

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 THE MEMBERS OF
THE BOARD OF DIRECTORS OF
UNITEDHEALTH GROUP INCORPORATED

Marianne D. Short #0100596
Peter W. Carter #0227985

DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
(612) 340-2600

*Attorneys for the Members of the Board of
Directors of UnitedHealth Group
Incorporated*

Counsel for other parties are listed inside front cover.

KARL L. CAMBRONNE

Chestnut & Cambronne

222 South 9th Street, Suite 3700

Minneapolis, MN 55402

Counsel for Lead Plaintiffs in Shareholder Derivative Litigation

ANDREW J. BROWN

Coughlin, Stoa, Geller, Rudman & Robbins, LLP

655 West Broadway, Suite 1900

San Diego, CA 92101

Counsel for Lead Plaintiffs in PSLRA Litigation

STEVE W. GASKINS

Flynn, Gaskins & Bennett, LLP

333 South 7th Street, Suite 2900

Minneapolis, MN 55402

Counsel for Defendant William McGuire

DAVID L. HASHMALL

Felhaber, Larson, Fenlon & Vogt, P.A.

220 South 6th Street, Suite 2200

Minneapolis, MN 55402-4504

Counsel for Defendant William Spears

RICHARD G. MARK

Briggs & Morgan, P.A.

80 South 8th Street, Suite 2200

Minneapolis, MN 55402

Counsel for Defendant David Lubben

BARBARA P. BERENS

Kelly & Berens, P.A.

3720 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

Counsel for the Special Litigation Committee

INTRODUCTION

By order dated April 22, 2008, the Court requested supplemental briefing on the following question:

To what extent, if any, should the authority of a board of directors to expand, “if the Board deems appropriate,” the number of members of a previously established Special Litigation Committee affect the determination under Minnesota law as to whether the Special Litigation Committee is sufficiently independent to merit deference under the business judgment rule?

The Members of the Board respectfully submit that, under Minnesota law, the presence of such authority does not affect the independence of the special litigation committee or the deference its decisions are owed; indeed, given this Court’s decision in *Janssen v. Best & Flanagan*, 662 N.W.2d 876 (Minn. 2003), it appears to be a necessary precaution in order to be able to ensure a special litigation committee continues to function in the event unexpected contingencies arise. Moreover, as with any other circumstance surrounding the creation of a special litigation committee, the authority to add members is subject to the requirements of Minn. Stat. § 302A.241 (that members be independent) and ultimately reviewed under the *Janssen* standard. Indeed, in the event such authority were actually invoked, a reviewing court would evaluate all of the facts and circumstances involved as part of its determination of whether deference under the business judgment rule was merited.

In this case, the Board did not exercise the authority given by resolution to expand the special litigation committee, and accordingly no review of how it exercised that authority is required. If it had exercised its authority, then a court asked to approve a

proposed settlement would evaluate whether each member, whenever added, was independent, whether the committee as a whole was and remained sufficiently independent and empowered, and whether the investigation by the committee was conducted in good faith. If all of those conditions were met, the court would defer to the business judgment of the special litigation committee to settle the litigation.

ARGUMENT

Under Minnesota law, only the board can establish a special litigation committee. Minn. Stat. § 302A.241, subd. 1. There is nothing in the statute itself that prohibits a corporate board from adding new members to a special litigation committee after its initial formation. Instead, the statute simply provides that “the board may establish committees,” including special litigation committees, and that such committees “shall consist of one or more persons.” Minn. Stat. § 302A.241, subds. 1 & 2. Indeed, because the statute gives corporate boards the greater power to “establish committees,” including special litigation committees “of one or more . . . persons,” *id.* at subd. 1, the statute also gives corporate boards the lesser power to add members to such a committee if necessary to accomplish its proper purpose, which in the case of a special litigation committee is “to consider legal rights or remedies of the corporation and whether those rights and remedies should be pursued,” *id.* Moreover, under this Court’s *Janssen* decision, the board is not permitted to “remedy defects” in its initial resolution by means of a later resolution. 662 N.W.2d at 890. Accordingly, due to this “one strike you’re out” rule, *see id.* (Hanson, J., concurring in part, dissenting in part), a provision to add members to a

special litigation committee should contingencies arise must be included in the initial resolution, as was done here.

It also makes practical sense for a board to have the authority to add new members to the special litigation committee if necessary. Absent such authority, unforeseen circumstances could indefinitely stall or terminate an investigation without the possibility of commencing a new one. For example, one or more of the members of the special litigation committee could become incapacitated for some reason. Or, a special litigation committee may find out that the amount of work involved requires more people in order to complete the investigation in a timely manner, or that the subject matter of the investigation has turned out to require the addition of someone with a particular expertise. Under these or other such circumstances, a board without the pre-existing authority to add members would run afoul of *Janssen's* "one strike you're out" rule if it revised its previous resolution to appoint additional members.

Any appropriate power to add members to a special litigation committee is, of course, limited both by statute and by the other terms of the board resolution creating the committee ("Resolution"). Any members added to a special litigation committee would be required to have the same qualifications as required of the initially appointed members: By statute, all members of a special litigation committee must be "independent persons." Minn. Stat. § 302A.241, subd. 1. Here, the Resolution similarly contemplates that committee members be "both independent and disinterested." A.279. Further, both the statute and the Resolution require that the special litigation committee, however constituted, conduct its investigation without the

Board's direction or control: The statute provides that "[c]ommittees *other than special litigation committees*, shall be subject . . . to the direction and control of the board."

Minn. Stat. § 302A.241, subd. 1 (emphasis added). The Resolution provides that the special litigation committee has "complete power and authority to investigate . . . analyze . . . and determine" whether to pursue whatever rights and remedies the corporation may have concerning the derivative claims, including "the express power to conduct any additional investigation or analysis it deems appropriate." A.279-80. Thus, the Board's power to add new members to the special litigation committee here was limited to the appointment of individuals who would be independent and disinterested, and who would conduct an independent investigation.¹

Because the power to add members here is necessarily limited to situations in which its exercise would not compromise the required independence or authority of the special litigation committee, the mere unexercised presence of such a power could not affect the determination of whether the special litigation committee is sufficiently independent under Minnesota law to merit deference under the business judgment rule.

Finally, it should be noted that the standard of judicial review proposed by the Board in its briefs to this Court fully encompasses any situation – merely hypothetical here – in which such a power to add members was actually exercised. In reviewing for good faith and sufficient independence under the *Janssen* standard, a court evaluates the

¹ There is thus no need to guess at what the Board might "deem appropriate" here, since its own Resolution requires that any addition of members not compromise the independence, disinterestedness, or complete power of the special litigation committee.

formation and composition of the special litigation committee as part of assessing whether the committee was sufficiently independent to conduct an investigation in good faith and merit the deference owed under the business judgment rule. If a power to add members has been exercised, the reviewing court would also consider the “who, when, and why” of the additions as part of that assessment. For example, if new members were added after the special litigation committee had reached a preliminary result and changed that result to one more favorable to interested board members, a court might well question the augmented committee’s independence. On the other hand, if members were added shortly after the committee began its investigation because it was determined the committee had run into more work than anticipated, or found it now needed someone with a particular expertise its original members did not possess, a court might well determine that the committee’s independence was not altered. In such cases the context would be crucial, and the test this Court followed in *Janssen*, requiring a court to probe the committee’s good faith and the “sufficiency” of its independence, will permit a reviewing court to determine whether deference is properly afforded under the business judgment rule without requiring that court to make a business judgment of its own.

CONCLUSION

The mere presence of a board’s authority to add new members to a special litigation committee after the committee’s formation does not in and of itself affect the committee’s independence under Minnesota law. If a board were to exercise such authority, and were to do so in a way that compromised the independence of the committee, the test for good faith and sufficient independence will ensure that such a

committee's decision is not afforded deference under the business judgment rule. For these reasons as well as those offered in its previous briefing, the Members of the Board urge that "minimal judicial review" for good faith and sufficient independence is the appropriate standard of review under Minnesota law for approval of the determinations of a special litigation committee exercising the business judgment to settle litigation.

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Respectfully submitted,

DORSEY & WHITNEY LLP

By 

Marianne D. Short #0100596

Peter W. Carter #0227985

Suite 1500, 50 South Sixth Street

Minneapolis, MN 55402-1498

Telephone: (612) 340-2600

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