proposed inspection renders *Grimes* and *Kaufman II* inapplicable -- because it cannot do so.

For example, Norfolk asserts that it "cannot now know whether the investigation it seeks would end up resulting in a derivative claim." (*Id.* at 1). But Norfolk has never articulated any purpose for its document demand other than filing a derivative suit, and Norfolk's counsel has acknowledged on the record that filing a derivative suit is the purpose of Norfolk's investigation: "We are trying to seek books and records to support -

if in fact its supportable - demand futility in the derivative context where there is an SLC report.” (July 18, 2008 Tr. at 19; *see also id.* at 22-23, 28-29.) Even now, in its opposition to summary judgment, Norfolk has not articulated any other purpose.¹

Because Norfolk wishes to investigate and pursue a derivative action based on the allegations of the federal securities complaint, it must challenge the business judgment of the SLC, which just conducted an investigation into those very same allegations and concluded that it was not appropriate for the Company to pursue claims based upon them. This is exactly the same situation that existed in *Grimes*. As a consequence, Norfolk is not entitled to receive documents other than the SLC’s Report, its exhibits and related minutes (all of which it already has received) – that is, documents that “should suffice for purposes of establishing or raising reasonable grounds for suspicions about a special committee’s independence, good faith and due care,” unless it “can articulate a reasonable need to inquire further after review of these basic documents.” *Grimes*, 724 A.2d at 567. Norfolk’s failure and inability to articulate how the “basic documents” it has already received raise any “reasonable grounds for suspicion” about the SLC’s

¹ Norfolk’s stated purpose of filing a derivative suit distinguishes this case from *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113 (Del. 2002). In *Saito* -- a case, unlike here, in which a corporation had restated its financial statements and been subjected to an SEC investigation -- the Supreme Court of Delaware identified a number of uses other than a derivative suit to which the information sought by the plaintiff could be put, including a proxy fight, a shareholder resolution, or an audience with the Board to discuss proposed reforms. *Id.* at 117. Norfolk has not articulated any such alternative purposes. The *Saito* Court went on to observe that “if a stockholder wanted to investigate alleged wrongdoing which 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.” *Id.* The only purpose Norfolk has articulated in this case is its desire to file a derivative suit, and accordingly, even under *Saito*, there is no basis for the inspection of books and records beyond those that have already been produced.

investigation is itself a sufficient basis to enter summary judgment in favor of the Company.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Company's motion for summary judgment, the Company respectfully requests that this Court enter summary judgment in its favor.

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