

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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August 5, 2008

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RE: Martha S. Sutherland v. Perry H. Sutherland, et al.
C.A. No. 2399-VCL

Dear Counsel:

I have reviewed the recent correspondence concerning the motion to dismiss filed by the defendants in 2006. In light of all that has happened in this case since that motion was filed, including all of the proceedings relating to the activities of the special litigation committee, certain things are now clear. First, some of the arguments advanced in favor of dismissal (in particular, the defense under Court of Chancery Rule 23.1 for failure to make a demand) are no longer justiciable.¹

¹ As in *Abbey v. Computer & Commcn's Tech. Corp.*, the circumstances surrounding the decision of the two nominal defendant companies to appoint a new director and designate him as a one-man special litigation committee with full powers to investigate and act with respect to the matters alleged in the complaint clearly evidence an intent to concede the issue of demand futility under Rule 23.1. 457 A.2d 368, 373 (Del. Ch. 1983). Neither *Speigel v. Buntrock*, 571 A.2d 767 (Del. 1990), nor the other cases cited in Mr. Saunder's August 1, 2008 letter are to the contrary. Those cases affirm that a board may delegate investigative powers to a committee

Second, in light of the special litigation committee's report, the complaint itself very likely contains claims the plaintiff no longer intends to pursue. For these reasons, I see no reason to plow ahead blindly with continued briefing on the 2006 motion to dismiss. Rather, I agree with Mr. Laster's suggestion that the plaintiff prepare and file an amended complaint and that, in the meanwhile, discovery proceed apace. In keeping with the plaintiff's undertaking, the amended complaint should be filed and served on or before September 10, 2008.

I have also reviewed and considered the correspondence regarding the motions for commissions to depose Ms. Tidwell and Ms. Martinez. I agree with Mr. Saunders that the plaintiff has not offered a sufficient basis to support a belief that either proposed deponent possesses information necessary to the case or likely to lead to the discovery of admissible evidence. Simply claiming that Ms. Tidwell is a close personal friend of one of the defendants and that Ms. Martinez is a friend of Ms. Tidwell is not enough to justify the issuance of a commission.

For the foregoing reasons, IT IS ORDERED, as follows:

1. The motion to dismiss filed September 27, 2006 is DENIED without prejudice;

without either conceding demand futility or invoking the heightened scrutiny required by *Zapata v. Maldonado*, 430 A.2d 779 (Del. 1981), in the case of a board with a majority of interested members that appoints a committee consisting of one or more of its minority disinterested members to investigate and exercise control over derivative litigation.

The decision to add Mr. Jeffrey to the board was taken only after the motion to dismiss raising the Rule 23.1 demand excusal issue was filed, and it was authorized by boards consisting of two out of three directors who are personally interested in the claims raised by the complaint. Moreover, from the outset, the character of the special litigation committee as one authorized under *Zapata* has been unquestioned. Indeed, the court's application of the heightened scrutiny required by *Zapata* to the committee's work in its May 5, 2008 decision refusing to dismiss the complaint on the basis of the special litigation committee's report reflects a clear understanding that the full boards of directors had conceded their own disability to consider a demand or to investigate or take action with respect to the complaint. See *Sutherland v. Sutherland*, 2008 WL 1932374 (Del. Ch. May 5, 2008).

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2. The plaintiff shall file and serve an amended and/or supplemental complaint on or before September 10, 2008;

3. The motions for commissions relating to the proposed depositions of Ms. Tidwell and Ms. Martinez are DENIED.

/s/ Stephen P. Lamb
Vice Chancellor