



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NORFOLK COUNTY RETIREMENT SYSTEM, )  
)  
Plaintiff, )  
v. )  
) C.A. No. \_\_\_\_\_  
JOS. A BANK CLOTHIERS, INC., )  
)  
Defendant. )

**VERIFIED COMPLAINT PURSUANT TO 8 DEL. C. § 220  
TO COMPEL INSPECTION OF BOOKS AND RECORDS**

Plaintiff brings this action against defendant Jos. A. Bank Clothiers, Inc. (“Jos. A. Bank” or the “Company”), seeking relief under 8 *Del. C.* § 220, and for its complaint alleges upon knowledge as to itself and otherwise upon investigation of counsel and information and belief as follows:

1. Plaintiff hereby seeks to enforce its right to inspect certain corporate books and records of Jos. A. Bank pursuant to Section 220 of the Delaware General Corporation Law (“Section 220”).

2. Jos. A. Bank is, and at all times relevant to this action has been, a Delaware corporation. Jos. A. Bank’s principal place of business is located at 500 Hanover Pike, Hampstead, Maryland, 21074.

3. Plaintiff is, and at all times relevant to this action has been, a beneficial holder of Jos. A. Bank common stock.

4. On November 27, 2007, counsel for plaintiff sent a letter on plaintiff’s behalf to Jos. A. Bank (the “Demand” or “Demand Letter”) at its principal place of business. (Exhibit A) Plaintiff’s counsel attached to the Demand Letter a limited power of attorney executed by plaintiff authorizing its counsel to make the Demand on its behalf. (Exhibit A-1 hereto) Plaintiff’s counsel also attached a true and correct copy of a recent brokerage account statement

reflecting plaintiff's beneficial ownership of Company common stock to the Demand Letter. (Exhibit A-2 hereto)

5. Plaintiff sent the Demand Letter to Jos. A. Bank's corporate headquarters via Federal Express. The Federal Express tracking information for the Demand Letter indicates that it was received and signed for by "K. Collins" at 9:35 a.m. on November 28, 2007. Plaintiff also caused the Demand Letter to be served by hand delivery on the Company's registered agent for service of process in Delaware on November 27, 2007.

6. By the Demand Letter and pursuant to Section 220, plaintiff demanded to inspect and copy certain books and records of the Company including the following:

A. All Board Materials<sup>1</sup> concerning the Company's financial data reporting procedures and controls, including, but not limited to, the establishment, modification, implementation, and/or oversight<sup>2</sup> of any such procedures or controls;

B. All Board Materials concerning the Company's inventory management procedures and controls, including, but not limited to, the establishment, modification, implementation, and/or oversight of any such procedures or controls;

C. All Board Materials concerning the Company's procedures and controls for tracking, auditing and reporting its inventory levels, including, but not limited to, the establishment, modification, implementation, and/or oversight of any such procedures or controls;

---

<sup>1</sup> The term "Board Materials" as used in the Demand Letter and herein means 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 or Directors or 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.

<sup>2</sup> The term "oversight" includes without limitation oversight by the Company's Board of Directors, or any committee thereof (including the Company's Audit Committee).

D. All Board Materials concerning inventory levels at the Company for the period June 1, 2005, through and including June 15, 2006;

E. All Board Materials concerning pricing strategies at the Company for the period June 1, 2005, through and including June 15, 2006;

F. All Board Materials concerning the Company's compliance (or noncompliance) with Generally Accepted Accounting Principles;

G. All Board Materials concerning the Company's auditing procedures and controls, including, but not limited to, the establishment, modification, implementation, and/or oversight of any such procedures or controls;

H. All Board Materials concerning the Company's quarterly and annual financial statements for fiscal years 2005 through the present, including without limitation the creation, auditing, and dissemination of any such financial statements;

I. All Board Materials concerning events, circumstances, and transactions underlying the announcements made by the Company in its Form 10-Q filed with the United States Securities and Exchange Commission ("SEC") on or around June 7, 2006 (the "June 2006 Form 10-Q"), through which it reported its financial results for the first fiscal quarter of 2006;

J. All Board Materials concerning any internal investigation by the Company or its accountants or advisors concerning the subject matter of the preceding categories of documents; and

K. All Board Materials concerning any investigation undertaken by the SEC, or any other state or federal governmental or regulatory agency concerning any of the above subject matter defined in categories A through and including J herein.

7. The Demand Letter set forth plaintiff's desire to inspect the documents for the following legitimate and proper purposes, reasonably related to plaintiff's interests as a shareholder of Jos. A. Bank:

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.

8. All of the documents identified in the Demand Letter are essential for these purposes.

9. On December 5, 2007, counsel for Jos. A. Bank responded to the Demand by facsimile and UPS Overnight wherein he requested a two-week extension of the time required to respond to the Demand, through and including December 19, 2007. (Exhibit B). Counsel also requested that plaintiff provide additional information concerning plaintiff's ownership of Company stock. In response, counsel for plaintiff informed counsel for the Company that plaintiff purchased 7000 shares of Jos. A. Bank stock on February 3, 2005, at \$28.11 per share,

and, while purchasing and selling some shares since, plaintiff has held shares in the Company continuously from that date through the present.

10. On December 19, 2007, counsel for Jos. A. Bank responded further to the Demand wherein he refused to make Jos. A. Bank's corporate books and records available for inspection. (Exhibit C).

11. Also on December 19, 2007, counsel for the Special Litigation Committee appointed by the Company's Board of Directors responded to the Demand wherein he refused to make Jos. A. Bank's corporate books and records available for inspection. (Exhibit D).

12. Plaintiff's purpose in making the Demand is reasonably related to its interests as a shareholder of the Company. In light of recent articles appearing in major news outlets, the contents of Jos. A. Bank's public filings with the SEC, and certain public statements by the Company, plaintiff has serious concerns regarding: (1) the steep decline in gross profits due to increased customer demand for fall merchandise, resulting in less demand for year-round core merchandise; (2) the conduct of Jos. A. Bank's officers and directors in handling the decline in profits; and (3) the conduct of Jos. A. Bank's officers and directors in conducting the business of the Company, including the adoption, implementation and oversight of adequate internal controls to prevent and remedy the misconduct summarized in this Complaint. These and other factors, including those discussed below, serve as credible evidence that wrongdoing at Jos. A. Bank may have occurred.

13. As an initial matter, the Company has been subjected to numerous lawsuits alleging securities fraud, which place the Company at risk of having to pay extraordinary recoveries as a result of these allegations.

14. As recent as September 10, 2007, Judge William N. Nickerson of the United States District Court for the District of Maryland entered a Memorandum Opinion and Order

denying defendants' motion to dismiss a securities class action lawsuit arising from the same allegations of misconduct alleged in plaintiff's Demand. (*See In re Jos. A. Bank, Inc. Securities Litigation.*, C.A. No. WMN-06-1892 (D. Md. Sept. 10, 2007) (Exhibit E hereto)) (the "September 10, 2007 Order").

15. Plaintiffs in the above-mentioned litigation allege that beginning in December 2005 and through June 2006, the Company issued a series of statements which allegedly omitted the Company's knowledge of excessive levels of inventory of the Company's Fall/Winter 2005 clothing line. These statements falsely reassured Jos. A. Bank's investors that its gross profit margins would increase substantially throughout the final two quarters of fiscal 2005 and into the first quarter of fiscal 2006.

16. Plaintiffs contend that the excess inventory resulted from an overestimation of customer demand, geographical problems in store expansion plans, and overly ambitious time-lines for opening new retail locations.

17. Plaintiffs further contend that Jos. A. Bank's executives were well aware of the inventory surplus problems and began to steeply discount the Fall/Winter 2005 merchandise in order to move the excess inventory. These discounts resulted in increased sales of the discounted merchandise but the very aggressive pricing scheme allegedly eroded the Company's overall profit margin. In addition, the discounts negatively impacted the sales of higher margin merchandise in the Spring/Summer 2006 line and its other core products.

18. Plaintiffs further allege that though aware of the Company's inventory problems, it continued to issue false and misleading financial statements to the investing public and in its reporting to the SEC because it failed to disclose any problems with respect to inventory.

19. Furthermore, on February 22, 2006, David E. Ullman ("Ullman"), Jos. A. Bank's Chief Financial Officer and Principal Financial and Accounting Officer, spoke at an institutional

investors conference where he expressed his desire to decrease the Company's level of promotional activity while maintaining its inventory and upscale appeal. Plaintiffs allege that Ullman made these statements while having knowledge of the Company's excess inventory issues and its ever increasing promotional activity.

20. On June 7, 2006, Jos. A. Bank reported adverse financial results for the first time:

[for] the first quarter of the Company's fiscal 2006, the Company's net income was \$5.9 million compared with \$6.7 million for the first quarter of the Company's fiscal 2005. The Company earned \$0.32 per diluted share in the first quarter of fiscal 2006 compared with \$0.38 per diluted share in the first quarter of fiscal 2005. As such, diluted earnings per share decreased 16% as compared with the prior year period.

21. In the Company's June 8, 2006 press release, Ullman commented on the above results:

While our sales of new transitional spring products remained consistent with last year, *gross profits declined primarily as a result of increased customer demand for fall merchandise, resulting in less demand for the year-round core merchandise.* Our new spring products continue to show strong sales in May and early June, so we expect our year-over-year profits to increase at least 10% in the second quarter of fiscal 2006. [Emphasis added.]

22. By the end of trading on June 8, 2006, the Company's stock plummeted 29% in reaction to the news. Furthermore, on June 15, 2006, Ullman made a presentation at the Morgan Stanley Small Cap Executive Conference wherein he stated:

One of the things we did in '05 was we built up in certain core Fall products, and that was one of the reasons why we had such a successful third quarter and fourth quarter of '05. We also said when we were building those categories, that we – we don't stop selling that stuff at Christmas. That type of product sells in January and February and even parts of March. So we did have more of that on hand going into the first quarter. And to sell more. And we did. The offset to that is that there – and that product is sold at a lesser margin rate in the first quarter than it would have been sold during the holiday. It could have been – it's in clearance mode at that time. But we had that by design. And the other – if you look at the other product – you know you had – so you had the Fall goods, you had year-round goods, and you had the Spring goods. The new Spring goods sold very well, margins were up very nicely. In that year-round category, most categories were working, but there were certain portions of our opening price point suits that did not work very well, and we actually had a decline in those

sales. The margin differential between the Fall goods that we sold early in the quarter and the year-round and the Spring goods is about ten points. So, since the Fall goods became a greater penetration or mix of sales, than the, you know the higher margin selling items because of the decline in the opening price point suits, it mixed out to a decline in the gross profit margins of about 140 points. So to us it was about the mix. The Fall goods sold even slightly better than planned. They sold at a higher margin rate than they did in the prior year, so they – that did what we expected. But it created an imbalance for us in terms of the overall mix of what we sold.

23. Judge Nickerson's September 10, 2007 Order stated that plaintiffs had adequately specified the content of the alleged misrepresentations and misleading omissions and therefore they have alleged material misrepresentations and omissions in satisfaction of the first element of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (the "Exchange Act").

24. Judge Nickerson also concluded that plaintiffs had supported their allegation of scienter with the requisite specificity required under the Private Securities Litigation Reform Act of 1995 ("PSLRA") because plaintiffs' allegations of scienter do not rest only on Jos. A. Bank's Chief Executive Officer and Officer, Robert N. Wildrick's ("Wildrick"), sale of 74% of his common stock during the relevant period for an alleged profit of \$36 million.

25. As a result of the Company's concealment and upon the revelation of the Company's true financial condition, Jos. A. Bank's stock plummeted 29% by the close of trading on June 8, 2006. Judge Nickerson concluded that plaintiffs' allegations were sufficient to satisfy Section 10(b)'s loss causation pleading requirements at the litigation's current stage and denied the defendants' motion to dismiss.

26. Plaintiff has complied fully with all requirements under Section 220 concerning the form and manner of making a demand for inspection of Jos. A. Bank's books and records.

27. Jos. A. Bank has wrongfully denied plaintiff access to the materials set forth in the Demand Letter refusing to permit such access.

28. Pursuant to 8 *Del. C.* § 220(c), plaintiff is permitted to apply to this Court for an Order compelling inspection of Jos. A. Bank's corporate books and records because Jos. A. Bank has wrongfully refused to permit the inspection after plaintiff complied with Section 220 concerning the form and manner of making demand for inspection of such documents and articulated a proper purpose for the inspection.

29. Given the foregoing, plaintiff seeks relief from the Court under 8 *Del. C.* § 220 to compel the inspection set forth in the Demand Letter forthwith without further delay.

30. Plaintiff has no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully prays for the following relief:

- A. An order summarily requiring Jos. A. Bank to immediately permit the inspection and copying of each and every requested book and record;
- B. An order directing Jos. A. Bank to pay reasonable attorneys' fees and expenses in connection with plaintiff's Section 220 demand and litigation; and
- C. Such other and further relief as this Court deems just and appropriate.

Date: January 3, 2008

**RIGRODSKY & LONG, P.A.**

By: /s/ Brian D. Long  
Seth D. Rigrotsky, Esquire (#3147)  
Brian D. Long, Esquire (#4347)  
919 North Market Street, Suite 980  
Wilmington, DE 19801  
(302) 295-5310

*Attorneys for Plaintiff*

OF COUNSEL:

Robert M. Kornreich, Esquire  
Carl L. Stine, Esquire  
WOLF POPPER LLP  
845 Third Avenue  
New York, NY 10022  
(212) 759-4600