

NO. A08-1157

State of Minnesota
In Court of Appeals

D. RANDALL BLOHM,

Appellant,

v.

BRUCE D. KELLY and BNK, INC., a Minnesota
Corporation, individually and collectively,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

JOHN D. HAGEN, JR. (#0039330)
Attorney at Law
P.O. Box 15609
Minneapolis, MN 55415
(612) 623-0908

Attorney for Appellant

TIMOTHY P. McCARTHY (#20335X)
Chestnut & Cambronne, P.A.
204 North Star Bank
4661 Highway 61
White Bear Lake, MN 55110
(612) 336-2937

Attorney for Respondents

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF UNDISPUTED FACTS	1
ARGUMENT	4
I. ALL DOCUMENTS TO WHICH BLOHM IS ENTITLED HAVE BEEN DISCLOSED, NO MORE REMAIN, AND THERE ARE NO DISCERNIBLE DAMAGES FOR ANY POTENTIAL BREACH BY KELLY	5
A. Blohm received all the documents he needed in order to determine if he had a claim either before or during litigation	5
B. Blohm received all of the documents required by law, but if any documents were not produced Blohm has not set forth the proper remedy	8
II. BLOHM CONFUSES A BREACH OF CONTRACT CLAIM WITH A BREACH OF FIDUCIARY DUTIES, BUT NEITHER IS SUPPORTED BY THE FACTS OR LAW	11
III. THE TRIAL COURT DID NOT ERR IN DISMISSING BLOHM'S DERIVATIVE CLAIMS BECAUSE IT FOLLOWED ESTABLISHED MINNESOTA POLICY AND PRECEDENT	13
A. The timing of referral to the SLC was not an error	13
B. Deference to the SLC is well-established in Minnesota Law and the trial court was correct in accepting the conclusions of the committee	16
CONCLUSION	21
APPENDIX	22

TABLE OF AUTHORITIES

	<u>Page</u>
<u>State Cases:</u>	
<i>Advanced Communication Design, Inc. v. Follett</i> , 601 N.W.2d 707 (Minn. App. 1999)	7
<i>Auerbach v. Bennett</i> , 393 N.E.2d 994 (N.Y. 1979)	18
<i>Berreman v. West Publishing Co</i> , 615 N.W.2d 362 (Minn. App. 2000).....	12
<i>Black v. NuAire, Inc.</i> , 426 N.W.2d 203 (Minn. App. 1988).....	15
<i>Drilling v. Berman</i> , 589 N.W.2d 503 (Minn. App. 1999)	17, 18
<i>Fownes v. Hubbard Broadcasting, Inc.</i> , 302 Minn. 471, 225 N.W.2d 534 (1975).....	9
<i>In re UnitedHealth Group</i> , 754 N.W.2d 544 (Minn. 2008)	4, 13, 18
<i>Janssen v. Best & Flanagan</i> , 662 N.W.2d 876 (Minn. 2003)	15, 17, 19
<i>Matter of Welfare of Mullins</i> , 298 N.W.2d 56 (Minn. 1980)	14
<i>PJ Acquisition Corp. v. Skoglund</i> , 453 N.W.2d 1 (Minn. 1990).....	14
<i>Pomush v. McGroarty</i> , 285 N.W.2d 91 (Minn. 1979)	10
<i>Wessin v. Archives Corp.</i> , 592 N.W.2d 460 (Minn. 1999)	17, 18
<i>Zapata Corp v. Maldonado</i> , 430 A.2d 779 (Del. 1981)	18

State Statutes:

Minn. Stat. § 302A.251.....11,12
Minn. Stat. § 302A.361.....11,12
Minn. Stat. § 302A.461 (2006)..... 9,11
Minn. Stat. § 302A.463(a) 9
Minn. Stat. § 302A.751..... 11, 12, 13
Minn. Stat. § 302A.751, subd. 1(b)(2&3) 12

State Regulations:

Minn. R. Civ. P. 56.03 (2006)..... 4, 6

STATEMENT OF UNDISPUTED FACTS

This case arises out of a dispute between the only two shareholders in a closely held corporation, BNK, Inc. ("BNK"). BNK operated an Auto Max franchise.¹ (Respondents' App. - RA. 9.) Respondent Bruce Kelly was an 80% shareholder and the sole director and appellant Douglas Randall Blohm was a 20% shareholder. (RA. 9.)

This lawsuit was commenced on January 20, 2006. (Appellant's App. A-5.)² A year prior on January 31, 2005, BNK sold its assets to Ninety Blue, LLC because Kelly "could see we weren't making any money and we weren't making any headway." (RA. 58.) The assets sold for a total of \$112,207.40. After paying off several creditors of BNK (RA. 67-68), a final distribution was made to the shareholders with Blohm receiving the value of his 20% share, i.e. \$2,400 and Kelly receiving the balance. (RA. 73.) This lawsuit resulted.

BNK was incorporated by Blohm in 1991. (RA. 28-29.) He represented the interests of BNK on and off for 15 years. (RA. 29.) However, at the closing of

¹ BNK operated two Auto Max locations until 1996 when it closed its Edina store and operated its University Ave. store until its assets were sold on January 31, 2005. (RA. 58.)

² Blohm decided to bring this action in district court even though the shareholder agreement under which he asserts his right to business records, *mandated* arbitration. *See* Report of Special Litigation Committee Ex. P, ¶10. Blohm asserted that he chose this forum because he thought the discovery processes would facilitate his receiving the information. (RA. 32.)

BNK's asset sale, Blohm represented the interests of BNK and Ninety Blue. (RA. 35-36; RA. 59.) Blohm charged Kelly \$3,400 for his fee for the closing. (RA. 71.)

Blohm acknowledges he received BNK's financial statements on a regular basis from BNK's accountants, Debra and Don Lindstedt, over the 15 year period in which he was involved with BNK. (RA. 36.) He would also have "casual conversations about the status of the operations of the company" with Mr. Kelly. (*Id.*)

In his Complaint, Blohm asserted that Respondent Kelly diverted corporate assets improperly, and for personal gain. (Appellant's App. A-1.) He also asserted that he had not received all corporate records to which he was entitled. (*Id.*) Blohm's Complaint essentially asserts that a fraud has been perpetrated upon him in denying him certain benefits from the sale of BNK assets, but without the specificity required to maintain this claim, even after all discovery was completed.

In this lawsuit, Mr. Kelly and BNK were initially represented by attorney Alan B. Demmer. Mr. Demmer suffered a heart attack on January 24, 2007, was in a coma for a month, hospitalized and eventually underwent heart transplant surgery in June 2007. Attorney Timothy McCarthy took over the representation of BNK and Kelly in March 2007. BNK created a Special Litigation Committee ("SLC") through an appropriate resolution on October 10, 2007, and appointed

Terrence Fleming to serve as the sole member of the Committee. (RA. 6-7.) The district court stayed the lawsuit pending the investigation and recommendation of the SLC. (Appellant's App. A-18.) There has been no objection to Mr. Fleming's objectivity or interest in the outcome.

The SLC conducted a thorough investigation and analysis of the issues and determined that Blohm's claims were mostly derivative in nature. (RA. 1-24.) The SLC did agree with Blohm that the question as to any failure to provide records was not derivative. However, the SLC did assert its opinion, with which the trial court agreed, that there was no demonstration of damages sufficient to maintain these claims. (RA. 17, fn 4.) The trial court considered this issue moot and dismissed this claim as well.

The SLC determined that Kelly had not diverted assets or received excessive compensation as Blohm alleged. Further, the SLC stated that, even had it been the case that there was a breach of duty or excessive compensation, any damage to Blohm would have been in his capacity as a shareholder, and therefore derivative of an injury to the company. The SLC recommended that the company not pursue this action against Kelly. Based on this recommendation and established precedent, the trial court granted Respondents' motion for summary judgment. (Appellant's App. A-21.) This appeal followed.

ARGUMENT

The primary issue presented by Appellant Blohm is whether the trial court correctly characterized his allegations as derivative in nature. If the court acted properly, then the report of the SLC, and the subsequent dismissal, were followed properly based on the deference owed the committee as representative of the company board and under established precedent supporting the business judgment rule. Here the standard of review has been recently articulated by the Minnesota Supreme Court in *In re UnitedHealth Group*, 754 N.W.2d 544 (Minn. 2008) where the Court re-affirmed a strong policy of deference to independent and diligent SLC's. The SLC here was diligent and independent, and therefore dismissal of any derivative claims is required in conformity with the committee's report.

"Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03 (2006). In the final analysis, this case probably should have been dismissed on this familiar ground alone. This is not because the bulk of the claims were not derivative in nature, or because the SLC was somehow incorrect in its Report, but because when it is all boiled down, there simply is not a prima facie case to be made. Defendants may have been able to avoid the expense and delay, not

to mention a complication of legal analysis that leads to such a lengthy Appellant's Brief, because after all the ink has been spilled, and Appellant's spleen vented, there simply is no case.

I. ALL DOCUMENTS TO WHICH BLOHM IS ENTITLED HAVE BEEN DISCLOSED, NO MORE REMAIN, AND THERE ARE NO DISCERNIBLE DAMAGES FOR ANY POTENTIAL BREACH BY KELLY.

After 32 months of litigation, Appellant cannot articulate his damages.

What the Appellant's Brief before this Court consists of, at its core, is essentially a vague sense by Blohm that he did not get what he felt he deserved. This has led to a repeated and unfounded assertion that records and documents exist to which he has been denied access by BNK and Mr. Kelly. There is no indication, and both the SLC and trial court agree, that there are in fact any more documents. There is simply no evidence that any remaining undisclosed documents exist that would allow Blohm to determine if he has a claim. In fact, Blohm claims to have been ready for trial when the matter was referred to the SLC, yet there is still no evidence of any wrongdoing or damages.

A. Blohm received all the documents he needed in order to determine if he had a claim either before or during litigation.

"Blohm could not tell whether Kelly had paid him fairly for his ownership interest without access to the records." (Appellant's Br. at 20.) But Blohm **had** access to the important financial records. Blohm received regular reports from BNK's accountant. (RA. 37.) ("I did receive financial statements from the

Lindstedts on a regular basis.”). “Blohm was regularly provided with financial statements between 1991 and 1995 (sic).”³ (Appellant’s App. A-27.) BNK’s accountant, Debra Lindstedt, testified that Blohm would receive any documents he requested. (RA. 18.) Still, even now Blohm states that “it is by no means clear, however, that he was shown all the pertinent documents”, but offers nothing more than his suspicions. (Appellant’s Br. at 21-2.) It was clear to the SLC (“voluminous documentation”) and it was clear to the trial court. (RA. 12.)

Moreover, to the extent that Blohm requested closing documents not otherwise produced, Blohm was in the unique position of representing both sides of this transaction. He drafted the closing documents and was the only attorney involved in the transaction. Blohm certainly could have reviewed and kept the documents of interest to him to see if he had been fairly paid for his ownership interest. Blohm could have postponed the closing but he “thought it was in both parties’ interest that the closing be allowed to proceed.” (RA. 36.)

Blohm now asks this Court to determine that he is entitled to, at the least, his attorney’s fees involved in seeking this information that has proved insubstantial or non-existent. (Appellant’s Br. at 22.) He goes so far as to assert that he should be compensated in damages, but does not explain the legal basis for these damages or how they should be calculated. (*Id.*)

³ This would appear to be a typographical error, as the record indicates that Blohm was provided with records from 1991-2005.

Considering the absence of a cognizable claim, the trial court was well within its authority to dismiss this claim and deny Blohm the relief he sought. "The decision to grant equitable relief, such as attorney fees, is reviewed under an abuse-of-discretion standard." *Advanced Communication Design, Inc. v. Follett*, 601 N.W.2d 707, 711 (Minn. App. 1999) (partially overturned on other grounds). The trial court, which heard a motion to compel (and Blohm is not appealing the failure to grant associated fees from that motion⁴), and monitored the discovery in this case, was in a position to determine the equity of this relief and chose not to grant it. The trial court would have been well within the bounds of reasonable discretion to accept that BNK's documents were open and available to Blohm without this litigation, and/or that all documents were produced and that therefore the taxing of costs would be unjust. As the trial court did not abuse its discretion Blohm's request for equitable relief should be denied.

Furthermore, the trial court declared that the issue of producing records was, at the time of the hearing, moot. This is based on the undeniable fact that there is no reasonable dispute at this time as to whether the records requested had been provided. This argument is simple— Plaintiff sought documents, Defendants produced all that they had, therefore the Court had no further

⁴ In his motion to compel, Blohm requested \$1,200 for the cost of preparing the motion. The trial court did not make any award of costs.

remedy to grant. Plaintiff's first requested remedy is "For an Order against Defendants Kelly and BNK to produce for the examination by Plaintiff all of BNK's business records including all financial books of account of the corporation from May 25, 1993 to the present date." (Appellant's App. A-5.) Through discovery, Blohm received all of these records.⁵ If he did not, an additional motion to compel would be the vehicle to require completion of this task. As no such motion was made, the Court was reasonably within its discretion to consider that BNK had fulfilled this remedy without court order, and therefore the need for the remedy of an Order was moot.

B. Blohm received all of the documents required by law, but if any documents were not produced Blohm has not set forth the proper remedy.

It should be noted that there are essentially two separate issues with respect to access to documents and records. Most of that discussed above could be considered discovery-related, that is that Blohm sought records in the process of litigation claiming that they would lead to proof that he was shortchanged in the sale of the corporate assets. As discussed above, this issue is one of

⁵ Attorney McCarthy took over representation of Kelly and BNK when Attorney Demmer became ill, and at that time a motion to compel discovery was pending. In response to this motion Defendants produced 21 additional boxes of documents (4 boxes initially produced), which Blohm reviewed, apparently without finding documentation necessary to avoid dismissal of his case. It should also be noted that Blohm had subpoena authority to require the production of documents from third parties of which he availed himself. Mr. Kelly also offered authorizations to access private data but Plaintiff did not request any authorizations.

monitoring and discretion for the trial court. The separate issue is the claim that Blohm was not provided with records during the existence of the company, as required by both law and contract. The statutory authority for this claim is Minn. Stat. § 302A.461 (2006). The contractual authority purportedly comes from a 1993 Shareholder Agreement.

Most of the documents required to be made available under this statute do not apply to this dispute. There are no issues related to the articles, bylaws, proceedings of board of directors meetings, or shareholder lists, for instance. The relevant part of this section relates to "financial statements required by section 302A.463." *Id.* Section 302A.463 requires that a balance sheet and statement of income be made available "within 180 days of the close of the corporation's fiscal year." Minn. Stat. § 302A.463(a).

There is no indication that these statutes were violated. Even had there been a breach of this requirement, the appropriate remedy would be mandamus, which was not requested. *See Fownes v. Hubbard Broadcasting, Inc.*, 302 Minn. 471, 473, 225 N.W.2d 534, 536 (1975). Blohm's argument for corporate records, therefore, is not grounded in statute, and does not comport with the remedy he seeks. The trial court was correct in dismissing this issue, and this Court should affirm the same.

Blohm asserts that in addition to the statutory authority for inspecting business records, Section 8 of the 1993 Shareholder Agreement allows a shareholder to copy business records at any time for practically any reason. Again, the trial court found that Blohm has received all of the records to which he was contractually entitled, and therefore the claim for breach was now moot. Furthermore, as there are no discernible contractual damages that flowed from the delay, the court was correct to deny Blohm relief and consider the matter of access to records closed. There is no contractual authority for providing attorney's fees for this action, as the exclusive forum for this dispute under the contract would have been binding arbitration under Section 10 of the Shareholder Agreement. The trial court correctly rejected this claim.

Having received all the available documents and records, either before or during the pendency of this case, Blohm is still not able to ascertain how he was damaged, other than his claim for legal fees associated with this fruitless search. He now requests an accounting be provided in order to continue this quest (Appellant's Br. at 25). This requested remedy is new on appeal, was not presented at the trial court, is not supported by any statute or precedent, and as such is not reasonably part of this Court's review. *Pomush v. McGroarty*, 285 N.W.2d 91, 93 (Minn. 1979).

Blohm's claims related to the supposed failure of Kelly and BNK to provide business records is moot because BNK and Kelly produced all of the records Blohm sought. The trial court was in a position to determine this based on its inherent authority to monitor and manage discovery. Blohm cannot maintain a claim for monetary damages base on contractual, statutory or equitable grounds, making summary judgment appropriate. This issue was properly dismissed by the trial court, and this Court should affirm that decision.

II. BLOHM CONFUSES A BREACH OF CONTRACT CLAIM WITH A BREACH OF FIDUCIARY DUTIES, BUT NEITHER IS SUPPORTED BY THE FACTS OR LAW.

Blohm next asserts that there are breach of fiduciary duty claims that should not have been considered derivative, and therefore not dismissed at summary judgment. (Appellant's Br. at 26.) The essential problem with this argument is that the "breaches" Blohm cited are not fiduciary duties, but relate to contractual obligations. Blohm's Complaint alleged two counts: first, a breach of statutory duties under Minn. Stat. §§ 302A.251, .361, and .461; and second, a violation of § 302A.751 through fraudulent, illegal or unfairly prejudicial actions. (Compl. ¶¶ 20, 23.) Blohm's current reliance on a contract claim is not supported by prior pleading.

The first of these counts is, apparently even by Blohm's admission, not applicable to this discussion. Blohm does not address these statutes in his argument before this Court, nor do they appear appropriate in this context. The

interests at issue in §§ 302A.251 and .361 relate to the business judgments of officers and directors, and the conduct of these corporate officials in relation to the operation of the corporation. The issue Blohm has with Kelly is more “shareholder-to-shareholder.” Based on his description of the foundation of the supposed breach being the Shareholder Agreement, it would appear that Blohm’s argument is that a breach of a contract (which was not pled) amounts to a breach of a fiduciary duty warranting equitable relief. (Appellant’s Br. at 26.) Therefore, this argument on appeal, essentially, relates to the second count from the Complaint exclusively.

The second count alleged by Blohm is that Kelly violated Minn. Stat. § 302A.751, subd. 1(b)(2&3). (Compl. ¶23.) The first of these alleged breaches, as defined by the statute, requires that some fraudulent or illegal action be taken against Blohm. Minn. Stat. § 302A.751, subd. 1(b)(2). Simply, this is not pled, not argued, and not borne out by the record. The trial court easily dismissed this claim based on the record at summary judgment.

Subdivision 1(b)(3) requires a finding that a director acted in some way that was “unfairly prejudicial” to the aggrieved shareholder. Blohm correctly cites *Berremán v. West Publishing Co*, 615 N.W.2d 362 (Minn. App. 2000) as the foundational case on this issue. In *Berremán*, this Court stated that “unfairly prejudicial conduct under Minn. Stat. § 302A.751, subd. 1(b)(3) is conduct that frustrates the reasonable expectations of shareholders in their capacity as

shareholders or directors of a corporation that is not publicly held or as officers or employees of a closely held corporation.” *Id.* at 374. The Court goes on to explain that the reasonable expectations of a close corporation shareholder include a share of corporate earnings. *Id.* at 375. This may be a direct claim, as Blohm asserts, but that alone does not require a denial of summary judgment. Blohm has, after all discovery was completed and on the eve of trial, developed no evidence that establishes that he was denied his reasonable expectation from the proceeds of the asset sale. In other words, even if it is accepted that Kelly breached the Shareholder Agreement in the ways Blohm alleges, without damages there is no need for relief, and therefore no action under § 302A.751. Dismissal was therefore warranted.

III. THE TRIAL COURT DID NOT ERR IN DISMISSING BLOHM’S DERIVATIVE CLAIMS BECAUSE IT FOLLOWED ESTABLISHED MINNESOTA POLICY AND PRECEDENT.

A. The timing of referral to the SLC was not an error.

Blohm next raises the question of whether the trial court erred in referring this case to an SLC “on the eve of trial.” Blohm cites no authority on point for the proposition that this case should not have been referred to an SLC, and in the end, the question is answered by the need to determine whether the claims in fact are derivative or direct. If the claims are derivative in nature, then they belong to the corporation and Blohm lacks standing to bring them. *See In re UnitedHealth Group Inc. Shareholder Derivative Litigation*, 754 N.W.2d 544,

550 (Minn. 2008) (“A derivative action actually belongs to the corporation, but the shareholders ... bring the action where the corporation has failed to take action for itself. In a derivative action, the plaintiff essentially brings two claims: one against the directors for failing to sue; the second based upon the right belonging to the corporation.”) (internal citations omitted); *See generally PJ Acquisition Corp. v. Skoglund*, 453 N.W.2d 1 (Minn. 1990). If Blohm lacks the right to sue, or standing, the timing of this determination is irrelevant. “An objection for want of standing goes to the existence of a cause of action. Questions which relate to the existence of a justiciable controversy essential to the Supreme Court’s exercise of jurisdiction may be raised at any time.” *Matter of Welfare of Mullins*, 298 N.W.2d 56, 61 (Minn. 1980) (internal citations omitted).

Blohm also asserts that the postponement of his trial amounted to prejudice, but courts exercise discretion everyday in the management of their dockets, and if a delay in bringing a case to trial were to become a ground for overturning a decision, this Court will likely have a substantial increase in its workload. In this case there was no intent to prejudice Blohm, or exercise of bad faith, but the relative lateness of this referral to the SLC is more the result of the illness to Respondents’ attorney, and the subsequent engagement of new counsel. But there is no reason to believe that a reason for the supposed late date is required. Blohm’s argument does not provide any substantive rationale

for overturning this order, but instead lists ways in which he considers derivative litigation to be unfair to plaintiffs.

Derivative litigation is undeniably difficult for plaintiffs, and this is by design. *See Black v. NuAire, Inc.*, 426 N.W.2d 203, 208-09 (Minn. App. 1988) (explaining that the purpose of derivative litigation was to protect corporations from nuisance suits). As a general principle of corporate law, the authority to manage a corporation rests with the directors and officers, with shareholders allowed minimal interference in day to day activities. Blohm may not like this fact, but the list of cases on page 32 of his brief merely serve as an objection to the state policy with respect to the rights of corporations to manage their own affairs. Even *Janssen v. Best & Flanagan*, 662 N.W.2d 876 (Minn. 2003), which Blohm cites as supposed support for his position, does not change this principle but merely “strikes the balance between allowing corporations to control their own destiny and permitting meritorious suits by shareholders” by not allowing a bad faith gaming of the system. *Id.* at 890. Respondents did not operate in bad faith, but exercised their right to manage BNK’s affairs.

Blohm’s claim concerning the referral of this action to the properly constituted SLC, who’s investigation was clearly diligent, and whose disinterest is unchallenged, therefore has no merit and should be rejected. The derivative

causes of action, if any, did not belong to him, and as such it would have been improper to allow him to bring these issues to trial.

B. Deference to the SLC is well-established in Minnesota Law and the trial court was correct in accepting the conclusions of the committee.

Blohm's final argument relates to the dismissal of the derivative portions of this litigation. To begin with, Blohm continues to deny that there are derivative claims here, but this should be undeniable. "Plaintiff claims that Kelly made improper disbursements of corporate assets." (Appellant's Br. at 27.) While Kelly denies the truth of this allegation, if it were true the corporation would still be the proper entity to recover its misappropriated assets. Similarly, if Kelly took excessive compensation from the corporation, the corporation should be made whole. These are claims of the company, and Blohm's interest in them is indirect— if anything improper was done, nothing was done specifically to him. As evidence of the derivative nature of these claims, if the company were able to recover, Blohm's recovery would be as a percentage of his ownership based on the increase in assets to distribute.

Blohm cites a treatise and a case from another jurisdiction to support his assertion that a derivative suit is not proper in a two shareholder corporation. This is not the law in Minnesota. A corporation is an entity, separate from its shareholders, capable of suing and being sued. If there is an injury here, it

suffered it. Blohm's invitation to this Court to ignore this foundational concept of corporate law should not be accepted.

In determining whether a claim is direct or derivative, we have focused the inquiry to whether the complained-of injury was an injury to the shareholder directly, or to the corporation. Where the injury is to the corporation, and only indirectly harms the shareholder, the claim must be pursued as a derivative claim.

Wessin v. Archives Corp., 592 N.W.2d 460, 464 (Minn. 1999). Blohm's assertion that he is the real party in interest does not fit with the claims he has brought for wrongful disbursements or excessive compensation, which are injuries to the corporation. (Appellant's Br. at 29.)

As derivative, Minnesota law is squarely behind the district court's dismissal of these claims in deference to the SLC. Blohm cites language from *Drilling v. Berman*, 589 N.W.2d 503 (Minn. App. 1999) and *Janssen v. Best & Flanagan*, 662 N.W.2d 876 (Minn. 2003) for the proposition that a court can closely scrutinize an SLC's evaluation of a legal situation, and the attendant judgment as to whether to pursue the claim. The argument is that because this is a legal judgment, it is within the court's expertise in a way that a business judgment is not. (Appellant's Br. at 37.)

This argument is wrong in two ways. First, this is not what the case law says. Under the prevailing precedent, a court in Minnesota will not second guess the judgment of an SLC if the committee pursued its investigation in good faith, diligently and disinterestedly.

Under the Minnesota business judgment rule, a court must defer to an SLC's decision to settle a shareholder derivative action if the proponent of that decision demonstrates that (1) the members of the SLC possessed a disinterested independence and (2) the SLC's investigative procedures and methodologies were adequate, appropriate and pursued in good faith.

In re UnitedHealth, 754 N.W.2d at 561. The portion of *Drilling* cited by Blohm merely asserts that this Court is capable of evaluating whether the investigation into a determination of legal liability was performed in a good faith manner. This does not mean that this Court should evaluate the resultant judgment of the company, but merely that a court is well-suited to evaluating good faith in this sort of investigation, better suited in fact than to evaluate whether the company exercised its business judgment properly. This is the fundamental principle behind the supreme court's recent affirmation of Minnesota's adoption of the rule from *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979) as opposed to *Zapata Corp v. Maldonado*, 430 A.2d 779 (Del. 1981) in *In re UnitedHealth*.

Underlying Blohm's misreading of the case law, as a second error in his analysis, is the fact that a decision to pursue litigation **is** a business judgment. Blohm cites a list of business reasons for derivative litigation from *Wessin v. Archives Corp.*, 592 N.W.2d 460, 466 (Minn. 1999). (See Appellant's Br. at 27.) But these business concerns are not the only business concerns a corporation might have. One of the principle reasons frequently cited for the existence of derivative litigation is the ability to head off nuisance suits. *In re UnitedHealth*,

754 N.W.2d at 550. Naturally this involves some legal decision-making, and the analysis will be, as the Court was concerned about in *Janssen*, whether “to spend money in the pursuit of a [] claim... would be the prudent use of [] funds.” *Janssen*, 662 N.W.2d at 889. Minnesota derivative law recognizes and upholds the understanding that a business judgment may require a legal analysis, but that this reality does not change the nature of the business judgment rule.

Blohm’s final argument relates to the allegedly improper burden of proof utilized by the SLC. While it is by no means admitted that this Court should scrutinize the SLC’s Report at the level Blohm suggests, even if this analysis could be challenged this way it would pass muster. To begin with, Blohm’s claim of excessive compensation **was** found to meet the standard of proof Blohm claims to be required. The SLC determined that the Shareholder Agreement allowed for the compensation paid to Kelly, and that there was nothing excessive about it (RA. 16, 22). Even assuming the validity of Blohm’s proposed burden of proof, the SLC acted in good faith to assess this claim in the way Blohm would require.

Similarly, in contradiction to the assertions of Blohm, the SLC did not just determine that Blohm lacked evidence of any derivative claims, but found that there was sufficient evidence for Kelly to meet Blohm’s proposed standard of proof with respect to the allegedly self-dealing wrongful disbursements.

[T]he Committee finds that BNK's accountants reviewed charges made to the credit processing account, and that the disbursements made by BNK to Lake Country were for services and products sold by Lake Country and initially debited to the BNK Account Receivable—Lake Country. Similarly, with respect to charges made to Kelly's MBNA credit card, the Committee finds that BNK did not make payments on Kelly's card for any expenses other than those incurred by BNK.

(RA. 21.) A review of the SLC's methodology and diligence, as evidenced by its thorough investigation and consideration of whether Kelly's actions were justified, leads to the indisputable conclusion that the Committee acted in good faith. This is the review prescribed by law for this Court. Blohm is attempting to require a deeper scrutiny of the SLC Report than derivative case law entails, and yet Kelly has met the standard scrutiny would employ.

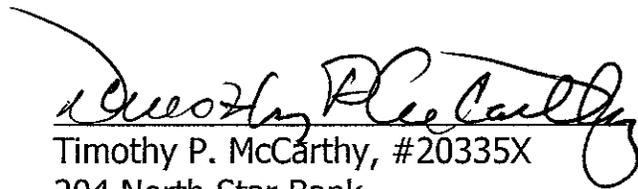
Though it is not necessary to delve deeper into the SLC's analysis, it is apparent that Blohm has taken a few comments in the Report out of context to attempt to make his argument that the wrong burden of proof was employed. As a matter of fact, it was not. These statements Blohm cites are more likely an indication of the SLC's conclusion that it would not be reasonable to continue this litigation, and that Blohm's claims were essentially of the character of a nuisance. This is the sort of conclusion an SLC is designed to make; this committee performed its duties properly and arrived at the appropriate conclusion in recommending dismissal.

CONCLUSION

For the reasons detailed above, because there are no cognizable claims to be adjudicated, and based on the well-established deference to a validly appointed Special Litigation Committee, this Court should affirm the trial court's dismissal of this action in its entirety.

CHESTNUT & CAMBRONNE, P.A.

Dated: 9-10-08



Timothy P. McCarthy, #20335X
204 North Star Bank
4661 Highway 61
White Bear Lake, MN 55110
(612) 336-2937

Attorneys for Respondents