IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MARTHA S. SUTHERLAND, as Trustee of the Martha S. Sutherland Revocable Trust dated August 18, 1976,	)	
Plaintiff,	)	
v.	)	Civil Action No. 2399-VCL
PERRY H. SUTHERLAND, TODD L. SUTHERLAND, and MARK B. SUTHERLAND,	)	
Defendants,	)	
and	)	
DARDANELLE TIMBER CO., INC., and SUTHERLAND LUMBER SOUTHWEST, INC.,	)	
Nominal Defendants.	)	

REPLY BRIEF OF NOMINAL DEFNDANTS DARDANELLE TIMBER CO., INC. AND SUTHERLAND LUMBER-SOUTHWEST, INC. IN SUPPORT OF THEIR MOTION TO DISMISS

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PRELIMINARY STATEMENT

This Court once observed that a plaintiff opposing a motion to dismiss filed by a special litigation committee is likely to "pull out all stops and [] throw every possible argument imaginable into the controversy, no matter how minor or picayune." *Kaplan v. Wyatt*, 484 A.2d 501, 511 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985). That observation is certainly true of plaintiff in this action. Here, the SLC was fully-engaged and independent. With the assistance of indisputably independent advisors, the SLC performed a comprehensive investigation, found plaintiff's claims were without support, and filed with the Court a thorough Report concluding that further prosecution of this action is not in the best interests of the Companies. Plaintiff was afforded broad discovery into the SLC's investigation (including access to more than 14,000 pages of documents produced by the Companies, the Individual Defendants and third parties, and three depositions of the SLC and its advisors) but was unable to find any support for her claims. Lacking any evidence, plaintiff's brief resorts to a series of picayune arguments and the sophistry of a grand conspiracy in which the lack of any evidence of a conspiracy somehow proves that the SLC and its advisors must be participants in it.

The thoroughness of the SLC's investigation is evidenced not only by the flaws in plaintiff's remaining arguments but also by the laundry list of claims plaintiff (and her brother Dwight Jr.) asserted and have now abandoned, including:

- the alleged unreasonableness of the total compensation and perquisites received by Perry and Todd
- the alleged excessive use of the Maysville facility at company expense
- the alleged personal use of Cimarron tax services
- the alleged waste of corporate funds in litigation between Dardanelle and Boylan, LLC
- the alleged sale of the Companies' real estate and other assets to "cover" losses
- the alleged payment by the Companies of legal fees for personal legal matters

- the alleged personal use of rental cars, hotels, and limousines by Perry and Todd at company expense
- the alleged chartering of private railroad cars at company expense
- the alleged rental of vans to attend Dwight Sr.'s memorial service at company expense
- the alleged payment by the Companies of Perry's membership in The River Club
- loans between and among the Companies, Perry, Todd, and other Sutherland-related entities
- the $360,000 charitable contribution made by Dardanelle allegedly to a "pet charity" of Perry and Todd
- the amendments to the Companies' certificates of incorporation
- the Companies' alleged payment for Choctaw-related flights

The thoroughness of the investigation is further evidenced by the uncontested facts that the SLC: (i) reviewed over 14,000 pages of documents; (ii) interviewed 18 persons with knowledge of the facts; (iii) hired independent counsel and an independent compensation expert to assist it; and (iv) conducted its investigation with the full cooperation of the Companies, the Individual Defendants, Home Center, and Cimarron. Report at 13; Nominal Defendants' Opening Brief ("OB") at 24; Affidavit of Bryan Jeffrey ("Jeffrey Aff.") ¶ 4.

Despite this record, plaintiff asks this Court to believe that the SLC and its counsel are the Individual Defendants' puppets and that they have deliberately "avoided probing areas" that might uncover wrongdoing. Plaintiff's Answering Brief ("PAB") at 6. Plaintiff, however, has offered no evidence to support these baseless assertions. The circumstances surrounding Mr. Jeffrey's acquaintance with Mark and past business relationship with his wife were fully vetted by the SLC and its counsel and disclosed in the Report and in response to plaintiff's discovery, and there is no evidence that Mr. Jeffrey based his findings in any way on an immaterial business relationship that ended years ago. To the contrary, the record demonstrates that a former U.S. Attorney named Harry Cummins, *not Mark Sutherland*,

identified Mr. Jeffrey as a potential candidate for the Companies' boards. Nor is there any support for plaintiff's assertion that Mr. Jeffrey was biased because of financial concerns. He received his standard hourly rate for his work on the SLC and as a director, and neither he nor his firm has a continuing relationship with the Companies or has done any work for them unrelated to the SLC or Mr. Jeffrey's responsibilities as a director. Jeffrey Aff. ¶¶ 3, 11.

By contrast, there is ample evidence that plaintiff has engaged in a campaign of falsehoods and mischaracterizations in a desperate attempt to exert leverage on her siblings to achieve other goals. For example, plaintiff alleged in the Complaint that Perry had unlimited personal use of the Aircraft at company expense (Compl. ¶ 45) and that Todd never paid for his personal use of the Aircraft. *Id.* ¶ 51. However, at the time she made those allegations plaintiff had in her possession documents produced by the Companies' in the Section 220 Action showing that Perry's employment agreement was amended on September 2, 2005 to require him to pay for any personal use of the corporate jet (Report at 34-35 n.18) and that Todd had, on a number of occasions, paid for his personal use of the Aircraft. *Id.* at 35 n.19. In addition, although the Complaint alleged that Perry and Todd held "private parties" at the Companies' expense (Compl. ¶ 64), neither plaintiff nor Dwight Jr. could identify any such private parties during their interview. Report at 113 n.59. Plaintiff also claims in her brief that she never asserted that "Ms. Campfield spent all of her time on Choctaw matters" (PAB at 29 n.15), despite the fact that her Complaint alleged that a Cimarron employee was "working full-time on Choctaw accounting matters" (Compl. ¶ 62), and that she later identified this employee as Ms. Campfield.[1] Transmittal Affidavit of Matthew C. Davis ("Davis Aff."), Ex. K.

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[1] Plaintiff also resorts to repeatedly mischaracterizing the deposition testimony of Mr. Jeffrey and Mr. Hurd. For instance, plaintiff claims that Mr. Jeffrey admitted that the net cash flow line item for the Aircraft "did not include substantial additional costs to the

The record demonstrates that the SLC thoroughly examined all of the allegations in the Complaint and all of the additional allegations that plaintiff and Dwight Jr. made in their interview, reviewed other areas (at its own initiative) that plaintiff did not mention, and found that in many instances the evidence *affirmatively disproved* plaintiff's claims, and in other instances, found that there was no evidence to substantiate them. *See, e.g.*, Report at 56-58; Davis Aff., Ex. B at 57. Undeterred by the absence in more than 14,000 pages of documents of any evidence of the broad-ranging wrongdoing she had accused her brothers of engaging in, plaintiff resorts to the argument that the SLC was required to perform a full "forensic audit" of the Companies. Such an endeavor, however, would have been exorbitantly expensive and would have been impossible to complete in the time provided to file the Report.[2] More importantly, it was not warranted by the circumstances of this case.

It is telling that even though plaintiff was granted broad discovery by this Court into the SLC's investigation, she still cannot identify any material flaw in the SLC's investigation or conclusions. Equally revealing is that plaintiff rarely cites to the Report in her answering brief – the document that she purports to challenge and to which the Court must look in assessing that challenge – and instead relies on generalizations and falsehoods about the extent and direction of the SLC's investigation. Tacitly recognizing the lack of any substantive merit in

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Companies." PAB at 44. In the portion of Mr. Jeffrey's deposition that plaintiff cites to support this statement, however, Mr. Jeffrey was discussing the types of costs that are included in the formula for charging timesharees for their use of the Aircraft under the Aircraft Time Sharing Agreement, not the costs included in the net cash flow line item. Davis Aff., Ex. B at 71-72. Other examples of plaintiff's mischaracterizations of Mr. Jeffrey and Mr. Hurd's testimony are noted *infra*. *See* Sections II.A. n.13, III.A. n.13 & n.17.

[2] Ironically, plaintiff now criticizes the SLC for not conducting an expensive and time-consuming full blown forensic audit when plaintiff pushed for a shorter time period to allow the SLC to complete its investigation (Davis Aff., Ex. A at 18) and condemns the Companies for the costs that have been incurred. PAB at 6.

her arguments, plaintiff continues to trumpet that this is a special case that deserves to go forward, regardless of the thoroughness of the SLC's investigation and the reasonableness of its findings. PAB at 48-49. Now that the relevant facts concerning plaintiff's allegations are before the Court, plaintiff resorts to an unsubstantiated conspiracy theory that the SLC and its independent advisors are in cahoots with the Individual Defendants (and a host of unrelated employees of Cimarron) to wrong her.[3]

As the SLC observed in its Report, its investigation revealed that this dispute has been, and continues to be, personal.[4] It is not in the Companies' best interests that the family feud continues. The Special Committee expressly encouraged the parties (and their respective counsel) to pause and reflect on the findings in the Report and thereafter seek to resolve their broader disputes. Rather than heed that advice, plaintiff and her counsel reacted to the filing of the Report by filing yet another action accusing her brother Perry and others of wrongdoing. *See* Moffitt Aff., Ex. B. The time has come for all of plaintiff's conspiracy theories and unfounded allegations to be put to rest. This action should be dismissed for the reasons identified by the SLC in its Report.

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[3] Plaintiffs' boundless suspicion was revealed in the deposition of Mr. Hurd when counsel, in an apparent effort to establish that the Report was untruthful in stating that Mr. Jeffrey, Mr. Hurd, and Mr. Sparks had conducted interviews at the Companies' offices in Kansas City, placed before him a photograph depicting street signs at the intersection where the Companies' offices are located and asked if the building in the photograph housed those offices, and later placed another photo, without any identifying street signs, and asked if the Companies' offices were in that building. Affidavit of S. Mark Hurd ("Hurd Aff.") ¶ 5. Plaintiff's attempted trick failed to achieve its intended effect.

[4] Master Glasscock recognized a personal component to plaintiff's purpose. *See* Post-Trial Argument Transcript dated Aug. 31, 2005 at 80 (*Sutherland v. Dardanelle Timber Co., Inc.*, C.A. No. 671-N) ("[A]re there other motives involved? I'm sure there are. This is a family that has a long history. We're dealing with family issues here….").

ARGUMENT

Plaintiff acknowledges that Delaware courts review a motion to dismiss a derivative action based on the determination of a special litigation committee under the two-step analysis established by the Delaware Supreme Court in *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788-89 (Del. 1981). PAB at 7. First, the Court considers whether the special litigation committee: (i) functioned independently of the parties to the action; (ii) acted in good faith and conducted a thorough investigation; and (iii) had reasonable bases for its conclusions. *See Zapata, 430 A.2d.* at 788. In the discretionary, second step of the *Zapata* analysis, the Court may apply its own independent business judgment and not grant a motion to dismiss where such a result appears "'irrational' or 'egregious' or some other such extreme word." *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, 1997 WL 305829, at *2 (Del. Ch.).

I. THERE IS NO MATERIAL ISSUE OF FACT CONCERNING MR. JEFFREY'S INDEPENDENCE.

For plaintiff to "successful[ly] challenge" Mr. Jeffrey's independence, she must demonstrate that there is "an actual and material issue of fact" concerning Mr. Jeffrey's independence. *See Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985). Mere supposition or speculation of bias is insufficient. *Kaplan v. Wyatt*, 499 A.2d 1184, 1189 (Del. 1984). Plaintiff makes several challenges to Mr. Jeffrey's independence, but none has merit.

First, plaintiff asserts that Mr. Jeffrey and SLC Counsel failed to provide "any evidence on the pre-existing personal and business relationships between [Mr.] Jeffrey and Mark and his wife" so that neither "Martha nor the Court can really know the truth." PAB at 17. That assertion is false. The Report itself disclosed that Mr. Jeffrey "had been acquainted with Mark through a mutual friend when Mark lived in Little Rock, at which time JPMS did *de minimis* accounting work for an antique business run by Mark's wife" and that "Mr. Jeffrey and Mark

had no contact since Mark moved to Kansas City more than six years ago." Report at 9 n.2. The SLC also provided to plaintiff a sworn interrogatory response indicating that Harry E. Cummins was the mutual friend who introduced Mr. Jeffrey to Mark 20-25 years ago, that Mr. Jeffrey had "prepared periodic financial statements" for Mark's wife's antiques business, and that the "amount billed and paid for such work did not exceed $5,000." Davis Aff., Ex. D at 16.

Armed with these facts, plaintiff deposed Mr. Jeffrey, who testified under oath that he performed the accounting work for Mark's wife 10-15 years ago, that the financial statements were prepared "monthly or quarterly," and that prior to Mark's relocation to Kansas City, "there were occasions where [he] saw [Mark] out socially, but very rarely." Davis Aff., Ex. B at 29. Plaintiff also knows (but does not tell the Court) that Mr. Jeffrey was identified as a potential board candidate and was initially contacted by Mr. Cummins (a former U.S. Attorney) on behalf of the Companies, and that Mark Sutherland had nothing to do with it. Mr. Jeffrey provided full and candid answers to plaintiff's probing inquiries, and not once did Mr. Jeffrey's counsel instruct him not to answer any of plaintiff's questions regarding the relationship. *See id.* at 28-30. Furthermore, in response to plaintiff's document requests, Mr. Jeffrey ascertained that business records no longer existed with respect to the work performed for Mark's wife's business. Jeffrey Aff. ¶ 2.

Thus, plaintiff has been given every opportunity to explore this area and adequate information has been disclosed to establish that Mr. Jeffrey was independent of any of the Individual Defendants.[5] To challenge his independence, plaintiff must show that Mr. Jeffrey has

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[5] In a telling example of the picayune nature of plaintiff's challenges, she does not argue that the SLC was not validly constituted but nonetheless wrongly claims that Mr. Jeffrey's prior relationship with Mark violates the resolutions appointing Mr. Jeffrey to the SLC. PAB at 17. To the contrary, the resolutions clearly state that Mr. Jeffrey "*has* no personal or business connection or relationship with any of the remaining directors"

"substantial [ties] that [] cause reasonable doubt about the SLC's ability to impartially consider whether the [defendants] should face suit." *See In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 942 (Del. Ch. 2003). A minimal business relationship that ended at least 10 years ago and a minimal social relationship that ended at least 6 years ago would not be "a material concern" to Mr. Jeffrey that would taint his ability to "decide impartially" whether to seek to terminate plaintiff's lawsuit.[6] *Id.* at 930, 941.

Plaintiff also argues that Mr. Jeffrey had "motive and bias in favor of the Defendants" as a result of his "financial interest in this matter." PAB at 18. Plaintiff alleges that Mr. Jeffrey's "financial interest" stems from the amount of compensation Mr. Jeffrey and JPMS received for their work during the SLC's investigation and from an alleged "secret financial relationship" between Mr. Jeffrey and the Companies after the SLC completed its investigation. *Id.* at 18-20. Plaintiff asserts that Mr. Jeffrey was somehow biased in favor of the Individual Defendants because he has been compensated approximately $64,000 (at his standard hourly rate of $250 per hour (Jeffrey Aff. ¶ 3)) for his role in the SLC up to the time the Report was filed

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(Report at 5 (emphasis added)), not that he *never had* any personal or business connection with any of the directors of the Companies.

6 Plaintiff's claim that Mr. Jeffrey cannot be independent because he "flip-flop[ped]" in his answer to an interrogatory is an attempt to elevate form over substance. This issue was fully explored during Mr. Jeffrey's deposition, and he explained that he had "simply missed that issue" when he was reviewing the initial interrogatory responses. Davis Aff., Ex. B at 188-89. The submission of the amended interrogatory response prior to his deposition corrected the erroneous statement in the initial response to the effect that Mr. Jeffrey had communicated with Perry, Todd, and Mark in September/October 2006 regarding the possibility of Mr. Jeffrey joining the boards of directors of the Companies and during the October 20, 2006 meeting of the boards of directors of the Companies, when in fact his communications to that point had been only with Harry Cummins and the Individual Defendants' outside counsel. Mr. Jeffrey was not "conveniently back[ing]-off" his initial response (PAB at 17), but was simply ensuring that his interrogatory responses were accurate.

with the Court.[7] PAB at 19. The key question here is whether Mr. Jeffrey could "base [his] decision on the merits of the issue rather than being governed by extraneous consideration or influences." *Katell v. Morgan Stanley Group, Inc.*, 1995 WL 376952, at *7 (Del. Ch.) (internal quotations and citations omitted).

Mr. Jeffrey fully disclosed in his deposition why he agreed to be compensated for his work at an hourly rate rather than by receiving a $50,000 base fee initially proposed on behalf of the Companies. Specifically, prior to agreeing to serve as a special litigation committee member, Mr. Jeffrey, "asked [the Companies] to pay [him his] hourly rate, rather than try to get any sort of premium on [his] work" because he believed that "at that point in time that [his] hours would be less than the $50,000 fee, based upon his hourly rates." Davis Aff., Ex. B at 13. Thus, Mr. Jeffrey, before the investigation even started, sought to minimize the expense to the Companies and his financial compensation from the investigation. The fact that the number of total hours Mr. Jeffrey was required to spend on the investigation was somewhat more than anticipated does not show financial motive or bias, only that Mr. Jeffrey, with assistance from the SLC's counsel, performed a thorough and exhaustive investigation of plaintiff's claims.[8]

Plaintiff also calls into question the $25,000 received by JPMS for the work it performed reviewing and organizing documents related to the use of the Aircraft and compiling spreadsheets analyzing the invoices that were prepared by Home Center for flights of the

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[7] Although plaintiff never sought re-argument of the Court's ruling that plaintiff was not entitled to discovery of time records for periods after the Report was filed, plaintiff nonetheless criticizes the SLC's decision to follow the Court's guidance in refusing to produce them. PAB at 18.

[8] The level of Mr. Jeffrey's involvement, and the substantial time devoted to the SLCs investigation compares favorably to the level of involvement by other special litigation committees. *See Carlton Invs.*, 1997 WL 305829, at *8 (SLC members devoted approximately 100 hours to the investigation).

Aircraft. PAB at 18-19. JPMS produced complete time records to plaintiff concerning this work. Rather than focus on the description in those time sheets of the work performed, plaintiff asserts that JPMS was somehow biased in its work for the SLC or that JPMS' work was unnecessary. The work performed by JPMS, however, was necessary and beneficial to the investigation[9] and any fees paid to JPMS (at rates less than those of the SLC's Counsel) for that work was at JPMS' standard hourly rate. Jeffrey Aff. ¶ 5; *see also Carlton Invs.*, 1997 WL 305829, at *11 ("The fact that [SLC member] chose to use members of his highly reputable firm to assist him in the process seems efficient, rather than culpable.").

Plaintiff has offered no evidence that the fees Mr. Jeffrey and JPMS collected are material enough to Mr. Jeffrey to taint his independence, or that he would be more willing to risk his reputation as an independent CPA than risk his relationship with the Individual Defendants. *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004). Plaintiff has cited no case law that holds that a member of a special litigation committee is not independent simply because he is paid at his standard hourly rate for his work on that committee, an arrangement that creates an incentive to perform a thorough investigation. Indeed, Mr. Jeffrey and JPMS would have been paid for the time spent on the investigation whether the SLC found wrongdoing or not. Accordingly, the amount of compensation Mr. Jeffrey and JPMS received for their work during the SLC's investigation does not call into question Mr. Jeffrey's independence.

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[9] In but one example of her conflicting arguments, plaintiff claims that the retention of JPMS to compile the spreadsheets concerning the use of the Aircraft was unnecessary and duplicative because Chris Jones provided the SLC with a "comprehensive spreadsheet" of plane usage at the start of the investigation (PAB at 19-20 n.10), but simultaneously argues throughout her answering brief that the SLC should not have relied on the word of anyone associated with the Companies because they might be biased.

Plaintiff also wrongly alleges that Mr. Jeffrey was biased in favor of the Defendants because he had a "secret financial relationship" with the Companies that is ongoing today. PAB at 19. Nothing could be further from the truth. Mr. Jeffrey is a board member of the Companies, and, in that role, he accompanied Perry and Todd to the Marble Falls and Fredericksburg stores to observe the taking of inventory and to attend a board meeting in August 2007, months after the Report was filed with the Court. Davis Aff., Ex. B at 36; Jeffrey Aff. ¶¶ 6, 10. Neither Mr. Jeffrey nor his firm assumed any responsibility for the inventory itself, nor is there any agreement or understanding that they will do so in the future. Jeffrey Aff. ¶ 10. Quite appropriately, as a board member Mr. Jeffrey wanted to familiarize himself with the Companies' businesses. *See id.* ¶ 6. Mr. Jeffrey was compensated at his standard hourly rate for this trip because of time lost at his regular position at JPMS and because the Companies had no pre-existing policy for compensation to an outside director. *See id.* ¶ 10. Information concerning Mr. Jeffrey attending store inventories was not included in the Report because it had not yet occurred, and Mr. Jeffrey had not even discussed the possibility of attending store inventories with Perry or Todd at the time the Report was filed.[10] Davis Aff., Ex. B at 36-37; Jeffrey Aff. ¶ 7. Mr. Jeffrey only broached the subject of visiting the stores and attending the related board meeting with the SLC's counsel to assure that his role was not limited to his function as the SLC and that it would be appropriate as a board member to familiarize himself with the Companies' business and attend the scheduled board meeting. Jeffrey Aff. ¶ 6.

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[10] Only facts actually known by a committee member can affect his independence. *See, e.g.*, *Lewis*, 502 A.2d 962; *Biondi v. Scrushy*, 2003 WL 203069 (Del. Ch.). Here, while Mr. Jeffrey contemplated attending store inventories during the investigation, the idea had not even been discussed with Perry or Todd. Jeffrey Aff. ¶ 7. Thus, Mr. Jeffrey's independence could not have been affected by events that he was not sure would even take place after the investigation.

Numerous other facts undercut plaintiff's naked speculation that there must be an ongoing, secret financial relationship. First, there are no future inventory trips planned that would involve Mr. Jeffrey. Davis Aff., Ex. B at 251; Jeffrey Aff. ¶ 10. Second, JPMS has not been retained to assist the company in connection with any work. Davis Aff., Ex. B at 251; Jeffrey Aff. ¶ 11. Third, Mr. Jeffrey has not had any communications with any of the Individual Defendants about JPMS or Mr. Jeffrey performing any accounting work for the Companies. Davis Aff., Ex. B at 251-52; Jeffrey Aff. ¶ 11.

In sum, despite plaintiff's efforts to cast doubt on Mr. Jeffrey's independence, there is no question that Mr. Jeffrey was independent throughout and after the SLC's investigation.[11] He fully disclosed all of the details concerning his past relationship with Mark and his wife – all of which establish that it was a brief, insignificant relationship many years ago. Plaintiff has failed to present any indication that Mr. Jeffrey's compensation and the compensation received by JPMS would have in any way affected his judgment and impartiality, and, accordingly, there is no material issue of fact concerning Mr. Jeffrey's independence.

II. THE SLC ACTED IN GOOD FAITH AND CONDUCTED A REASONABLE INVESTIGATION.

A special litigation committee's investigation must be "a reasonable investigation under the circumstances" of the matters alleged in the Complaint. *Kaplan*, 484 A.2d at 508. Despite plaintiff's allegations to the contrary, the SLC and its advisors acted in good faith and the undisputed facts demonstrate that the SLC's actions met all of the benchmarks of a

[11] Plaintiff does not challenge the independence of the SLC's legal advisor or its executive compensation consultant, RSM McGladrey, despite considerable discovery into the independence of each. The retention of independent advisors is an important "factor in reaching a finding of independence" of a special litigation committee. *Strougo v. Padegs*, 27 F. Supp. 2d 442, 451 (S.D.N.Y. 1998). Here, the undisputed independence of counsel and McGladrey also strongly favors a finding that the SLC is independent.

reasonable investigation. *See Katell*, 1995 WL 376952, at *9 (basing decision to grant motion to dismiss on the "overall impression of the Committee's good faith and the reasonableness of its investigation"). The SLC's investigation was thorough, comprehensive, and demonstrably objective.

The Court is aware of both the broad scope and the detail contained in the Report and the Appendix. Also, it is undisputed that the SLC reviewed more than 14,000 pages of documents related to the allegations in the Complaint and subsequent allegations made by plaintiff and Dwight Jr. during their interview. Report at 13. It is also undisputed that the SLC interviewed 18 persons with knowledge regarding the facts relevant to plaintiff's allegations. *See id*. The SLC conducted its investigation without any interference and with the cooperation of all persons who had knowledge concerning plaintiff's allegations. OB at 24; Jeffrey Aff. ¶ 4. All of these undisputed facts demonstrate the thoroughness of the SLC's investigation.

A. The Decision Not To Retain Interview Notes Was Reasonable And Not Made In Bad Faith.

Constrained by the indisputable facts demonstrating the thoroughness of the SLC's investigation, plaintiff grasps at a tangential straw and accuses Mr. Jeffrey and the SLC's counsel of bad faith because they did not retain handwritten notes from the 18 interviews they conducted and, instead, kept and provided to plaintiff summaries of the interviews prepared from those notes. There is nothing nefarious about this practice. Indeed, precisely this issue was raised by the plaintiff in *Kaplan*, a case cited by plaintiff in her brief, in his effort to demonstrate that the special litigation committee in that case had acted in bad faith. The *Kaplan* Court, citing the fact that law enforcement agencies routinely do not retain interview notes and that this practice "has been approved by the courts," held that the SLC did not act in bad faith during its investigation and granted defendants' motion to dismiss. 484 A.2d at 517, 521 (noting

defendants' citation to *United States v. Pacheco*, 489 F.2d 554 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975)). Mr. Jeffrey and the SLC's counsel's actions likewise were in good faith.

Mr. Jeffrey and the SLC's counsel followed a reasonable process of taking rough notes during the interviews and consolidating them into more complete interview summaries that were ultimately produced to plaintiff. Hurd Aff. ¶ 3. The handwritten notes were cryptic and incomplete (Davis Aff., Ex. C at 79; Hurd Aff. ¶ 3) and would not have provided plaintiff with any special insight into the interviews that took place. Once the summaries were prepared, there was no reason for Mr. Jeffrey and the SLC's counsel to retain them.

Plaintiff argues that because Mr. Hurd allegedly admitted that "there were any number of factual conclusions or allegations in the Report that were based on statements purportedly made in the interviews that were *not* reflected in the [] interview summaries," then those statements "must have been in the interview notes." PAB at 13 (emphasis in original). That argument is both a misrepresentation of the record and a *non sequitur*. As Mr. Hurd in fact explained during his deposition, it was merely "possible" that "there [were] matters that [he] didn't take notes on but that were material enough [to make] their way into the report."[12] Davis Aff., Ex. C at 74-75. The handwritten interview notes, moreover, did not include every statement made by the interviewees and were never intended to be transcripts of the interviews. Hurd Aff. ¶ 3. They were only intended to trigger the SLC and its counsel's memory during the interview summary drafting process. *See id.* This directly contradicts plaintiff's unfounded speculation that "statements [that] were important enough to be put in the Report … must have been in the interview notes" (PAB at 13), and belies plaintiff's argument that the interview notes

[12] Plaintiff's brief does not identify any factual conclusions in the Report that are not reflected in either the documentary record considered by the SLC or the interview summaries.

were the "only [] evidence of what was asked and may have been actually said in the interviews." *Id.* at 14. Thus, the handwritten interview notes would not have provided plaintiff with any better insight into the contents of the interviews than the more complete interview summaries, and plaintiff has not been obstructed in performing a complete and thorough review of the Report.[13]

Plaintiff also alleges that the notes are important because they "were the *only* potential evidence for the repeated, bald assertions that Jeffrey allegedly was an 'active participant' in each interview." PAB at 14. This allegation is, in the first instance, nonsensical because the notes referenced statements by interviewees, not who asked what questions. Moreover, although Mr. Jeffrey did actively participate in each interview, and so testified, his level of participation is in any event not a concern because the special litigation committee "can select any agent to perform its duties … as long as the agents can perform their assigned tasks competently." *Katell*, 1995 WL 376952, at *10. Here, plaintiff has not challenged the SLC's counsel's ability to conduct the interviews. Thus, Mr. Jeffrey's level of verbal participation in the interviews is not a concern.

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[13] Plaintiff identifies two alleged conflicts in the deposition testimony of Mr. Jeffrey and Mr. Hurd to demonstrate the "critical importance of the destroyed interview notes." PAB at 13-14. First, plaintiff notes that Mr. Jeffrey stated that, "in [his] opinion," the interviews summaries "reflect all of the material facts and information" from the interviews (Davis Aff., Ex. B at 42), while Mr. Hurd testified that it was "possible" that the interview summaries did not contain all the information from the interviews that was used in the Report. Davis Aff., Ex. C at 74-75. This does nothing to advance plaintiff's argument because, as explained above, the handwritten interview notes would not have provided plaintiff with further insight into the contents of the interviews and the SLC's investigation in general.

Also, the fact that Mr. Hurd and Mr. Jeffrey have divergent recollections regarding whether Mr. Jeffrey provided comments to the interview summaries is insignificant. The key point is not in dispute here – that Mr. Jeffrey did review the interview summaries and was satisfied that they were "fair characterization[s]" of the interviews. Davis Aff., Ex. B at 40-42; *see also* Davis Aff., Ex. C at 94 (Mr. Hurd confirming he sent the interview summaries to Mr. Jeffrey).

Finally, plaintiff's argument is premised upon the erroneous claim that the handwritten notes would have been discoverable by plaintiff because they were "reviewed by the SLC in the course of its investigation." PAB at 14-15. *See Sutherland v. Sutherland*, 2007 WL 1954444, at *3 (Del. Ch.) (granting plaintiff access to documents reviewed by the SLC). The interview notes, however, do not fall into this category because they were created during the SLC's investigation and were not a pre-existing document that the SLC reviewed as part of its investigation. The difference is significant. Under plaintiff's theory, all documents created by the SLC during its investigation should have been produced, whether they be drafts of certain documents, document indexes created by the SLC's counsel, internal memoranda or other preliminary drafts, as to which the Court granted a motion for a protective order, because they were "reviewed" by the SLC. Plaintiff's strained reading of this Court's opinion provides no basis to challenge the SLC's conclusions.

B. The SLC Provided Sufficient Evidence To Demonstrate That There Were No Issues of Material Fact.

A motion to dismiss brought by a special litigation committee is a "hybrid motion created by *Zapata* which takes the qualities from a Chancery Rule 41(a)(2) motion to dismiss and a Chancery Rule 56 motion for summary judgment." *Lewis*, 502 A.2d at 966. The motion "must be supported by a thorough written record." *Kaplan*, 484 A.2d at 506. Plaintiff simply ignores these cases and argues that, under *Zapata*, the SLC must meet the same evidentiary standard as a moving party seeking summary judgment under Rule 56, and that the SLC has failed to meet this standard because it has "failed to submit *any* evidence in support of the Motion." PAB at 9-10 (emphasis in original).

Plaintiff's argument that the Report itself is not evidence and that the Report is insufficient because it does not cite specifically to evidence for support of its facts and

conclusions reeks of desperation. This argument is contradicted by the standard practice of this Court to use and rely upon the special litigation committee's report as evidence in evaluating the reasonableness of the committee's investigation and whether the committee had reasonable bases for its conclusions. *See, e.g., Kaplan*, 484 A.2d at 519-20 (holding that the special litigation committee's investigation was reasonable because the "report of the Committee appears to be comprehensive and well documented and gives indication of a reasonable and thorough investigation of the plaintiff's allegations"); *Katell*, 1995 WL 376952, at *10-13 (citing repeatedly to the special litigation committee's report throughout its review of the reasonableness of the committee's conclusions and stating that "[t]he remainder of the legal analysis in the Special Committee's report provides a reasonable prediction of how this Court might rule on the issues in this case. The Special Committee's report does touch upon the unsettled issues regarding the fiduciary duties of general partners of limited partnerships, but it provides a careful and reasonable analysis of each of these issues."). Clearly, the SLC, through the Report[14] and its Appendix, as well as other documents filed with the Court, deposition testimony and the affidavits submitted in support of this reply brief has set forth a "thorough written record" sufficient to satisfy the *Zapata* standard.

Plaintiff attempts to nitpick the reasonableness of the SLC's investigation because neither the Report nor the opening brief "describe or discuss in any detail or meaningful way [the documents that were] requested *or* reviewed" and "what if anything was done to *actually* confirm that the production of documents [was] complete." PAB at 20-21 (emphasis in original).

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[14] Plaintiff's argument that the Report's credibility should be called into question because it was not signed by Mr. Jeffrey or the SLC's counsel is absurd. PAB at 10. Mr. Jeffrey testified under oath that the Report was his work product (with the assistance of the SLC's counsel). *See* Davis Aff., Ex. B at 35.

These assertions are baseless for several reasons. First, it is undisputed that the SLC served document requests on the Individual Defendants, served a subpoena on Home Center, and was granted a commission and served a subpoena on Cimarron. The Report clearly discloses this information. Report at 12. This Court encouraged the SLC to take such actions to ensure that all responsive and relevant documents were produced (Davis Aff., Ex. A at 35), and the SLC followed the Court's instructions. The SLC and its counsel reviewed the documents received, looked for any gaps and made follow-up requests. Davis Aff., Ex. C at 71-72. A sufficient record has been established to demonstrate what steps the SLC took to ensure it received all relevant documents. Moreover, plaintiff received copies of all of the documents that the SLC received and there is therefore no mystery regarding what documents the SLC reviewed as part of its investigation.

III. THE SLC HAD REASONABLE BASES FOR ITS CONCLUSIONS.

Under *Zapata*, the SLC must have "a reasonable basis for its conclusions to dismiss the lawsuit." *Katell*, 1995 WL 376952, at *10. The SLC is not required to "show that the parties do not dispute material facts regarding [plaintiff's] allegations." *Id.* at *12. Here, while plaintiff asserts the desperate and illogical argument that the SLC has not submitted "*any* evidence in support of the Motion" (PAB at 10 (emphasis in original)), the Report and its Appendix, other documents and sworn testimony, and the affidavits submitted in support of this reply brief clearly do constitute evidence in support of the SLC's conclusions. *See supra* II.B.

Remarkably, plaintiff asserts that she had "minimal evidence available to [her]" in evaluating the reasonableness of the SLC's conclusions. PAB at 21. This assertion is false. Before filing this action, plaintiff had the books and records produced in response to the Section 220 demand and, after the SLC completed its investigation, plaintiff received broad discovery

not only of all of the documents the SLC reviewed, but also took three depositions, and received sworn responses to interrogatories. It is a testament to the thoroughness of the SLC's investigation and the reasonableness of its conclusions that plaintiff, even with this broad discovery, identifies only picayune challenges to the SLC's determinations.

A. The SLC Reached Reasonable Conclusions Regarding Perry And Todd's Total Compensation And Employment Contracts.

Plaintiff has completely abandoned her argument that Perry and Todd's total compensation, including perquisites, is excessive and unfair to the Companies.[15] Plaintiff, however, still argues that the SLC's conclusion that Perry and Todd's employment contracts were fair is not reasonable. PAB at 21-27. Plaintiff challenges the conclusion that Perry and Todd's employment contracts memorialized oral agreements that existed prior to the drafting and execution of the employment contracts because, she argues, they would have to be similar to the contract Dwight Sr. had. *See id.* at 22-23. This argument is not only picayune, it is nonsensical. Perry and Todd never claimed that their employment contracts were modeled after or based upon the deal Dwight Sr. had – only that their agreements memorialized oral agreements already in place as to them.[16] Report at 100; OB at 11.

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[15] In an apparent effort to distance herself from this now abandoned challenge, plaintiff did not even submit the deposition transcript from the SLC's compensation expert, who testified that the SLC's process in assessing Perry Sutherland's compensation "was as clean and objective as [it] could be." Moffit Aff., Ex. A at 116.

[16] This point is evidenced by looking at the initial drafts of the employment contracts created by Thomas Jones, outside counsel with respect to the employment contracts, and circulated to Perry and Todd for their review. Moffitt Aff., Ex. C & D. Mr. Jones made it clear during his interview that he did not base the drafts on Dwight Sr.'s employment contract, but rather on the terms provided to him by Brian Maxwell to memorialize the oral agreements already in place. Moffitt Aff., Ex. E; Report at 82; *compare also* Moffitt Aff., Ex. C & D *with* Davis Aff., Ex. I. The initial drafts included a "Deferred Compensation" provision that is similar to the one Dwight Sr. had in his employment agreement. Davis Aff., Ex. I; Report at 82. Perry indicated during his interview that the "Deferred Compensation" provision was removed from the drafts of his and Todd's

Plaintiff also criticizes the SLC for purportedly not "investigat[ing] and consider[ing] the process … by which the Employment Agreements were approved."[17] PAB at 23. Plaintiff does not explain what the Companies could possibly stand to gain by pursuing claims based on alleged procedural shortcomings when the total compensation is objectively reasonable and unchallenged. In any event, in making this statement, plaintiff conveniently ignores the analysis on page 100 of the Report concerning the process by which the employment agreements were approved, including the ramifications of the terms of the agreements not being negotiated. Report at 100. Plaintiff also falsely argues that the SLC did not consider the fact that Martha was removed as a director the day before Perry and Todd's contracts were approved. PAB at 23. To the contrary, the SLC was fully aware that plaintiff was not re-elected to the board of Southwest and that she was never a director of Dardanelle (Report at 30) and was aware of the reasons articulated by the Individual Defendants for not reelecting her in drawing its conclusions and analyzing the process by which Perry and Todd's employment contracts were approved. Report at 100-04.

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contracts because he did not understand that to be part of his and Todd's employment by the Companies. Moffitt Aff., Ex. F. This fact demonstrates that Perry and Todd were not basing the terms of their written contracts on Dwight Sr.'s, but rather to memorialize the oral agreements already in place as to themselves.

[17] Plaintiff also claims that there are "material contradictions" between Mark's statements during his interview and his statements during his deposition in the Kansas City books and records case. PAB at 24. Plaintiff mischaracterizes the summary of Mark's interview. The summary does not suggest that "Mark spoke with a number of people about the terms" of Perry's employment contract. *Id.* The interview summary only states that Mark was aware of what other family members and district managers were paid – information he was privy to because of his involvement in the business (Davis Aff., Ex. J at 127-28) – and that he spoke with Steve Scott regarding Perry's salary before approving the agreement. Moffitt Aff., Ex. G. Mark did not say that he spoke "with a number of people" – only that he spoke with Mr. Scott. Furthermore, in his interview, Mark said he spoke with Mr. Scott only regarding Perry's *salary*, not Perry's perquisites. These statements as reflected in their interview summary are entirely consistent with Mark's deposition testimony that he spoke only with Perry regarding the perquisites in Perry's contract. Davis Aff., Ex. J at 128.

In yet another attempt to elevate form over substance, plaintiff criticizes Mr. Jeffrey for not concluding that the compensation received by Perry and Todd was unfair by virtue of the competition and removal provisions in their employment contracts, even though he considered a signing of a contract to be a single transaction. PAB 25-26. Mr. Jeffrey, however, is not a Delaware lawyer, and it was perfectly reasonable for him to rely upon the advice of his counsel that the entire fairness standard should only be applied separately to the compensation provisions of Perry and Todd's employment contracts. *See, e.g., Carlton Invs.*, 1997 WL 305829, at *12 (good faith reliance on counsel by special litigation committee was "acceptable, practical and often necessary"); *Katell*, 1995 WL 376952, at *10 ("heavy reliance" on counsel by committee members is acceptable).

Plaintiff next advances her technical, procedural argument that her challenges to the provisions in Perry and Todd's employment agreements allowing them to compete with the Companies and providing them with severance benefits even if they were terminated for cause were ripe for adjudication.[18] PAB at 25-26. Delaware law is clear that a claim should not be adjudicated where "it is literally impossible to predict whether or not" the injury will occur. *Multi-Fineline Electronix, Inc. v. WBL Corp. Ltd.*, 2007 WL 431050, at *8 (Del. Ch.). Here, no injury to the Companies occurred or appeared likely to occur because neither Perry nor Todd intended to compete with the Companies and the Companies had no intention of terminating

[18] Plaintiff mischaracterizes Mr. Jeffrey's testimony that when he was "pressed on the ripeness issue" he stated "'it gave [the SLC] another argument' that the Employment Agreements were not wrongdoing." PAB at 25 (quoting Davis Aff., Ex. B at 242). Mr. Jeffrey made this statement in connection with a discussion of the statute of limitations analysis performed by the SLC, not during a ripeness discussion. Davis Aff., Ex. B at 241-42. In addition, Mr. Jeffrey immediately clarified his statement by explaining that plaintiff's knowledge in the 1990's of some of her claims "would certainly be a position [] the defendants" would take and that the SLC should therefore consider it, although the statute of limitations was not dispositive of the SLC's analysis. *Id.*

either Perry or Todd. Report at 111. Plaintiff's claims clearly were not ripe because litigation "sooner or later" was not "unavoidable" (*Bebchuk v. CA, Inc.*, 902 A.2d 737 (Del. Ch. 2006)), and her claims were only "prospective … [and] depend[ed] upon the occurrence of events that ha[d] not occurred and may [have] never occur[ed]." Report at 111.

Mr. Jeffrey's belief that the competition and severance benefits provisions were not "reasonable" (PAB at 26; Davis Aff, Ex. B at 200), the SLC's recommendation that those provisions be modified (PAB at 26; Report at 112), and the subsequent amendments to Perry and Todd's employment contracts to alter those provisions (Jeffrey Aff. ¶ 10) only reinforce the premature nature of plaintiff's challenge to them.[19] The Companies were never, and most likely never would have been, harmed by the provisions, and in all events, cannot be harmed by them now since they have been amended. Regardless of plaintiff's picayune procedural arguments, it simply cannot be in the Companies' best interests to pursue claims relating to contractual provisions that are not in force and never caused any injury.

B. The SLC Reached Reasonable Conclusions Regarding The Cimarron Accounting Expenses.

In her complaint, plaintiff alleged that Perry and Todd "enjoyed the benefits of free personal tax and accounting services at significant expense to Dardanelle." Compl. ¶ 61. Plaintiff, however, has abandoned that sweeping allegation and now only suggests that Perry, solely through accounting services rendered to Choctaw, has benefited from Cimarron's tax

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[19] Plaintiff's citation to *In re Digex S'holders Litig.*, 789 A.2d 1176 (Del. Ch. 2000) is not persuasive. PAB at 25. In *Digex*, 789 A.2d at 1180, the directors voted to approve a merger agreement that waived the protections afforded by 8 *Del. C.* § 203. The Court held that a challenge to the board's decision was ripe because a "resolution of this matter is of the utmost importance to all of the parties as the merger moves toward receiving the approval of [the] shareholders and the closing presumably soon thereafter." *Id.* at 1206. The present situation is different because no action related to the competition and severance benefits provisions is imminent. Given this fact, there is no urgency or reason for the Court to resolve plaintiff's challenges to these provisions.

services at the expense of Dardanelle.[20] PAB at 27-34. In making this claim, plaintiff completely ignores the extensive record in the Report about the investigation performed by the SLC into Cimarron's structure and workings, and claims that the SLC only performed an "intentionally superficial" investigation. *Id.* at 28. Rather than superficial, the SLC's investigation of the use of Cimarron's services for Choctaw-related tax matters and by the Sutherland family in general was thorough and reasonable.[21] The evidence shows that Choctaw did not receive free services, but was charged a fixed fee, set not by any of the Individual Defendants, but by third parties.

Plaintiff argues that the SLC failed to "focus [] on the undisputed evidence that Dardanelle and Southwest historically had 'absorbed' – and thus paid for – accounting services for Choctaw and other entities" and "failed to investigate the substantial amount, and cost, of the Cimarron services to Choctaw in general and for the IRS audit in particular." Report at 29-30. This argument is wrong because the SLC not only performed a thorough investigation of the Companies' practice of "absorbing" the costs of accounting services for Choctaw and other entities (to the extent actual charges exceeded the fixed charges Cimarron determined to bill to the users), but it also used all of the evidence available to assess the amount of time Cimarron's

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[20] Plaintiff's newly-narrowed focus conspicuously ignores the findings in the Report that she has been a beneficiary, to the detriment of her siblings, from the fixed fee structure for other family entities. *See* Report at 57-58 & n.40.

[21] The SLC, through interviews and documents produced to it, reviewed the history of Cimarron, the types of services it provided, to whom it provided those services, and how Cimarron charged for its work. Report at 51-52. The SLC interviewed 8 employees of Cimarron, including Connie Campfield, David Dotson, Nancy Spieker, Steve Scott, Brian Maxwell, Carol Braun, Sharon Tanner, and Julie Meier. *See id.* at 13. The SLC also reviewed the circumstances surrounding the change in billing structure at Cimarron in 2004 and how much it charged Perry, Todd, and other family members for its services. *See id.* at 52-53.

employees devoted to Choctaw-related matters before Cimarron began to track separately time charges for Choctaw.

In 2004, Cimarron changed the way it tracked hours billed to Choctaw and other Sutherland family-owned entities so that it could determine the actual number of hours devoted to each entity. Report 52-53. Prior to this change in billing practice, Cimarron charged Sutherland family members and the entities they owned a fixed fee per year for accounting work. *See id.* at 51-52; Davis Aff., Ex. L. Choctaw was charged and paid a yearly fixed fee of $7,500 for Cimarron's services. Report at 54-55. The fixed fee charged by Cimarron to Choctaw and other entities was determined by professionals at Cimarron, not by any of the Individual Defendants. *See id.* at 97. To the extent the aggregate time charges for tax services provided by Cimarron to members of Dwight Sr.'s family (including plaintiff) and their companies exceeded the aggregate fixed fees charged to all those individuals and businesses, the Companies would have absorbed the overage. Accordingly, the only way for the SLC to determine if and to what extent the Companies absorbed Cimarron's fees before the billing practice change was to calculate the number of hours Cimarron's employees devoted to Choctaw and the amount of fees incurred.

Through its investigation, the SLC determined that Connie Campfield was the Cimarron employee assigned to perform Choctaw-related work.[22] S*ee id.* at 13, 56; Davis Aff., Exs. M & O. Thus, the SLC interviewed Ms. Campfield, as well as Mr. Dotson, the Tax Director at Cimarron, and Ms. Spieker, the Accounting Manager at Cimarron, to determine the

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[22] Plaintiff falsely claims that she did not assert that "Ms. Campfield spent all of her time on Choctaw matters." PAB at 29 n.15. In her complaint, plaintiff stated that a Cimarron employee was "working full-time on Choctaw accounting matters." Compl. ¶ 62. During her interview, plaintiff identified this employee to be Ms. Campfield. Davis Aff., Ex. K.

number of hours Ms. Campfield and others devoted to Choctaw-related matters.[23] Report at 13; Davis Aff., Exs. M & O. From these interviews, the SLC determined that Ms. Campfield, including during the period of the IRS audit of Choctaw, was "responsible for approximately seven DDS Family investments [including Choctaw], but [] had simultaneous responsibility for even more entities owned by other branches of the Sutherland family." Report at 56. The SLC also determined that Ms. Campfield occasionally devoted a full business day to Choctaw, but at no time was she working exclusively on Choctaw (nor could she have considering her other duties). *See id.*; Davis Aff., Exs. M & O. The SLC was unable to determine the exact number of hours Ms. Campfield devoted to Choctaw-related matters because her time sheets before 2004 did not separately track time devoted to Choctaw, but rather aggregated that time with other DDS Family Investments.[24] Davis Aff., Ex. B at 164; Jeffrey Aff. ¶ 8. Report at 55; Davis Aff., Ex. M. Due to the manner in which the time sheets were kept before the billing change, the SLC reasonably determined it was "not practical, based on the existing documentary record, to

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[23] The interviews of Mr. Dotson and Ms. Spieker contradict plaintiff's claim that the SLC only interviewed Ms. Campfield regarding Cimarron's recordkeeping and timekeeping procedures and that only "junior" level Cimarron employees (who plaintiff claims without any support might be "guarded … of saying anything that could lead to personal liability for Perry or Mark" (PAB at 29)) were interviewed regarding Choctaw. PAB at 33.

[24] The SLC sought the time sheets for this period regarding Choctaw-related services through its subpoena of Cimarron (Moffitt Aff., Ex. H (Request No. 8)) but no time sheets were produced because the time sheets did not separately account for Choctaw-related time. Plaintiff makes much of the allegedly conflicting testimony of Mr. Hurd and Mr. Jeffrey regarding whether the SLC requested Cimarron time sheets. PAB 32-33. There is in fact, no conflict in the testimony. The SLC asked for, and received, records of time devoted to Choctaw-related matters during the period for which they existed but did not subscribe to plaintiff's conspiracy theory (PAB at 31) that Cimarron be required to provide documentary proof of the non-existence of Choctaw time records from before 2003. The interviews of Cimarron's employees, who are third parties to the family feud, is the best evidence of how their time was recorded during that time period. The SLC had no reason to believe that Ms. Campfield (an individual plaintiff encouraged the SLC to interview) or any other Cimarron employee lied about Cimarron's practices, and thus, reasonably relied on their statements.

determine precisely to what extent Choctaw and other entities may have received a benefit that was subsidized by the Companies." Report at 97.

Plaintiff argues that even without the time sheets, other evidence demonstrates that the Companies "must have" absorbed a significant amount of Cimarron's fees for Choctaw, specifically during Choctaw's audit by the IRS. Plaintiff merely speculates that Choctaw would have generated "substantial" work on a routine basis for Cimarron (PAB at 30), which speculation is undermined by the fact that the actual Cimarron charges to Choctaw for August 1, 2003 through July 31, 2004 was $7,948, for August 1, 2004 to July 31, 2005 was $12,174, and for August 1, 2005 to July 31, 2006 was $8,766. Report at 54-55, 98. Even if one were to assume (if actual, separate time records for Choctaw had existed before August 2003) that actual time charges would have exceeded the $7,500 fixed fee billed to Choctaw before the billing practice change,[25] it still would not be in the Companies' best interests to pursue such "overages" against Perry because at that time Dwight Sr. owned almost all of Choctaw.[26] Even if the entire overage were treated as additional compensation to Perry (even though he owned a very small interest in Choctaw),[27] his total compensation would still remain objectively reasonable – a conclusion plaintiff has not even challenged.

In sum, the SLC took reasonable steps to determine the amount the Companies absorbed for Cimarron's services provided to Choctaw and other DDS Family Investments and

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25 With respect to the period the IRS was auditing Choctaw (2001-2003), the SLC is aware that Choctaw paid more than $60,000 to outside accounting and legal professionals for services in connection with the IRS audit. *See* Report at 56. It is pure speculation by plaintiff that the IRS audit would not have cost a "mere $60,000" (PAB at 34) and that the Companies would have been left to absorb the costs.

26 Report at 54-55 n.35.

27 Documents submitted by plaintiff confirm that Perry's interest in Choctaw was approximately one percent. Davis Aff., Ex. N (showing Perry's 1% interest in horses).

included the information that was available in its Report. Based on the evidence that was available and its interviews with Cimarron's employees, the SLC concluded that the total value of any benefit received by Choctaw from this practice "would not be material." Report at 98. As the Individual Defendants would have a variety of defenses to any claim for the "overage" – if such a claim could be proved given that Cimarron did not separately track time for Choctaw before August 2003 – it would not be in the Companies' best interests to pursue such a claim.

C. The SLC Reached Reasonable Conclusions Regarding The Defense Of The Section 220 Action.

Plaintiff attacks the SLC's conclusion regarding the Section 220 Action on three fronts: (i) the SLC conducted only a sham investigation of plaintiff's Section 220 claims; (ii) the SLC applied the wrong legal standard in its review of plaintiff's breach of fiduciary duty claims; and (iii) the SLC wrongly concluded that the Companies received a benefit by defending the Section 220 Action. PAB at 34-38. None of these arguments is persuasive.

Contrary to plaintiff's claims, the SLC conducted a thorough investigation into the Companies' defense of the Section 220 Action. The SLC performed an extensive review of the proceedings in the Section 220 Action (Report at 58-78) and interviewed the participants – Perry, Todd, Martha, Dwight, Jr. and Robert Saunders. Report at 13. Plaintiff attempts to discredit the SLC's investigation by noting that the SLC never "received or reviewed any substantive correspondence" between Skadden and anyone at the Companies regarding "defense strategy, likelihood of success, or potential costs to defend." PAB at 35. Discussion regarding such topics, however, routinely occurs telephonically, not via email or through a client memorandum. Thus, it is not surprising that there are no written communications regarding these topics. Furthermore, the document requests served on Perry and Todd and the informal requests served on the Companies sought all documents concerning plaintiff's July 13, 2004

demand letter seeking books and records. Moffitt Aff., Ex. I; Report at 12. The absence of any communications between Skadden and anyone at the Companies concerning these topics in the documents received by the SLC confirms that these types of communications were not reduced to writing.

Plaintiff also claims that the SLC failed to investigate how the Individual Defendants could justify the "extraordinary expenditures" incurred in defending the Section 220 Action (i) when the directors claimed that the documents sought would prove that there was no wrongdoing; (ii) when it would not have been burdensome to produce the documents; and (iii) given the Companies allegedly "tenuous financial condition." PAB at 36-37. Plaintiff's claim is not that the SLC failed to investigate, but rather that her arguments call for a different conclusion. The SLC did consider these factors in its determination, but concluded that the Companies had sufficient justification for defending the Section 220 Action.

Among other things, the SLC determined that "the Individual Defendants could not know what the outcome of the Section 220 Action would be" at the beginning of the case and as it progressed.[28] Report at 107. Thus, it is unfair to say that the Individual Defendants knew there would be "extraordinary expenditures." Furthermore, the SLC determined that the Individual Defendants had several reasons for incurring expenses defending the Section 220 Action. During his interview, Todd stated that just after plaintiff made her books and records demand, plaintiff informed him that it was "all or nothing" – meaning that she would not settle

[28] Because the Individual Defendants could not have known the final cost of defending the Section 220 Action in advance, the SLC broke the litigation down into parts (Report at 58-78) and reviewed the Individual Defendants' decision to cause the Companies to continue to defend the Section 220 Action at various points of the litigation. The SLC determined that the Individual Defendants' decision at each point was reasonable. Plaintiff never specifically challenges any of the Individual Defendants' decisions during the course of the litigation, just the overall, after-the-fact cost of the litigation.

the Section 220 Action unless she received all of the documents she sought. Moffitt Aff., Ex. J. Given plaintiff's statement, the Individual Defendants had justification for refusing to produce all of the documents listed in plaintiff's demand because they believed, in good faith, that her requests were overbroad and were for an improper purpose. Indeed, the Court did limit the scope of the documents plaintiff was entitled to, validating in part the Individual Defendants' position.[29] Report at 73-74.

Plaintiff also argues the Individual Defendants acted unreasonably by defending the Section 220 Action because the cost of copying the requested documents would have been less than the defense costs. PAB at 37. If the Court were to accept plaintiff's premise – that corporations should never defend section 220 claims because it would cost less to produce the documents – it would undercut the statutory right of corporations to defend against improper demands for books and records. It will *always* be less expensive to just copy the documents. The SLC took into account the Companies' statutory right to defend against the Section 220 Action in reaching its conclusions. Davis Aff., Ex. B at 186, Ex. C at 222-23. To the extent plaintiff argues this case should be viewed differently because of the level of costs that would have been avoided by producing the documents, the SLC concluded that "the Individual Defendants could not know what the outcome of the Section 220 Action would be and spent what they believed, based on the facts and circumstances that were present, was necessary to defend it." Report at 107. The SLC also noted that before deciding to defend the Section 220 Action and throughout the course of the Section 220 Action, the Individual Defendants and the

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[29] There were circumstantial facts around the time of plaintiff's demand that led the Individual Defendants to question the *bona fides* of her stated purposes, and merely stating a proper purpose, even when combined with credible evidence of wrongdoing, does not preclude a finding that the stockholder has an improper purpose. *See Highland Select Equity Fund, L.P. v. Motient Corp.*, 2007 WL 907650 (Del. Ch.).

Companies' counsel "engaged in costs-benefits discussions concerning whether it was prudent to defend the Section 220 Action." *Id.* at 110. In sum, the SLC closely examined the Individual Defendants' consideration of the costs of defending the Section 220 Action and their reasons for choosing to bear those costs.

Plaintiff also argues, without any evidence or case law support, that the Individual Defendants chose to defend the Section 220 Action for "purely personal reasons" and that the entire fairness standard should apply, rather than the business judgment standard applied by the SLC. PAB at 38. The SLC, through interviews with the Individual Defendants and Mr. Saunders and a review of the documentary evidence concerning the Section 220 Action, concluded that there were not "any facts that would evidence that Perry, Todd, or Mark had a dishonest purpose in causing the [Companies] to defend the Section 220 Action or that they were seeking to conceal wrongdoing on their part." Report at 110. That the SLC's thorough investigation of plaintiff's other claims of wrongdoing revealed that they were not supported by the facts further corroborates this conclusion. Thus, the business judgment standard was the proper standard to apply. Plaintiff's request that the Court adopt a standard assessing the costs of defending a section 220 lawsuit against directors if the corporation ultimately does not prevail runs counter to the statutory right of a corporation to defend in good faith a Section 220 action and the public policy of this state to encourage people to serve on boards of directors. *See, e.g.*, *Production Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 793 (Del. Ch. 2004) (section 102(b)(7) was adopted "for the intended purpose of encouraging capable persons to serve as directors of corporations").

D. The SLC Reached Reasonable Conclusions Regarding The Payment Of Personal Expenses By The Companies.

Plaintiff claims that the SLC did not conduct an adequate investigation of her claims regarding the payment of personal expenses by the Companies because, she argues, the SLC only focused on "the handful of expenses that Martha and Dwight Jr." articulated. PAB at 39. The SLC, consistent with its charge from the Companies' boards, thoroughly investigated the claims asserted in the Complaint, as well as the allegations plaintiff and Dwight Jr. made during their interview, but also examined the systems and processes in place at the Companies and at Cimarron to assess the likelihood of the broad-ranging improper conduct plaintiff claims. Because the claims asserted in the Complaint and interview have been disproved, plaintiff attempts to "move the goalposts" by arguing that the SLC, regardless of the falsity of her claims, was obligated to investigate every possible payment of personal expenses by the Companies. Not only was a full-blown forensic audit not called for by the allegations raised in the Complaint and during plaintiff and Dwight Jr.'s interview, it would have been exorbitantly expensive. *See* Davis Aff., Ex. B at 57. Also, a forensic audit was not necessary because the SLC satisfied itself with the integrity and independence of the accounting processes employed by Cimarron, investigated each of the many specific expenses that plaintiff and Dwight Jr. claimed had been paid by the Companies, and uncovered no evidence of improper accounting or other wrongdoing.[30]

Plaintiff also nitpicks Mr. Jeffrey's review of the Companies' general ledgers. PAB at 39-41. During his review, Mr. Jeffrey was granted full access to the general ledgers and

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[30] Among others, plaintiff's concerns included expenses for hotels, car and van rentals, limousine services, private railroad cars, The River Club and litigation. Report at 113-121.

sub-ledgers of the Companies, as well as the back-up documentation for the ledgers. Jeffrey Aff. ¶ 4; Report at 14. Mr. Jeffrey, using his extensive accounting background, "focused in part on a representative sample of the travel and miscellaneous categories where, in his judgment, inappropriate business expenses would likely be found." Report at 14. Mr. Jeffrey also reviewed the back-up documentation for between 5 and 10 of the general ledger entries and "every entry regarding checks written by either of the Companies to Perry from January 2001 through October 24, 2006." Davis Aff., Ex. B at 54. In addition, Mr. Jeffrey spent time with Mr. Scott discussing the general ledgers and reviewing Cimarron's accounting procedures. *See id.* at 62-63. In sum, the extent of Mr. Jeffrey's review of the general ledgers of the Companies was reasonable and sufficient.

Plaintiff further claims that the SLC had no basis for concluding that it was the Companies' "usual and customary practice" for the Companies to advance expenses on certain people's behalf and then to receive reimbursement from that person.[31] PAB at 39-40. In fact, the SLC determined this was the customary practice through interviews and follow-up telephone conversations with employees at Cimarron and the Companies (Davis Aff., Ex. O; Moffitt Aff., Exs. K-N) and Mr. Jeffrey's review of the general ledgers and the back-up documentation for certain entries in those general ledgers. Plaintiff fails to point out that it was also common for

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[31] Plaintiff makes much of the fact that the Report did not mention two payments made for work done by Leo King on Perry's house in 2000 and 2001, at a time when Perry's base compensation was $120,000, before Dwight Sr. increased his salary to $200,000 in 2002. PAB at 41 & n.19. Plaintiff argues that these payments required the SLC to conduct a full-scale forensic audit. The SLC was fully aware of these payments, which were properly added to Perry's W-2s – a fact conspicuously absent from plaintiff's brief. Davis Aff., Ex. Q; Jeffrey Aff. ¶ 9; Hurd Aff. ¶ 4. Given that these payments were properly accounted for and included as compensation on Perry's W-2s, there is no basis to argue that a forensic audit was required. Moreover, even adding the compensation to Perry from Mr. King's services, Perry's total compensation was not more than that for 2003 forward, which plaintiff does not challenge. Report at 101-03.

Perry and other Sutherland employees to pay personally for business expenses as they arose and to be reimbursed at a later date by the Companies. Moffitt Aff., Ex. N. Thus, it was not the case that the Companies consistently advanced money for certain employees, as plaintiff appears to encourage the Court to conclude.

E. The SLC Reached Reasonable Conclusions Regarding The Ownership, Use And Costs Of The Aircraft.

Plaintiff argues that the Report includes a number of "conclusory assertions" regarding the ownership, use and costs of the Aircraft without any "meaningful support." PAB at 42. This argument is ridiculous. The Report contains extensive analyses of the ownership, use, and costs of the Aircraft (Report at 23-27, 34-48, 104-105), and the Appendix contains hundreds of pages analyzing the use of the Aircraft by the Individual Defendants, Dwight Sr., and others. It is clear from these sources how the SLC reached its conclusions, what those conclusions were, and that they were reasonable.

Plaintiff's first counter-factual argument is that the Report does not provide any evidence for the SLC's conclusion that the purchase of the Aircraft was proper. PAB at 42. To the contrary, the SLC "looked closely at the merits of the business decision" to purchase the Aircraft and "concluded that such ownership constitutes a reasonable business expense which would likely be protected by business judgment rule principles." Report at 104. The SLC listed the following factors in reaching this conclusion:

> (i) Southwest has minimized its expense by owning only 50% of the Aircraft, and further reducing costs through its time-share relationships; (ii) the need for efficient air transportation for business purposes is apparent given the relatively remote and geographically diverse locations of most of the Companies' stores; (iii) the Companies' business usage of the Aircraft, on a mileage basis, exceeds that of Dwight Sr., Norma, Perry, Todd and Choctaw in the aggregate; (iv) the cost of invoiced travel is dictated by federal regulation; (v) the average negative cash flow

> to Southwest over the past five years to own the Aircraft, in excess of invoiced amounts for travel, is approximately $38,000; (vi) the reported depreciation on the Aircraft represents an opportunity for tax deferrals; and (vii) if the recent $1.55 million appraised value (of a 50% interest) in the Aircraft is accurate, and as was the case with the Lear Jet, were the Aircraft to be sold, Southwest would likely recover a substantial portion of its initial $1.9 million investment, less the carrying cost of the investment.

Id. at 104-105; *see also id.* at 45-46. The Report also noted that "the Individual Defendants would have a particularly strong statute of limitations defense and possibly an acquiescence defense with respect to this business decision." *Id.* at 104.

Plaintiff next asserts that because the Lear Jet owned by Southwest prior to its purchase of the Aircraft was "used a mere 2-3% of the time for trips related Southwest's retail lumber business" then the Aircraft must have been purchased for personal, rather than business, reasons. PAB at 43. Plaintiff fails to reveal, however, that this 2-3% figure relates to the use of the Lear Jet in the early 1990s, before the opening of several stores in remote locations, and omits the use associated with the Companies' charter business. Report at 37. Plaintiff also criticizes the SLC for not inquiring into the state of mind of the persons who bought the Aircraft to determine why it was purchased (PAB at 42-43), notwithstanding her suggestion elsewhere that the SLC should have discredited everything it learned from the interviews (other than of her and Dwight, Jr.), and notwithstanding extensive records showing how the Aircraft was used. *See* Appendix.

Plaintiff next argues that the SLC failed to analyze properly the business use of the Aircraft as compared to the personal use.[32] PAB at 43-44. Plaintiff completely ignores the

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[32] Plaintiff goes so far as to claim that the Individual Defendants, apparently recognizing that years later plaintiff would file a derivative lawsuit, intentionally increased the number of business hours flown as a result of her demand for company records. PAB at 44.

analysis the SLC actually performed, which is broken down in detail in the Appendix, to reach the conclusion that the Companies' business usage of the Aircraft, on a mileage basis, exceeds the use of Dwight Sr., Norma, Perry, Todd and Choctaw for personal flights in the aggregate. Report at 105. Furthermore, an analysis of whether the business usage of the Aircraft increased subsequent to plaintiff's requests for company records (PAB at 43-44), although easily ascertained from the information in the Appendix, was not necessary because of the small number of personal flights taken compared to other flights and the opening of new stores at geographically remote locations. Davis Aff., Ex. B at 136-37; Report at 45-46.

Plaintiff also argues that the SLC failed to investigate reasonably the costs to the Companies of the ownership and use of the Aircraft and only focused on the "net cash flow" line item on the Companies' financials.[33] PAB at 44-47. In particular, plaintiff falsely claims that Mr. Jeffrey admitted that the net cash flow line item "did not include substantial additional costs to the Companies," including carrying costs, maintenance costs, and depreciation.[34] *Id.* at 44-45.

But the SLC recognized that the net cash flow line item, which includes maintenance and operating costs, did not include depreciation. Accordingly, the SLC looked beyond the net cash flow line item and considered depreciation in its analysis. Report at 48. The SLC noted that "to the extent the Aircraft is later sold and it retains its market value, the

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[33] Plaintiff claims that Mr. Jeffrey "admitted that he knew of the flaws in" the SLC's approach to analyzing the costs of the Aircraft. PAB at 44. But, plaintiff provides no citation for that statement. This is because Mr. Jeffrey never said it.

[34] Plaintiff mischaracterizes Mr. Jeffrey's testimony. In the portion of Mr. Jeffrey's deposition that plaintiff cites to support this statement, Mr. Jeffrey was discussing the types of costs that are included in the formula for charging timesharees for their use of the Aircraft under the Aircraft Time Sharing Agreement, not the costs included in the net cash flow line item. Davis Aff., Ex. B at 71-72. The Report clearly states that the maintenance costs, along with insurance, fuel, travel, and other miscellaneous costs, are included in the net cash flow line item. Report at 47-48.

depreciation amounts represent a potential tax deferral" and that a market survey prepared in November 2006 indicated that the Aircraft was worth $3.1 million – approximately 82% of the original purchase price. *Id.* The SLC also took "into account in its analysis the time value of carrying the investment in the Aircraft." *Id.* Clearly, the SLC focused on much more than the net cash flow line item (which includes maintenance and operating costs) as it also considered non-cash costs such as carrying costs and depreciation.[35]

Plaintiff's suggestion that the SLC should have looked to Home Center's breakdown of its ownership costs for its half interest in the Aircraft in reaching its conclusions is misguided for several reasons. PAB at 46. Home Center purchased its half of the Aircraft using a like-kind exchange under Section 1031 of the Internal Revenue Code (Moffitt Aff., Ex. E), while Southwest contributed cash to purchase its half. *Id.* Accordingly, the tax basis for Home Center's half of the Aircraft is completely different than Southwest's. Furthermore, Home Center's breakdown includes depreciation of the Aircraft, while Southwest's net cash flow line item does not (a fact the SLC recognized). Report at 48. Putting aside depreciation, the aggregate operating income for Home Center with respect to the Aircraft for 2002 through 2006 (-$80,203) is very similar to Southwest's total cash flow with respect to the Aircraft for that same 5 year time period (-$187,664). Thus, plaintiff's comparison of Home Center's breakdown and the net cash flow line item holds no importance.

Finally, it is meaningless that Mr. Jeffrey could not recall during his deposition precisely "how" Southwest paid for its 50% interest in the Aircraft. PAB at 44. The SLC knew

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[35] Plaintiff's brief also ignores Mr. Jeffrey's testimony regarding the significantly greater cost to the Companies of chartering an aircraft to reach the geographically remote store locations. See Davis Aff. Ex. B at 140-41.

that the Companies were in a net borrowing position[36] at the time of the purchase of the Aircraft (Davis Aff., Ex. B at 73-74), and the SLC also knew what that borrowing rate was. Report at 122. Thus, the SLC did not need to specifically inquire about how the Companies paid the $1.88 million purchase price because it already knew the terms of the Companies' borrowings.

F. The SLC Reached Reasonable Conclusions Regarding The Statute Of Limitations Issues.

Although the Report expressly recognizes the concept of tolling, plaintiff claims that the SLC reached unreasonable conclusions regarding the statute of limitations because, she argues, the statute was tolled during the pendency of her Section 220 proceeding. In so doing, plaintiff turns a blind-eye to the consequences of her own sworn testimony that she suspected systematic wrongdoing at the Companies since the mid-1990s, and that of Dwight Jr. that since 1997 he believed it was inappropriate for the Companies to have a jet.[37] Report at 28-29.

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[36] Plaintiff's assertion that the net borrowing position of the Companies has worsened (PAB at 44) paints only half the picture. Although the debt in 2006 may be higher than in previous years, the Companies borrowed during this period to acquire various assets, such as land and building materials for new stores. For example, on April 24, 2006, Southwest borrowed $1,000,000 from Latigo Cattle Co., LLC to fund the acquisition of the Marble Falls store. Report at 124.

[37] Plaintiff's reliance on *Orloff v. Shulman*, 2005 WL 3272355 (Del. Ch.) is misplaced. In *Orloff*, 2005 WL 3272355, at *6, 10, the defendants had "engaged in a campaign of intentional disinformation," including the dissemination of fraudulent documents, that prevented the plaintiffs from having sufficient information to bring their complaint until they received the company's books and records through the Section 220 action. No such allegations are included in plaintiff's Complaint. Moreover, plaintiff proceeded to make claims (such as the allegation that private train charters were paid by the Companies) that were unrelated to the books and records produced to her, and plaintiff's counsel informed the press that Perry and Todd were using the Companies as a "personal piggy bank" even *before* any of the books and records were produced. Moffitt Aff., Ex. O. In all events, plaintiff suspected wrongdoing as far back as the mid-1990s but has no explanation for her delay of almost 10 years in seeking books and records. A plaintiff who suspects mismanagement may not wait years to act and then claim the belated filing of a Section 220 action remedies her years-long torpor.

Because the statute accrues when a plaintiff is on inquiry notice, her tolling arguments are inapposite. *See* Report at 96 (citing cases).

Moreover, contrary to plaintiff's assertion that "a substantial basis for the SLC's conclusions involves a three year statute of limitations" (PAB at 47), the SLC only concluded that "the Individual Defendants would have a substantial argument that claims based upon events occurring before September 6, 2003 would be barred by the statute of limitations." Report at 97; OB at 10 (the Individual Defendants would have a "significant argument"). The SLC also recognized that the Individual Defendants could "assert with some factual support that many of the expenses incurred before Dwight Sr.'s death were at his direction and that all of the stockholders of Dardanelle tacitly acquiesced in them." Report at 97. Notwithstanding the relative strength of the statute of limitations and acquiescence defenses, the SLC still reviewed significant claims and events occurring before September 6, 2003 and did not solely rely upon the availability of any defenses in reaching any of its determinations. Report at 98; OB at 10; Davis Aff., Ex. B at 241 ("As it relates to how the case should proceed, I don't recall [the statute of limitations] being very significant").

IV. IF THE COURT DETERMINES TO EXERCISE ITS DISCRETION TO APPLY THE SECOND STEP OF *ZAPATA*, THIS ACTION NONETHELESS SHOULD BE DISMISSED.

Under *Zapata*, the Court has discretion to apply its own business judgment to decide whether a motion to dismiss derivative litigation should be granted. In applying this discretionary, second step, the Court may consider the merits of plaintiff's claims, as well as various ethical, commercial, promotional, public relations, employee relations and other considerations. *See Zapata*, 430 A.2d at 788. The purpose of this discretionary, second step is to prevent abuse where the "technical requirements" have been satisfied, but a dismissal

nonetheless appears "irrational" or "egregious." *Katell*, 1995 WL 376952, at *13; *Carlton Invs.*, 1997 WL 305829, at *2. Given the clear record of independence and the good faith and reasonableness of the Special Committee's investigation and conclusions, there is no reason for this Court to apply the second step of *Zapata*. *See, e.g., Katell*, 1995 WL 376952, at *13.

Plaintiff, once again, trumpets that this case was "an extreme use of a single member SLC" that warrants this Court exercising its discretion under *Zapata*. PAB at 49. Because the SLC only had one member, plaintiff was granted extremely broad discovery by this Court to assess the independence of Mr. Jeffrey and the reasonableness of the SLC's findings. Even with this long rope, plaintiff still is not able to credibly undermine the independence of Mr. Jeffrey, the good faith basis of the SLC's investigation, or the SLC's conclusions. This speaks volumes to the work performed by the SLC.

Nonetheless, if the Court opts to apply the second step of *Zapata*, the Special Committee respectfully submits that the Court should concur with the conclusions set forth in the Report. As noted in the Companies' opening brief, although the absence of merit to the claims asserted by plaintiff alone provides a sufficient basis for the SLC to determine in the exercise of its business judgment that continued prosecution of meritless claims is not in the best interests of the Companies or their stockholders, the SLC considered numerous other factors that also counsel in favor of dismissal. *See* OB at 26. Plaintiff disputes none of these considerations and this action, accordingly, should be dismissed.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Companies' opening brief and in the Report, this action should be dismissed.

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January 30, 2007
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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2008, the foregoing REPLY BRIEF OF NOMINAL DEFENDANTS DARDANELLE TIMBER CO., INC. AND SUTHERLAND LUMBER-SOUTHWEST, INC. IN SUPPORT OF THEIR MOTION TO DISMISS was caused to be electronically served upon the following counsel of record:

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