

No. A08-114

State of Minnesota
In Supreme Court

In re UnitedHealth Group Incorporated
Shareholder Derivative Litigation

and

In re UnitedHealth Group Incorporated
PSLRA Litigation.

**SUPPLEMENTAL BRIEF OF WILLIAM W. MCGUIRE
ON CERTIFIED QUESTION**

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ISSUE PRESENTED

Whether the ability of a board of directors to expand the number of members of a previously established Special Litigation Committee (SLC) affects the determination as to whether the SLC is sufficiently independent to merit deference under Minnesota's business judgment rule.

ARGUMENT

As this Court explained in *Janssen*, “whether the board delegates to a committee of disinterested persons the board’s power to *control the litigation*” is relevant to determining whether an SLC is “independent” and qualifies for deference under the business judgment rule. *Janssen v. Best & Flanagan*, 662 N.W. 2d 876, 888 (Minn. 2003) (emphasis added). “A mere advisory role . . . fails to bestow a sufficient legitimacy to warrant deference to the committee’s decision by a court.” *Id.* In *Janssen*, this Court found an SLC’s authority and independence lacking where the board resolution had tightly circumscribed the scope of the SLC investigation, “restrict[ing] [the] factual investigation” to “facts developed by law firms that had been hired to represent [the Company] in lawsuits about other legal issues.” *Id.*; see also *Biondi v. Scrushy*, 820 A. 2d 1148, 1155-58 (Del. Ch. 2003) (holding that SLC could not satisfy independence requirement where, among other things,

board resolution reserved the board's right to file planned motions to dismiss or stay the litigation, irrespective of the SLC's recommendation).

In sharp contrast to the resolutions at issue in *Janssen* and *Biondi*, the UnitedHealth Board resolution could scarcely be a more clear or comprehensive delegation of authority to control this litigation. The Board's resolution unequivocally delegated to the SLC "*complete power and authority* to investigate" the derivative claims, "analyze the legal rights or remedies" available, and "*determine* whether those rights or remedies should be pursued." Opening Br. of McGuire Ex. 2 at 14 (SLC Report, quoting June 26, 2006 Board resolution) (emphasis added)). In view of this broad mandate, the fact that "the number of members of the [SLC] c[ould] be expanded in the future through Board action" should not affect a determination under Minnesota law as to whether this SLC is sufficiently independent to merit deference under the business judgment rule.

As this Court explained, the delegation-of-authority component of SLC "independence" requires that the Board delegate its authority to "control the litigation." *Janssen*, 662 N.W. 2d at 888. Accordingly, the

courts that have considered this question have focused on the character of the delegation of authority: it is not enough that the SLC serve in an “advisory” capacity; it must have the authority to make ultimate decisions about the potential derivative claims. *See id.; In re Par Pharm., Inc. Derivative Litig.*, 750 F. Supp. 641, 647 (S.D.N.Y. 1990) (“[A] mere advisory role of the [SLC] fails to bestow sufficient legitimacy on the Board’s decision to warrant deference”); *Greenfield v. Hamilton Oil Corp.*, 760 P. 2d 664, 668 (Colo. Ct. App. 1988) (“[T]he purpose [of an SLC] is to *substitute* its independent, and presumably objective, judgment for the judgment of the directors Such a purpose cannot be fulfilled where . . . the committee is given only the power of recommendation, while the power of ultimate decision is still retained in the hands of” the board.); *Gall v. Exxon Corp.*, 418 F. Supp. 508, 517 (S.D.N.Y. 1976) (“The focus of the business judgment rule inquiry is on those who actually wield the decision-making authority . . .”). The UnitedHealth Board resolution unquestionably satisfies this test. No court has suggested that a board of directors must relinquish its ability to *expand* the SLC’s membership in appropriate circumstances or risk rendering the SLC’s investigation

and determinations useless in court. Indeed, in *Hollinger International, Inc. v. Black*, 844 A.2d 1022, 1034 (Del. Ch. 2004), the Delaware Chancery Court noted that the board had added members to the SLC after it was created and did not question the SLC's independence.¹

Logic supports the authority. There is no reason to suppose that the SLC's independence was compromised in any way as a result of the Board's retention of the ability to add to its membership, for at least three reasons.

First, no matter how this Court answers the certified question before it, the SLC's members will be subject to judicial scrutiny for disinterestedness and good faith. *See Janssen*, 662 N.W. 2d at 888 ("All the state variations upon the business judgment rule as applied to committees reviewing litigation have two common elements. At a minimum, the board must establish that the committee acted in good faith and was sufficiently independent from the board of directors to

¹ In *Biondi v. Scrushy*, *supra*, the court noted that the Board had appointed a new member to the SLC (and made him the Chair of the committee) after the SLC had been created. Although very critical of the SLC's composition in other respects, the court did not even pause to question the propriety of the Board's appointment of a new member. *See* 820 A.2d at 1157.

dispassionately review the derivative lawsuit.”). If the Board had added to the SLC’s membership, those additional members would also have been subject to such scrutiny.

Second, there is no suggestion that Board members were privy to the specifics of the SLC’s independent investigation while it was pending. Thus, even if the ability to add to an SLC’s membership could theoretically allow some boards to “dilute” the voices of the original two members, that is not the case here. The Company did not know what the SLC was doing or have access to its internal debates. The Board would thus have no reason to dilute the voices, because it did not even know what the voices were saying. And there is simply no reason to believe that the Board retained this ability to add members for some improper purpose that did or could compromise the SLC’s independence.

Third, the Board did not expand the SLC’s membership in this case. Even if the Board could theoretically have used its ability to appoint additional members in a way that would have cast some doubt on the independence of the SLC, that is not what happened; the SLC was in fact completely free from interference by the Board at all times

during its investigation, and the originally-constituted SLC arrived at a final determination respecting this litigation that is binding on the Board. Whether the SLC was *in fact* independent is the touchstone of the inquiry. *See Gall*, 418 F. Supp. at 517 (“The focus of the business judgment rule inquiry is on those who *actually wield the decision-making authority*, not on those who might have possessed such authority at different times and under different circumstances.”) (emphasis added); *In re infoUSA, Inc. S’holders Litig.*, No. 1956-CC, 2008 WL 762482, at *2 (Del. Ch. Mar. 17, 2008) (concluding that “the SLC has the authority it needs to conduct its investigation,” but noting that “the Company knows how unpleasant a forum this Court will become *if it tries to impede or interfere* with the SLC’s work”) (emphasis added); *cf. Lichtenberg v. Zinn*, 260 A.D. 2d 741, 744 (N.Y. App. Div. 1999) (“[T]he record makes clear that the board of directors granted the SLC unfettered and unlimited authority to conduct its investigation.”).

In any event, the UnitedHealth SLC was at *no* time “subject . . . to the direction and control” of the Board in any relevant respect. Minn. Stat. § 302A.241, subdiv. 1 (2006). Quite the contrary, it was at all times acting pursuant to its unfettered delegated authority to

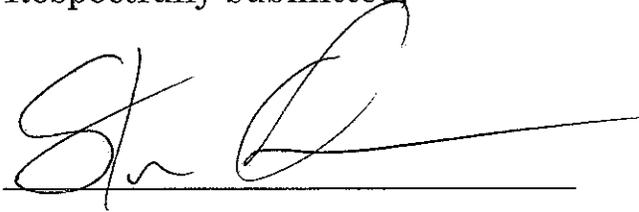
“determine whether [any] rights or remedies should be pursued.”
Opening Br. of McGuire Ex. 2 at 14 (SLC Report, quoting June 26, 2006
Board resolution).

CONCLUSION

For the reasons stated above, if this Court deems it necessary to answer the supplemental question, it should hold that the authority of a board of directors to expand the membership of an SLC does not in and of itself affect the determination under Minnesota law as to whether the SLC is sufficiently independent to merit deference under the business judgment rule. The determination of independence is a factual inquiry that turns on the particular circumstances of each SLC, and the independence of the SLC in this case has not and could not be questioned.

April ²⁸~~29~~, 2008

Respectfully submitted,



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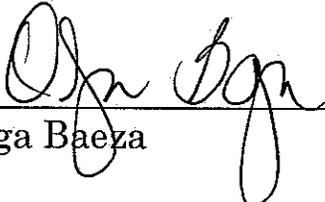
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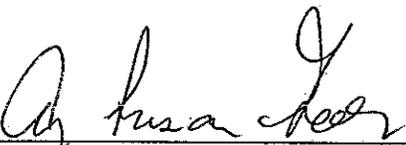
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I further certify that all parties required to be served were served on the 28th of April, 2008.

Sworn to and subscribed before me this 28th day of April, 2008.



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My commission expires June 30, 2009.

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