

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
DAVID J. LUBBEN ON CERTIFIED QUESTION**

FOLEY & LARDER LLP
Seth L. Levine
90 Park Avenue
New York, NY 10016
Tel: (212) 682-7474

Michael P. Matthews
777 East Wisconsin Avenue
Milwaukee, WI 53202
Tel: (414) 271-2400

BRIGGS AND MORGAN, P.A.
Richard G. Mark (#0067581)
Daniel J. Supalla (#0387064)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
Tel: (612) 977-8400
Fax: (612) 977-8650

Attorneys for David J. Lubben

(Additional Counsel for Other Parties Listed on Following Page)

Karl L. Cambronne
Jeffrey D. Bores
Jack L. Chestnut
CHESTNUT & CAMBRONNE, P.A.
3700 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402
Tel: (612) 339-7300
Fax: (612) 336-2940

Vernon J. Vander Weide
Thomas V. Seifert
HEAD SEIFERT &
VANDER WEIDE, P.A.
333 South Seventh Street, Suite 1140
Minneapolis, MN 55402-2422
Tel: (612) 339-1601
Fax: (612) 339-3372

Andrew J. Brown
COUGHLIN, STOIA, GELLER,
RUDMAN & ROBBINS, LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Tel: (619) 231-1058
Fax: (619) 231-7423

Garrett D. Blanchfield, Jr.
REINHARDT, WENDORF &
BLANCHFIELD
332 Minnesota Street, Suite E-1250
St. Paul, MN 55101
Tel: (651) 287-2100
Fax: (651) 287-2103

Barbara P. Berens
KELLY & BERENS, P.A.
80 South Eighth Street, Suite 3720
Minneapolis, MN 55402
Tel: (612) 349-6171
Fax: (612) 349-6416

Peter W. Carter
DORSEY & WHITNEY, LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
Tel: (612) 340-2600
Fax: (612) 340-2868

Steve W. Gaskins
FLYNN, GASKINS
& BENNETT, LLP
333 South Seventh Street, Suite 2900
Minneapolis, MN 55402
Tel: (612) 333-9500
Fax: (612) 333-9579

David L. Hashmall
FELHABER LARSON FENLON
& VOGT, P.A.
220 South Sixth Street, Suite 2200
Minneapolis, MN 55402-4504
Tel: (612) 339-6321
Fax: (612) 338-0535

LORI SWANSON
JEFFREY J. HARRINGTON
Office of the Attorney General
445 Minnesota Street, Suite 1400
St. Paul, MN 55101
Tel: (651) 297-2730

David M. Brodsky
LATHAM & WATKINS, LLP
885 Third Avenue, Ste. 1000
New York, NY 10022-4802
Tel: (212) 906-1200

Grant J. Esposito
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104
Tel: (212) 468-8000

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE BUSINESS JUDGMENT RULE GUARDS AGAINST A LACK OF INDEPENDENCE IN ALL CIRCUMSTANCES, EVEN THOSE POSED BY THE COURT’S ADDITIONAL QUESTION.....	2
II. THE BOARD’S RESERVATION OF POWER TO APPOINT ADDITIONAL SLC MEMBERS ALONE SHOULD NOT AFFECT THE DEFERENCE AFFORDED TO AN SLC’S DECISIONS.....	3
III. THE ADDITIONAL QUESTION IS PURELY THEORETICAL BECAUSE NO ADDITIONAL MEMBERS WERE APPOINTED TO THE SLC AFTER IT WAS FORMED	5
CONCLUSION	5

TABLE OF AUTHORITIES

CASES

<i>Jacka v. Coca-Cola Bottling Co.</i> , 580 N.W.2d 27 (Minn. 1998)	5
<i>Janssen v. Best & Flanagan</i> , 662 N.W.2d 876 (Minn. 2003)	1-2, 4

STATUTES

Minn. Stat. § 302A.241, subd. 1.....	3-5
--------------------------------------	-----

ARGUMENT

The Court has 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 business judgment rule contains the framework for addressing the provision of the Resolution (A.106-07) identified in the Court’s Order. The answer to the Court’s question is that if an SLC has been found to lack independence or good faith under whatever circumstances are presented, then Minnesota courts are not required to afford deference to the SLC’s decision to pursue, settle, or dismiss derivative litigation.

The portion of the Resolution cited by the Court, by itself, does not increase or diminish the power or discretion afforded to the SLC to investigate and analyze the derivative claims. The provision does nothing more than explicitly reserve a power that the Board already had to appoint SLC members, as evidenced by the Board’s initial SLC resolution, although the exercise of this power would still be subject to review under *Janssen v. Best & Flanagan*, 662 N.W.2d 876 (Minn. 2003). The mere existence of such a provision in a resolution should not affect the degree of deference afforded to an SLC’s decision.

The impact, if any, of a board’s reserved power to add a member at its discretion is, in this case, an abstract question. The composition of the SLC appointed to analyze the derivative litigation was unchanged throughout its existence. Had the Board

exercised the power reserved to it, that action would be analyzed under *Janssen* to determine whether the SLC's process was at a stage where adding one or more members to the SLC would be considered an impermissible "second bite at the apple." See *Janssen*, 662 N.W.2d at 890 (Hanson, J., dissenting). However, that theoretical event never occurred.

I. THE BUSINESS JUDGMENT RULE GUARDS AGAINST A LACK OF INDEPENDENCE IN ALL CIRCUMSTANCES, EVEN THOSE POSED BY THE COURT'S ADDITIONAL QUESTION

The business judgment rule requires independence and good faith on the part of an SLC under all circumstances. See *Janssen*, 662 N.W.2d at 888. The business judgment rule will, for example, protect against a board's attempt to "stack" an SLC with non-independent members. Should a court determine that the board has done so, it may determine that the independence requirement is not satisfied and the SLC's decision should not be afforded deference. *Janssen* is one example of how courts can reject an SLC's decision if the board has unduly interfered with the SLC's independence.

In *Janssen*, the resolution instructed the SLC that it was not to "reinvestigate, verify or otherwise attempt to prove or disprove factual findings, determinations, events or circumstances' described in prior investigative reports" 662 N.W.2d at 880. The district court, relying on that part of the resolution, concluded that the SLC lacked independence because it "was told by the board of directors what to believe." *Id.* This Court agreed that the SLC in *Janssen*, under a straightforward application of the business judgment rule, lacked independence because the board's resolution "restricted [its] factual investigation." *Id.* at 888.

But the resolution in *Janssen* and the resolution in this case are much different. In *Janssen*, the board's resolution expressly limited the SLC's power to investigate the derivative plaintiffs' claims. In this case, nothing in the Resolution limited this SLC's authority and power to investigate the claims in the derivative suits; instead, it simply tried to provide for a contingency that did not occur.

II. THE BOARD'S RESERVATION OF POWER TO APPOINT ADDITIONAL SLC MEMBERS ALONE SHOULD NOT AFFECT THE DEFERENCE AFFORDED TO AN SLC'S DECISIONS

The Resolution in this case is important for what it says and for what it does not say. Here, the Resolution states that "the number of members of the Special Litigation Committee can be expanded in the future through Board action if the Board deems appropriate." Order at 2; (A.106). All this resolution does is expressly reserve to the Board a power that it already implicitly possesses, that is, the power to create and convene a special litigation committee with more than one independent director or independent person. Minnesota Statutes section 302A.241, subdivision 1 expressly permits boards to establish special litigation committees that include "one or more independent directors or other independent persons."

There is nothing in the law that prevents a corporation from adding members to the SLC, and there are many reasons why such action might be required. Those reasons might include the death or incapacity of one of the originally-appointed SLC members, or a subsequent realization that the scope of the SLC's investigation simply requires more members. Thus, on its face, the paragraph of the Resolution cited by the Court does not

violate the statute, and it certainly does not show that the independence of the SLC has been compromised.

The Resolution is also important for what it does not say; it does *not* say that the SLC's power to investigate claims or reach an independent conclusion is diminished or limited in any way. Other paragraphs in the Board's resolution vested the SLC with "complete power and authority to investigate the Derivative Claim and the claims raised in the Derivative Actions and analyze the legal rights or remedies of the Company and determine whether those rights or remedies should be pursued." (A.106). The SLC also had the power to review the Independent Committee's report and had "the express power to conduct any additional investigation or analysis it deems appropriate." (A.107); *compare* this language with *Janssen*, 662 N.W.2d at 880, 888 (the SLC was instructed not to conduct a separate investigation). The portion of the Resolution cited by the Court does not expressly or implicitly limit the power to the SLC to independently and in good faith investigate the derivative claims, and this is particularly true where the Board's Resolution, considered in its entirety, comports with Minnesota law.

Even if the Board added another member to the SLC, that member must be independent (as required by section 302A.241, subdivision 1) and the SLC would still have full authority and power to investigate and analyze the derivative claims (as provided in the rest of the Resolution). Judicial review of the SLC's independence and good faith as mandated by *Janssen* would prevent the Board from attempting to "stack" the SLC with non-independent members—before or after the initial appointment—or otherwise interfere with the SLC's process. There is simply no legal, practical, or policy

reason to regard this provision of the Resolution any differently than the original appointment of the SLC members; under any circumstance, the SLC will be subjected to judicial review for independence and good faith as set forth in *Janssen*.

III. THE ADDITIONAL QUESTION IS PURELY THEORETICAL BECAUSE NO ADDITIONAL MEMBERS WERE APPOINTED TO THE SLC AFTER IT WAS FORMED

In this particular case, the issue posed by the additional question is purely theoretical because the Board never appointed any additional members to the SLC after it was formed. While the certified question presents the Court with a general legal question, that question should be answered in the context of the case before the Court. *Jacka v. Coca-Cola Bottling Co.*, 580 N.W.2d 27, 30 (Minn. 1998) (“In a contested proceeding, a legal question may examine the validity of a rule only as applied to the facts of the case.”)

CONCLUSION

The portion of the Resolution cited by the Court does not contravene the requirement that the Board appoint independent members under Section 302A.241, subdivision 1, and it does not limit the authority of the SLC to investigate and analyze the merits of the derivative claims. It does not change the answer to the certified question, which is that deference should be given to the decisions of an SLC that is independent and acts in good faith.

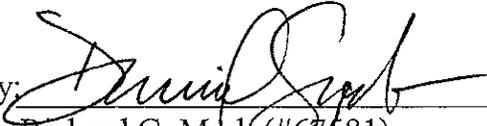
Dated: April 29, 2008

FOLEY AND LARDNER, LLP

Seth L. Levine
90 Park Avenue
New York, NY 10016
(212) 682-7474

Michael P. Matthews
777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400

BRIGGS AND MORGAN, P.A.

By: 
Richard G. Mark (#67581)
Daniel J. Supalla (#0387064)

2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

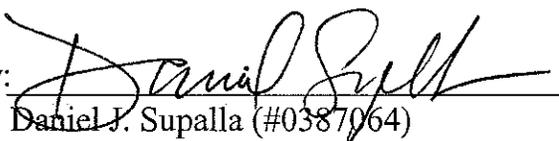
ATTORNEYS FOR DAVID J. LUBBEN

CERTIFICATE OF COMPLIANCE

The undersigned counsel for David J. Lubben, certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01. It is printed in 13-point, proportionately spaced typeface using Microsoft Word 2003 and contains 1,333 words, including headings, footnotes and quotations.

Dated: April 29, 2008

BRIGGS AND MORGAN, P.A.

By: 
Daniel J. Supalla (#0387064)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

ATTORNEYS FOR DAVID J. LUBBEN