



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. )

**OPENING BRIEF OF DEFENDANT JOS. A. BANK CLOTHIERS, INC.  
IN SUPPORT OF ITS MOTION FOR A STAY OF PROCEEDINGS**

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## **PRELIMINARY STATEMENT**

Defendant Jos. A. Bank Clothiers, Inc. (“the Company”) has moved for a brief stay in this Section 220 action, in which Plaintiff seeks to inspect documents in order to investigate a modest diminution in the Company’s earnings for a single quarter that was announced in June 2006. That “wrongdoing” has already been the subject of a dismissed shareholder derivative suit, a pending securities class action, and is now being investigated by a Special Litigation Committee of the Company’s Board of Directors (the “SLC”). The Company respectfully requests a brief stay of proceedings until the SLC has an opportunity to (1) issue its report, an event that is anticipated to occur in a week or two, and (2) act on that report as appropriate.

Such a stay will not prejudice Plaintiff (which waited almost a year and a half after disclosure of the alleged “wrongdoing” to seek the inspection). Further, the result of the SLC investigation will either eliminate entirely the need for any document inspection pursuant to Section 220, or greatly change the scope of the documents that may properly be reviewed. Accordingly, the Company requests that the Court stay this Section 220 action until at least such time as the SLC completes its investigation, issues its report, and takes any action it deems appropriate.

## **STATEMENT OF FACTS**

### **A. The Company**

The Company's executive management team has served the Company for eight years, since late 1999. The Company's shareholders have enjoyed seven consecutive years of increased annual earnings per share. 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.<sup>1</sup>

The only exception to this pattern of increasing quarter-over-quarter earnings was the first quarter of 2006. Id. 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. That single quarter of very slightly reduced quarterly earnings was a temporary blip; the Company went on to achieve record earnings of more than \$43 million in 2006.

### **B. The Derivative Litigation**

The Company announced its first quarter 2006 results on June 5, 2006. Shortly thereafter, on August 11 and August 28, 2006, two separate derivative suits were filed in response to that announcement. The derivative actions were consolidated before the Honorable Judge Benson Everett Legg, Chief Judge of the U.S. District Court for the District of Maryland. On October 20, 2006, plaintiffs filed a consolidated derivative complaint (the "Derivative Action"). In the Derivative Action, plaintiffs alleged that members of the defendant "made statements in press releases and teleconferences with

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<sup>1</sup> A summary chart, based on data contained in the Company's SEC filings and showing the Company's continuous growth, is attached as Exhibit A to the Affidavit of Sean M. Brennecke ("Brennecke Aff.") filed contemporaneously herewith.

securities analysts during the period from January 5, 2006 to October 20, 2006 that (i) falsely portrayed the Company's inventory and pricing strategies as the driving force behind rising sales and profits, and (ii) omitted the material information that the Company's overstock of seasonal clothing had forced the Company to sell this merchandise at deep discounts, drastically reducing profit margins," thereby breaching their fiduciary duties of loyalty and care and violating Section 14(a) of the Exchange Act. (See Brennecke Aff. Ex. B.)

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. On September 13, 2007, Judge Legg dismissed the complaint 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." (See Brennecke Aff. Ex. B at 10.)

**C. The Securities Class Action**

In addition to the Derivative Action, on July 24 and August 3, 2006, two securities class actions were filed in response to the Company's announcement of the modest earnings decrease in the first quarter of 2006. Those cases were consolidated before Judge William M. Nickerson of the United States District Court for the District of Maryland, and plaintiff Massachusetts Labor Annuity Fund was appointed to serve as Lead Plaintiff. On February 2, 2007, it filed a Consolidated Class Action Complaint (the "Securities Class Action"), making allegations substantially similar to those in the Derivative Action. (See Brennecke Aff. Ex. C.)

**D. The SLC Investigation**

On September 17, 2007, four days after Judge Legg dismissed the Derivative Action, the same plaintiffs' counsel who filed the Derivative Action served a demand letter on the Company, demanding that the Board establish a 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 Brennecke Aff. Ex. D.) Thereafter, the Company's Board appointed a SLC to investigate the matters raised by the shareholder's September 17, 2007 demand letter. (See Brennecke Aff. Ex. E.) The SLC retained the law firm of Kramon & Graham, P.A. to represent its interests and commenced its investigation.

Counsel for the shareholders subsequently informed counsel for 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]." (See Brennecke Aff. Ex. F.)

**E. Plaintiff's Section 220 Demand and Complaint**

Although the earnings announcement that precipitated the Derivative Action and the Securities Class Action was made in June, 2006, Plaintiff did not send its Section 220 demand to the Company until almost eighteen months later, on November 27, 2007 (hereafter "Section 220 Demand" or the "Demand"), well after the SLC had been formed and its investigation of the alleged "wrongdoing" was under way. (See Brennecke Aff. Ex. G.)

Plaintiff's stated purposes for the inspection were 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.

Complaint ¶ 7.

In response to Plaintiff's Demand, the Company informed Plaintiff of the Derivative Action, the pending derivative suit demand, and on-going (and almost completed) SLC investigation. (See Brennecke Aff. Ex. H.) The Company further informed Plaintiff that the completion of the SLC's investigation was imminent, with completion anticipated by the end of January, 2008, and requested that Plaintiff withdraw or defer its Demand until the SLC reports on its investigation. Id.

Instead of contacting counsel for the Company or the SLC, or postponing its Demand briefly to wait for the outcome of the pending SLC investigation as requested, Plaintiff, without explanation, filed the Complaint in this Section 220 action on January 3, 2008. The Complaint relies almost exclusively on the Complaint in the Securities Class Action for its allegations of "wrongdoing." (See Section 220 Complaint ¶¶14-25.)



Nothing in the Complaint suggests that a brief delay would adversely affect the Plaintiff or the Company. The Company answered the Complaint on January 28, 2008, and simultaneously moved for a stay of proceedings.

### **ARGUMENT**

#### **A BRIEF STAY WOULD PROMOTE ECONOMIES OF TIME AND EFFORT FOR THE COURT, LITIGANTS AND COUNSEL.**

To enable courts to manage their dockets, courts possess the inherent power to stay proceedings. Nutzz.com, LLC v. Vertrue Inc., 2006 Del. Ch. LEXIS 137, \*36 (July 25, 2006); Salzman v. Canaan Capital Partners, L.P., 1996 Del. Ch. LEXIS 88, \*14-15 (July 23, 1996); see Landis v. North American Co., 299 U.S. 248, 254 (1936); General Foods Corp. v. Cryo-Maid, Inc., 198 A.2d 681, 683 (Del. 1964). In Kaufman v. Computer Associates Int'l, Inc., 2005 Del. Ch. LEXIS 192, at \*4 (Dec. 21, 2005), this Court declined, “in the exercise of its discretion,” a SLC’s request for a stay of a Section 220 action that would impose “only a minimal burden” on a SLC that was in the midst of a massive investigation of financial accounting scandals. *Id.* at \*15. Here, the SLC is on the verge of completing its work, and considerations of efficiency militate in favor of a brief stay so that the merits of this case can be assessed in light of the issuance of the report of the SLC and any appropriate action taken by the SLC in furtherance of the report.

Such a stay will not prejudice Plaintiff. Plaintiff’s conduct shows that there is no urgent need for the inspection that it seeks by this action. The allegations of “wrongdoing” in Plaintiff’s Demand, which it concedes in its Complaint are the same allegations that give rise to the pending Securities Class Action, concern the events, circumstances, and transactions underlying the Company’s June 2006 Form 10-Q,

including the Company's announcement that its gross profits for the quarter had declined. Plaintiff waited to submit a Section 220 demand until November 27, 2007, almost a year and a half after the alleged revelation of "wrongdoing," and after a shareholder derivative complaint had been dismissed, and after the SLC had been created at the behest of the same stockholders that had filed the dismissed lawsuit.<sup>2</sup> Plaintiff has identified no prejudice it would suffer from a brief stay of proceedings to permit the SLC to complete its work.

Furthermore, the SLC's decision is likely to dramatically change the scope of Plaintiff's inspection demand. At the conclusion of its investigation, the SLC will either pursue the same claims that Plaintiff seeks to investigate, or decline to pursue those claims, or take any other action that it deems appropriate. Under any of these circumstances, the nature and propriety of Plaintiff's Demand will be affected. If the SLC decides to pursue the alleged derivative claims, there likely will be no reason for Plaintiff to investigate the alleged "wrongdoing." If the SLC issues a report demonstrating that pursuing such claims is not in the Company's best interest, then the Plaintiff may agree, and drop its Demand. Even if the Plaintiff does not agree, and still wishes to pursue a derivative suit, then it will have to challenge the SLC's decision under the limited standards applicable to demand-refused cases, which will likely shrink the scope of documents that may properly be reviewed under Section 220.<sup>3</sup>

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<sup>2</sup> In Kaufman, by way of contrast, the SLC was not formed until several months after the Section 220 action was filed. 2005 Del. Ch. LEXIS 192, at \*4-5. The motion for stay was not submitted for decision until several more months had passed.

<sup>3</sup> Additionally, because the SLC's investigation in this case was premised on a prior derivative demand requesting investigation of the same allegations of "wrongdoing," by the time Plaintiff completes its investigation another action may well be filed either by the SLC or the shareholders who made the demand challenging demand-refusal. Either way, any derivative action

A subsequent decision in the Kaufman litigation is instructive. After the stay was denied, the corporation produced certain documents to the shareholder and withheld others. The plaintiff then moved for production of the withheld documents. In denying the motion, the Court applied the “same principles” as are used in Section 220 cases involving investigations by independent committees, under which certain basic documents about the functioning of the special committee are deemed sufficient. Kaufman v. CA, Inc., 905 A.2d 749, 754 (Del. Ch. 2006) (citing Grimes v. DSC Communications, 724 A.2d 561 (Del. Ch. 1998)). Here, the merits of the Section 220 action should not be litigated until the set of basic documents relating to the SLC’s work is finalized.<sup>4</sup>

### **CONCLUSION**

Proceeding with the Section 220 action prior to the time when the SLC completes its investigation and issues its report will unnecessarily waste the resources of the Company, the litigants, and the Court. For all the foregoing reasons, the Company

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subsequently filed by Plaintiff will be subject to a stay or dismissal motion under McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng. Co., 263 A.2d 281 (Del. 1970).

<sup>4</sup> Another factor supporting a stay is the flimsiness of Plaintiff’s alleged purpose to inquire into whether the Company’s Board can impartially consider a derivative demand. That issue is already decided against Plaintiff, as a matter of collateral estoppel, as a result of Judge Legg’s decision in the Derivative Action. See West Coast Mgmt. & Capital, LLC v. Carrier Access Corp., 914 A.2d 636 (Del. Ch. 2006)(no “proper purpose” for Section 220 inspection existed where federal district court’s dismissal of shareholder’s first derivative suit due to failure to adequately plead demand futility precluded shareholder from pursuing a second derivative suit under the doctrine of issue preclusion); In re Career Education Corp. Deriv. Litig., 2007 WL 2875203 (Del. Ch. Sept. 28, 2007)(all claims of derivative plaintiffs were dismissed with prejudice under doctrine of issue preclusion on grounds that plaintiffs were precluded from relitigating issue of demand futility based on previous judgment of another court that a different set of shareholders failed to plead demand or demand futility with the requisite particularity). See also Leboyer v. Greenspan, 2007 WL 4287646 (C.D.Cal. June 13, 2007); Henik ex rel. LaBranche & Co. v. LaBranche, 433 F.Supp.2d 372 (S.D.N.Y.2006); In re Sonus Networks, Inc. S’holder Deriv. Litig., 422 F.Supp.2d 281 (D.Mass.2006), aff’d 499 F.3d 47 (1st Cir. Aug. 16, 2007).

respectfully requests that this Court enter an order staying this Section 220 action until such time as the SLC completes its investigation, issues its report, and takes whatever action, if any, it deems appropriate.

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