

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

MARY DAVIS, MAUREEN COLLIER,
and THE POLICE RETIREMENT
SYSTEMS OF ST. LOUIS, Derivatively
on behalf of TARGET CORPORATION,

Plaintiff,

v.

GREGG W. STEINHAFEL, BETH M.
JACOB, JAMES A. JOHNSON, JOHN
MULLIGAN, ANNE M. MULCAHY,
ROXANNE S. AUSTIN, CALVIN
DARDEN, MARY E. MINNICK,
DERICA W. RICE, JOHN G. STUMPF,
DOUGLAS M. BAKER, JR., HENRIQUE
DE CASTRO, KENNETH L. SALAZAR,
and SOLOMON D. TRUJILLO,

Defendants,

- and-

TARGET CORPORATION, a Minnesota
corporation,

Nominal Defendant.

Civil Action No. 14-cv-00203
(PAM-JJK)

**Memorandum of Law of the Special Litigation Committee of
the Board of Directors of Target Corporation in Support of its
Motion for Approval and Dismissal**

Questions Presented

On March 30, 2016, the Special Litigation Committee (SLC) of Target Corporation's Board of Directors issued its Report addressing the derivative claims arising out of the December 2013 data breach. As a result of its 21-month investigation, the SLC decided that it was not in Target's best interests to pursue derivative claims arising out of the 2013 data breach against the named officers and directors.

Under Minnesota law, federal courts defer to a corporation's special litigation committee decision to dismiss a derivative action if the SLC demonstrates (1) that it possessed a disinterested independence and (2) that it conducted a good faith investigation into the derivative allegations.

Accordingly, the SLC has moved to dismiss the consolidated derivative action here. In order to decide whether to defer to the SLC's decision and grant its motion to dismiss—a motion supported by the SLC's 91-page report and the affidavits of the two SLC members—the Court need answer only two questions:

1. An SLC demonstrates disinterested independence if it was sufficiently independent to base its decision on the merits. Here, Chief Justice Kathleen Blatz (ret.) and Professor John Matheson were not Target board members before being appointed and will not be board members after their work is done. Neither has personal or professional ties to Target or any defendant; they hired their own counsel and experts; and they designed and conducted the investigation. Did the SLC possess disinterested independence?
2. An SLC demonstrates a good faith investigation not by its outcome, but rather by its investigative methodology and procedures. Here, the SLC retained independent counsel and experts, interviewed 68 witnesses, reviewed and analyzed thousands of documents, met frequently, and considered myriad factors bearing on Target's best interests in deciding whether to pursue claims against the officers and directors for the data breach. Did the SLC conduct a good faith investigation?

If the answer to these two questions is yes, the Court should fulfill the Minnesota legislature's intent of placing the decision of whether or not to pursue derivative litigation back into the hands of the rightful owner—the corporation—and should defer to the SLC's determination and grant its motion to dismiss the consolidated derivative complaint.

Factual Background¹

In the three week period between November 27 and December 18, 2013, Target Corporation experienced a data breach in which a hacker stole the payment card data of up to 40 million of its customers and stole personally identifiable information—specifically names, residence addresses, phone numbers, and/or email addresses—of up to 70 million of its customers. The announcement of the breach led to widespread media attention, negatively affected Target's sales, and had an immediate and detrimental effect on Target's reputation with consumers. As a result, congressional committees sought testimony and information from Target, regulatory agencies began investigations, and private litigants initiated claims.

Procedural history

Among those private litigants were six Target shareholders. One made a derivative demand on Target's Board of Directors that it investigate and bring actions against the Board members and the company's CEO, CFO, and CIO (the "Demand").

¹ The factual background set forth here closely tracks the Report of the Special Litigation Committee at p. 1 and pp. 28–45. The Report is attached to the Affidavit of Kathleen A. Blatz ("Blatz Aff.") at Exhibit B.

The others sued the Board members and officers in five derivative actions. One of those actions was brought in Hennepin County District Court for the State of Minnesota. That case was stayed pending resolution of this derivative action.² The other four were brought in the United States District Court for the District of Minnesota and were ultimately consolidated into this action.³

The crux of the claims made here is twofold: The derivative shareholders claim that Target's officers and directors (1) failed to properly provide for and oversee an information security program and (2) failed to give customers prompt and accurate information in disclosing the breach.⁴ The claimed failures by the Board and officers, it is alleged, were the result of the officers' and directors' conscious disregard of their duties and constituted breach of their fiduciary duties to Target.⁵ Derivative plaintiffs' complaint identified a variety of damages, including damage to Target's reputation, damage to Target's bottom line from decreased traffic, and expenses incurred in connection with the breach, and it sought remedies on Target's behalf, including money damages from the defendants and corporate governance changes.⁶

On June 11, 2014, in response to the Demand—which was made after this suit was filed—and in accordance with Minn. Stat. § 302A.241, Subd. 1, Target's Board of

² *Koeneke v. Austin et al.*, No. 27-cv-14-1832, Stipulation & Order Staying Action, May 21, 2014.

³ *Davis et al. v. Steinhafel et al.*, No. 14-203, Consolidation Order, Apr. 14, 2014, Docket No. 34.

⁴ *See generally Davis et al. v. Steinhafel et al.*, No. 14-203, Verified Consolidated Shareholder Derivative Complaint for Breach of Fiduciary Duty and Waste of Corporate Assets, July 18, 2014, Docket No. 48.

⁵ *See id.*

⁶ *Id.*

Directors established the SLC;⁷ and by resolution adopted on July 24, 2014, Target's Board expanded the SLC's charge to include all the derivative suits.⁸ The resolutions vested the SLC with complete power and authority to investigate the allegations, claims, and requests for relief; to determine whether and/or to what extent Target should pursue whatever rights and remedies it has relating to such allegations, claims, and requests for relief; and to respond to the litigation on behalf of the Board and the Company. After the Board formed the SLC, the Court granted a joint agreed motion by the parties to stay the case pending the SLC's decision,⁹ and the case remained stayed until April.¹⁰

The SLC's members and their independence

Both members of the SLC are disinterested and independent.¹¹ Neither member of the SLC had ever served on Target's Board of Directors, been employed by Target, or otherwise represented Target.¹² They will not remain Target Board members once their duties as the SLC are completed.¹³ As members of the Special Litigation Committee of the Board, they do not attend regular meetings and have no duties with respect to the operation of the business.¹⁴ The members of the SLC are solely tasked with executing the duties set forth in the resolutions, which are investigating the claims, determining the

⁷ Copies of the Board Resolutions are attached to the Affidavit of Kathleen A. Blatz at Ex. A.

⁸ Blatz Aff. Ex. A.

⁹ *Davis et al. v. Steinhafel et al.*, No. 14-203, Order, June 23, 2014, Docket No. 45.

¹⁰ *Davis et al. v. Steinhafel et al.*, No. 14-203, Fifth Joint Report to the Court, Jan. 29, 2016, Docket No. 55.

¹¹ Blatz Aff. ¶ 5; Affidavit of John H. Matheson ("Matheson Aff.") ¶ 5.

¹² Blatz Aff. ¶ 5; Matheson Aff. ¶ 5.

¹³ *Id.*

¹⁴ *Id.*

best interests of Target with respect to the Demand and derivative litigation, and responding on behalf of Target.¹⁵ Their compensation for their work on the SLC is not based on their decision but is based solely on their normal hourly rates.¹⁶ Neither member has any material personal, professional, familial, or financial ties with Target or with any of the officers or directors named in the derivative actions or the Demand.¹⁷

After having served as a District Judge in Minnesota's Fourth Judicial District beginning in 1994, the Honorable Kathleen A. Blatz was appointed to the Minnesota Supreme Court in 1996 and was appointed Chief Justice in 1998.¹⁸ She served in that capacity until her retirement on January 10, 2006.¹⁹

Chief Justice Blatz received a bachelor's degree from the University of Notre Dame, *summa cum laude*, Phi Beta Kappa.²⁰ She received her Master of Social Work degree and her Juris Doctor degree, *cum laude*, from the University of Minnesota.²¹

Prior to being appointed a judge, Chief Justice Blatz served in the Minnesota House of Representatives.²² In 1978, she was elected to the first of eight terms.²³ During her legislative tenure, she served on various committees, including the Tax, Financial Institutions and Insurance, and Judiciary Committees.²⁴ At the legislature, Chief Justice

¹⁵ Blatz Aff. Ex. A.

¹⁶ Blatz Aff. ¶ 6; Matheson Aff. ¶ 6.

¹⁷ Blatz Aff. ¶ 5; Matheson Aff. ¶ 5.

¹⁸ Blatz Aff. ¶ 7–8.

¹⁹ Blatz Aff. ¶ 7.

²⁰ Blatz Aff. ¶ 14.

²¹ *Id.*

²² Blatz Aff. ¶ 9.

²³ *Id.*

²⁴ *Id.*

Blatz held several leadership positions, including that of Assistant Minority Leader and Chair of the Crime and Family Law Committee.²⁵ During her legislative career, she also practiced law at Popham, Haik, Schnobrich & Kaufman Ltd. and later served as an Assistant Hennepin County Attorney.²⁶

Currently, Chief Justice Blatz is an attorney principally engaged as an arbitrator in commercial disputes.²⁷ She is a qualified arbitrator for the American Arbitration Association and is on the roster of arbitrators selected for large, complex commercial disputes.²⁸ She has also served on numerous boards, including as a director on the Columbia Funds Board, where she chairs the Governance Committee, and as a director/trustee on the Blue Cross Blue Shield of Minnesota/Aware Integrated, Inc. Board, where she chairs the Business Development Committee.²⁹

Chief Justice Blatz also served on a special litigation committee for the Board of Directors of UnitedHealth Group Inc.³⁰ That SLC was charged with investigating shareholder derivative claims involving, among other claims, breaches of fiduciary duties by its officers and directors.³¹

John H. Matheson is the Law Alumni Distinguished Professor of Law and Director of the Corporate Institute at the University of Minnesota Law School.³² He is an

²⁵ Blatz Aff. ¶ 10.

²⁶ Blatz Aff. ¶ 11.

²⁷ Blatz Aff. ¶ 12.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Blatz Aff. ¶ 13.

³¹ *Id.*

³² Matheson Aff. ¶ 7.

internationally recognized expert in the area of corporate and business law and has taught in China, Germany, Ireland, England, the Netherlands, Uruguay, and Lithuania.³³ He teaches courses in the business law area, including business associations/corporations, contracts, advanced corporate law, and comparative corporate governance.³⁴

Professor Matheson received a bachelor's degree from Illinois State University with high honors.³⁵ He received his J.D., *cum laude*, from Northwestern University School of Law, where he was Editor-in-Chief of the Northwestern University Law Review.³⁶ After completing his J.D., he clerked for Judge Robert A. Sprecher of the United States Court of Appeals for the Seventh Circuit.³⁷ After his clerkship, Professor Matheson joined Hedlund, Hunter & Lynch (now Latham & Watkins) in Chicago.³⁸ In 1982, he joined the University of Minnesota Law School faculty.³⁹ Professor Matheson is also a practicing lawyer.⁴⁰ He is Of Counsel to Kaplan, Strangis and Kaplan, P.A., specializing in corporate governance counseling, fiduciary duties, mergers and acquisitions, and securities law matters.⁴¹ He is a member of the American Law Institute.⁴²

³³ *Id.*

³⁴ *Id.*

³⁵ Matheson Aff. ¶ 8.

³⁶ *Id.*

³⁷ Matheson Aff. ¶ 9.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Matheson Aff. ¶ 10.

⁴¹ *Id.*

⁴² *Id.*

Professor Matheson is a five-time recipient of the school's annual Professor of the Year Award for Excellence in Teaching and Counseling.⁴³ In 2008, Professor Matheson received the University-wide Award for Outstanding Contributions to Postbaccalaureate, Graduate, and Professional Education and was inducted into the Academy of Distinguished Teachers.⁴⁴ He is the first professor of the Law School to be so honored by the University.⁴⁵

Professor Matheson's several books and numerous journal articles predominantly address business and corporate law issues.⁴⁶ He recently published the third edition of his treatise on Minnesota Corporate Law, *Corporation Law and Practice*.⁴⁷ One of Professor Matheson's co-authored articles, "Challenging Delaware's Desirability as a Haven for Incorporation," received the 2007 National Burton Award for Legal Excellence.⁴⁸

Professor Matheson also served as the reporter for the 2006, 2008, 2010, and 2014 amendments to the Minnesota Business Corporation Act.⁴⁹ Although the Reporter's

⁴³ Matheson Aff. ¶ 11.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Matheson Aff. ¶ 12.

⁴⁷ *Id.*

⁴⁸ *Id.*; see Philip S. Garon et al., *Challenging Delaware's Desirability as a Haven for Incorporation*, 32 Wm. Mitchell L. Rev. 769 (2006).

⁴⁹ Matheson Aff. ¶ 13.

Notes do not have the effect of law, Minnesota courts often give them substantial consideration in statutory interpretation.⁵⁰

Professor Matheson has also served as the chair of a special litigation committee for Medtronic, Inc.⁵¹ That special litigation committee was tasked with investigating shareholder derivative claims involving, among other things, alleged director and officer breaches of fiduciary duties.⁵²

Overview of the SLC's investigative methodology

Over a period of twenty-one months, the SLC conducted an investigation into the circumstances surrounding Target's data breach and evaluated the claims made in the Demand and derivative complaints.⁵³ Its aim was to conduct its investigation in accordance with the fundamental principles of independence and good faith.⁵⁴ During its investigation, with the assistance of independent counsel, it searched databases containing hundreds of thousands of documents, reviewed thousands of documents, interviewed 68 witnesses (five of them twice), received information and opinions from independent experts it hired, considered the applicable law, and deliberated. The SLC examined the roles of current and former officers, directors, employees, and third-party consultants in Target's data security program.⁵⁵ In evaluating the claims detailed in the

⁵⁰ See generally *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 99 (Minn. 1989) (considering Reporter's Notes to determine intent of legislature); *Whetstone v. Hossfeld Mfg. Co.*, 457 N.W.2d 380, 383 (Minn. 1990) (same).

⁵¹ Matheson Aff. ¶ 14.

⁵² *Id.*

⁵³ Blatz Aff. ¶ 20; Matheson Aff. ¶ 20.

⁵⁴ Blatz Aff. ¶ 21; Matheson Aff. ¶ 21.

⁵⁵ Blatz Aff. ¶ 20; Matheson Aff. ¶ 20.

Demand and derivative complaints, it focused on discovering reliable, truthful, and reasonably complete information about all the relevant issues and all aspects of the underlying claims.⁵⁶ It considered the evidence collected and evaluated the credibility of the people it interviewed.⁵⁷ In its deliberations, the SLC considered whether valid legal claims exist; it also undertook a comprehensive weighing and balancing of the legal, ethical, commercial, professional, public relations, fiscal, and other factors common to reasoned business decisions in deciding whether it would be in Target's best interests to pursue claims against the officers and directors named in the Demand and derivative complaints. A nonexclusive list of the factors the SLC considered is included in its report.⁵⁸

Retention of counsel and experts⁵⁹

In July 2014, the SLC retained Gaskins Bennett Birrell Schupp, LLP as its independent counsel to provide legal advice and to assist the SLC with all phases of its work, including document collection and review, planning and administration of the SLC's investigation, preparation for and participation in witness interviews, and selection and retention of experts.⁶⁰ Counsel has never represented Target or any of the individual defendants.⁶¹ Counsel provided legal guidance concerning the available methods to

⁵⁶ Blatz Aff. ¶ 21; Matheson Aff. ¶ 21.

⁵⁷ Blatz Aff. ¶ 31; Matheson Aff. ¶ 31.

⁵⁸ Blatz Aff. Ex. B, pp. 87–90.

⁵⁹ Although the retention of counsel and experts is a factor bearing on both the SLC's disinterested independence and its good faith methodology, to avoid redundancy, it is only discussed in this section.

⁶⁰ Blatz Aff. ¶ 15; Matheson Aff. ¶ 15.

⁶¹ *Id.*

resolve the claims against defendants in the derivative actions and putative defendants identified in the Demand, advised the SLC on the applicable legal standard and the law governing derivative claims, and assisted in the preparation of the SLC's final report.⁶² The SLC relied on the assistance and advice of its counsel throughout its investigation.⁶³

The SLC also retained two experts and relied on their expertise in the investigation.⁶⁴ The SLC retained Evan Francen, co-founder and President of FRSecure LLC, a full-service information security company, to provide consulting services on the technical aspects of the data breach.⁶⁵ William McCracken, a member of the National Association of Corporate Directors Board of Directors, was also retained to consult on issues of corporate governance related to data security.⁶⁶

Documents utilized during the investigation

Throughout the course of its investigation, the SLC, with assistance from counsel, reviewed and analyzed thousands of documents, including electronically stored information.⁶⁷ The documents can be categorized into five groups. First, throughout the investigation, the SLC propounded its own written information requests and document requests to Target, and Target provided written answers and produced over 55,000 documents in response to those specific requests.⁶⁸ Second, the SLC requested relevant

⁶² Blatz Aff. ¶ 16; Matheson Aff. ¶ 16.

⁶³ *Id.*

⁶⁴ Blatz Aff. ¶ 17; Matheson Aff. ¶ 17.

⁶⁵ Blatz Aff. ¶ 18; Matheson Aff. ¶ 18.

⁶⁶ Blatz Aff. ¶ 19; Matheson Aff. ¶ 19.

⁶⁷ Blatz Aff. ¶ 23; Matheson Aff. ¶ 23.

⁶⁸ *Id.*

documents from all of the director-defendants.⁶⁹ In response, they collectively produced approximately 1,300 documents.⁷⁰ Third, the SLC had complete, unrestricted access to the database of approximately 465,000 documents produced in the Target MDL and maintained by Target's outside counsel.⁷¹ Fourth, the SLC requested and received the transcripts of all depositions taken in the Target MDL.⁷² Coordinating Lead Counsel over the MDL and Lead Counsel for the financial institution plaintiffs made deposition transcripts available to the SLC, as did counsel for Target.⁷³ Finally, the SLC and counsel reviewed many documents available through public sources.⁷⁴ Throughout its investigation, the SLC, in its role as a duly constituted Committee of the Board established to evaluate claims the company might have against its officers and directors, asked for and received access to documents that included attorney-client privileged and other confidential information with the understanding that it would, absent intentional waiver, maintain their confidentiality.⁷⁵

At the SLC's request and under its supervision, counsel for the SLC performed comprehensive searches of all the available documents, reviewed and analyzed documents retrieved, reported on their findings, and provided thousands of pages of

⁶⁹ Blatz Aff. ¶ 24; Matheson Aff. ¶ 24.

⁷⁰ *Id.*

⁷¹ Blatz Aff. ¶ 25; Matheson Aff. ¶ 25.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Blatz Aff. ¶ 26; Matheson Aff. ¶ 26.

⁷⁵ Blatz Aff. ¶ 27; Matheson Aff. ¶ 27.

relevant materials for further review by the SLC.⁷⁶ Document review and analysis by the SLC and its counsel continued throughout the investigation.⁷⁷

The SLC and its counsel also accessed and analyzed Target's financial reports and disclosures through the SEC's EDGAR database, including Target's form 10-Ks, form 10-Qs, its annual definitive proxy statements along with definitive additional materials when available, and various 8-Ks during the relevant period.⁷⁸ The SLC and its counsel also accessed and analyzed pleadings, decisions, and other papers in the related cases and investigations, and reviewed the legal holds issued to Target employees and directors.⁷⁹ Counsel accessed, read, and analyzed various information-security-related articles and articles concerning corporate-risk governance, including information-security-risk governance in particular, and discussed these topics with the SLC and its experts.⁸⁰ The SLC members themselves conducted research on pertinent topics, such as the corporate governance of information security risk.⁸¹

Interviews

The SLC, with counsel, conducted 73 interviews of 68 individuals.⁸² These interviews were a key part of the SLC's investigative process as they helped the SLC corroborate and contextualize the documentary information it had gathered, evaluate the significance of data, gain an understanding of Target's corporate culture—especially as it

⁷⁶ Blatz Aff. ¶ 28; Matheson Aff. ¶ 28.

⁷⁷ Blatz Aff. ¶ 30; Matheson Aff. 30.

⁷⁸ Blatz Aff. ¶ 29; Matheson Aff. ¶ 29.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Blatz Aff. ¶ 34; Matheson Aff. ¶ 34.

related to data security—assess employees’ morale, understand employees’ attitudes towards Target’s data security policies and processes, and determine how those policies and procedures were implemented throughout the company.⁸³ The SLC members actively participated in all these interviews.⁸⁴ Most of the interviews were conducted in-person, with three having been conducted via videoconference.⁸⁵ The SLC members traveled to Washington, D.C. twice, New York City, and San Diego⁸⁶ to conduct interviews during the course of its investigation.⁸⁷

Those interviewed included Target’s current and former officers who are named as defendants; the current and former members of Target’s Board of Directors who are named defendants; Target’s current and former chief compliance officer; personnel from the general counsel’s office; members of Target’s corporate security team; members of the Target Information Protection team; members of the Target Technology Services team; Target’s point-of-sale hardware engineers; Target’s network engineers; Target’s internal auditors; and representatives from Target’s third-party cardholder data security assessor and its independent auditor.⁸⁸

In addition to the 73 interviews in which the SLC members participated personally, as part of the investigation, counsel conducted two supplemental interviews

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Chief Justice Blatz traveled to San Diego; Professor Matheson participated via conference call.

⁸⁷ Blatz Aff. ¶ 34; Matheson Aff. ¶ 34.

⁸⁸ Blatz Aff. ¶ 35; Matheson Aff. ¶ 35. A list of interviewees is included as Appendix G to the Report. For a more fulsome discussion of the roles of the interviewees, see Blatz Aff. Ex. B at pp. 40–41.

and reported to the members of the SLC the substance of the interviews, issues raised, and information gleaned from them.⁸⁹ Those interviewed were employees involved in data risk assessments and risk treatment.⁹⁰ Counsel also met and had telephone conversations with a number of attorneys possessing relevant information, including Coordinating Lead Counsel in the MDL.⁹¹

SLC meetings

Throughout its investigation, members of the SLC and counsel, in addition to engaging in telephone calls on a regular basis, met in person on more than 100 occasions.⁹² The SLC reviewed the evidence developed, analyzed legal memoranda provided by counsel, assessed the credibility of the witnesses, and ascertained what additional information might be necessary or desirable in order to determine what course of action would be in the best interests of Target.⁹³

During one meeting, the SLC toured Target's new Cyber Fusion Center and met with Target's Chief Information Security Officer, Target's Vice President of Cyber Security, its Vice President of Information Security, and its Senior Director of Cyber Security, to discuss Target's cybersecurity teams and their roles.⁹⁴

⁸⁹ Blatz Aff. ¶ 37; Matheson Aff. ¶ 37.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Blatz Aff. ¶ 31; Matheson Aff. ¶ 31.

⁹³ *Id.*

⁹⁴ Blatz Aff. ¶ 33; Matheson Aff. ¶ 33.

At another meeting, and at the SLC's invitation, Target's counsel gave a presentation on the facts and issues raised in the Demand and derivative complaints from Target's perspective.⁹⁵

Counsel for the individual director defendants requested the opportunity to make a presentation on behalf of their clients, and the SLC agreed to hear the presentation during one of its meetings.⁹⁶

The SLC also twice—at the beginning and toward the end of its investigation—invited counsel for the derivative shareholder plaintiffs and the Demand shareholder to make a presentation on the issues arising from their allegations, including their view of the factors bearing on whether there were rights and remedies Target had against the defendants named in the complaint that were in Target's best interests to pursue.⁹⁷

Counsel for the consolidated federal derivative plaintiffs, along with counsel for the state derivative plaintiff, responded with a telephone presentation and a written submission in October 2014.⁹⁸ They also provided a written submission in response to the SLC's second invitation in February 2016.⁹⁹

The SLC, in conducting its investigation, considered and evaluated the derivative plaintiffs' counsel's investigative suggestions, including suggested interview questions, witnesses, and experts.¹⁰⁰ While the SLC considered the perspective offered by

⁹⁵ Blatz Aff. ¶ 32; Matheson Aff. ¶ 32.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Blatz Aff. ¶ 36; Matheson Aff. ¶ 36.

plaintiffs' counsel, it conducted its own investigation and did so independently.¹⁰¹ It did not share the information it gathered or its conclusions with the derivative plaintiffs, the individual defendants, Target, or their respective counsel before it issued its report.¹⁰²

The SLC is confident that it received sufficient pertinent information to thoroughly understand the facts and the relevant parties' positions and views and reach an informed, reasoned judgment as to the best interests of Target with respect to the derivative actions and the shareholder Demand.¹⁰³ Once it concluded its investigation, the SLC reviewed the material developed, deliberated, and adopted its final report.¹⁰⁴

The SLC's report and conclusions

On March 30, 2016, the SLC issued its 91-page report.¹⁰⁵ The SLC sent the Report and Appendices to Target's Board of Directors and sent copies to counsel for, variously, Target Corporation, the derivative plaintiff shareholders, Lead Coordinating Counsel for plaintiffs in the MDL, the shareholder who made the Demand on the Board, and the individual defendants.¹⁰⁶ The Report described the SLC's members, its formation, and its investigative methodology and set forth the factors it weighed in making its determinations. The Report did not set forth detailed factual findings. The SLC

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Blatz Aff. ¶ 38; Matheson Aff. ¶ 38.

¹⁰⁴ *Id.*

¹⁰⁵ Blatz Aff. ¶ 39; Matheson Aff. ¶ 39.

¹⁰⁶ Copies of the transmittal letters are attached as Ex. A to the Affidavit of Steve Gaskins.

determined that publishing detailed findings would not be in Target’s best interests because doing so could imprudently create risks for the Company.¹⁰⁷

The SLC concluded that it would not be in Target’s best interests to pursue claims against the officers or directors identified in the Demand and derivative complaints, including those named in this action. It also determined that it should seek dismissal with prejudice of the pending claims, and so has filed this motion to dismiss the consolidated derivative complaint.

Argument

The Court should defer to the SLC’s decision to dismiss these claims because the SLC demonstrated disinterested independence and an adequate, appropriate investigative methodology pursued in good faith.

It is fundamental that a derivative case—which is brought by a shareholder for the benefit of the corporation in which he or she owns stock—belongs to the company, not to the shareholder who brought it.¹⁰⁸ It is also fundamental that the board of directors is in charge of the business decisions of a corporation, including who it should or should not sue.¹⁰⁹ In an instance in which directors or officers of a corporation are self-dealing to the detriment of the company or are committing crimes, or otherwise breaching their fiduciary duties, equity allows a shareholder to bring suit against wrongdoers on behalf of

¹⁰⁷ Blatz Aff. Ex. B at p. 68.

¹⁰⁸ *In re UnitedHealth Group Inc. S’holder Derivative Litig.*, 754 N.W.2d 544, 556 (Minn. 2008) (hereinafter “*UnitedHealth I*”).

¹⁰⁹ Minn. Stat. §302A.201, Subd. 1 (“The business and affairs of a corporation shall be managed by or under the direction of a board...”).

the corporation.¹¹⁰ That equitable doctrine, however, is in tension with the right of a corporation to have its officers and directors run its business.

Minn. Stat. § 302A.241, which authorizes the use of special litigation committees, was enacted in part to address that tension and was designed to enable a corporation to dismiss, settle, or pursue a derivative suit despite a conflict of interest on the part of some or all of its directors. Under Minnesota law, corporations on whose behalf shareholder derivative claims have been made may establish a special litigation committee “consisting of one or more independent directors or other independent persons to consider legal rights or remedies of the corporation and whether those rights and remedies should be pursued.”¹¹¹ “Committees other than special litigation committees . . . are subject at all times to the direction and control of the board.”¹¹² Thus, by statute, an SLC is not subject to a board’s direction and control,¹¹³ and special litigation committees remove the substantive decision about whether to pursue the claims advanced in a shareholder’s derivative action from both the alleged wrongdoers and from potentially disgruntled shareholders—who might “bring nuisance lawsuits with little merit” or even legitimate suits not worth pursuing—and places that decision in the hands of independent

¹¹⁰ See *Janssen v. Best and Flanagan*, 662 N.W.2d 876, 882 (Minn. 2003).

¹¹¹ Minn. Stat. § 302A.241, Subd. 1.

¹¹² *Id.*

¹¹³ See *id.*; *UnitedHealth I*, 754 N.W.2d at 550.

persons.¹¹⁴ However, courts do insist that there be some judicial oversight to assure that the SLC's process is fulsome and that the SLC members are independent.¹¹⁵

Under Minnesota law, a special litigation committee is charged with fully informing itself of the legal and factual issues underlying derivative claims and determining whether pursuit of those claims is in the best interests of the corporation.¹¹⁶ In making its determination, a special litigation committee has an obligation to undertake a “comprehensive weighing and balancing of factors” that takes into account the legal, ethical, commercial, professional, public relations, fiscal, and other factors “common to reasoned business decisions.”¹¹⁷

It is now well settled that when evaluating a motion to dismiss a derivative action, what an SLC's investigation has uncovered and the relative weight accorded in evaluating and balancing the factors considered by the SLC “are beyond the scope of judicial concern.”¹¹⁸ Rather, Minnesota law requires a court to defer to a special litigation committee's decision with respect to a shareholder derivative action if the proponent of that decision demonstrates that (1) the members of the SLC possessed a

¹¹⁴ See *Janssen*, 662 N.W.2d at 882–83 (discussing the rationale for applying the business judgment rule in derivative lawsuits).

¹¹⁵ See, e.g., *Drilling v. Berman*, 589 N.W.2d 503, 510 (Minn. Ct. App. 1999) (an investigation “so restricted in scope, so shallow in execution, or otherwise so Pro forma or halfhearted as to constitute a pretext or sham” would prevent application of the business judgment rule).

¹¹⁶ *Janssen*, 662 N.W.2d at 884.

¹¹⁷ *Id.* at 883, 889.

¹¹⁸ *In re UnitedHealth Group Inc. S'holder Derivative Litig.*, 591 F. Supp. 2d 1023, 1030 (D. Minn. 2008) (joint order of J. Rosenbaum and J. McGunnigle, also filed in Minn. Dist. Ct. No. 27-CV-06-8085) (hereinafter “*UnitedHealth II*”) (quoting *Drilling*, 589 N.W.2d at 508).

disinterested independence and (2) the SLC's investigative procedures and methodologies were adequate, appropriate, and pursued in good faith.¹¹⁹

The SLC asks this Court to approve the SLC's exercise of its business judgment in the disposition of the shareholder derivative claims and dismiss the above-captioned action because the SLC and its processes satisfy both prongs of the applicable Minnesota test.

1) The members of the SLC possess a disinterested independence.

In determining whether SLC members are disinterested and independent, the Minnesota Supreme Court has directed courts to consider the totality of the circumstances, including, but not limited to, the following eleven factors:

(1) whether the committee's members are defendants in the litigation; (2) whether members are exposed to direct and substantial liability; (3) whether the "members are outside, non-management directors"; (4) whether the members were on the board when the alleged wrongdoing occurred; (5) whether the "members participated in the alleged wrongdoing"; (6) whether the members approved conduct involving the alleged wrongdoing; (7) whether the members or their affiliated firms "had business dealings with the corporation other than as directors"; (8) whether the members "had business or social relationships with one or more of the defendants"; (9) whether the members received advice from independent counsel or other independent advisors; (10) the severity of the alleged wrongdoing; and (11) the size of the committee.¹²⁰

An examination of these factors demonstrates the disinterested independence of this SLC. First, neither member is a defendant nor were they Target directors until appointment to this SLC; thus, they do not have exposure to any type of liability in this

¹¹⁹ *UnitedHealth I*, 754 N.W.2d at 559.

¹²⁰ *Id.* at 560 n.11 (citing 2 Dennis J. Block et al., *The Business Judgment Rule: Fiduciary Duties of Corporate Directors* 1746–53 (5th ed. 1998)).

litigation, they were not on the board when the alleged wrongdoing occurred, and they were not in a position to approve or participate in any alleged wrongdoing. Chief Justice Blatz and Professor Matheson were even more independent than outside, non-management directors would be. Neither the members nor their advisors had material business dealings with Target, and neither member had business or social relationships with any named defendant. The members received advice from both independent counsel and independent experts. The breadth and depth of the SLC investigation was appropriate for the severity of the allegations, and the size of the committee was appropriate for the workload of the investigation and the determinations made by the committee. The statute authorizes a committee of one or more members and this committee had two members, which helped to assure diversity of opinion and point-of-view.

Other factors further demonstrate the disinterested independence of this SLC. Target played no role in the conduct of the SLC's investigation of the shareholder derivative claims other than providing the SLC with access to documents and witnesses. The SLC independently selected the Target current and former employees it wished to interview and conducted those interviews independently. In addition, after establishing the SLC, Target's Board of Directors had no say in or influence on the way the SLC conducted its investigation. Indeed, the resolution appointing the SLC expressly provided that the SLC "is granted full power and authority [] to investigate the allegations, claims, and requests for relief . . ." in the Demand and shareholder derivative claims.

In *UnitedHealth II*, after concluding that “the SLC is clearly disinterested and independent” based on the application of the eleven factors noted by the Minnesota Supreme Court, the federal and Minnesota courts jointly noted that the SLC’s members were former justices of the Minnesota Supreme Court who had no connection to UnitedHealth prior to accepting appointment to the SLC, did not face any liability in connection with the lawsuits, and received advice from independent experts and counsel.¹²¹ The courts held that these facts “strongly suggest[ed] the SLC [was] in a position to base its decision on the merits.”¹²²

In *Kokocinski v. Collins*, the court concluded the SLC members possessed a disinterested independence where the two members were not defendants in the case, had never served on the board and had no personal ties to the company, and received counsel and advice from an outside law firm and experts who also had no ties to the company.¹²³

The same result is appropriate here—based on the foregoing, the Court should conclude that the SLC possessed a disinterested independence.

2) The SLC’s investigative procedures and methodologies were adequate, appropriate, and pursued in good faith.

The second element this Court must analyze is the adequacy of the procedures the special litigation committee utilized to gather the information it used to support its decision regarding the shareholder derivative claims.¹²⁴ The focus of this factor is on the

¹²¹ 591 F. Supp. 2d at 1028.

¹²² *Id.* at 1028–29.

¹²³ *Kokocinski v. Collins, et al.*, No. 12–633, Mem. Op. & Order Granting Motions to Dismiss (“*Kokocinski Order*”), Mar. 30, 2015, Docket No. 98, pp. 29–30.

¹²⁴ *UnitedHealth I*, 754 N.W.2d at 559 (citing *Auerbach*, 393 N.E.2d at 1001–03).

SLC's investigative process and methodology. Whether an SLC's methods demonstrate good faith depends on the nature of the particular investigation.¹²⁵ Minnesota courts look to the totality of the circumstances, and the factors underlying this decision include the following: (1) the length and scope of the investigation; (2) the committee's use of independent counsel or experts; (3) the corporation's or the defendants' involvement, if any, in the investigation; and (4) the adequacy and reliability of the information supplied to the committee.¹²⁶ "Evidence that 'the investigation has been so restricted in scope, so shallow in execution, or otherwise so pro forma or halfhearted as to constitute a pretext or sham . . . would raise questions of good faith.'"¹²⁷

In *UnitedHealth II*, both courts, federal and state, determined that the SLC's procedures were adequate, appropriate, and performed in good faith when the SLC presented evidence—its Report and affidavits of the SLC members—showing the investigation's comprehensive scope.¹²⁸ In *UnitedHealth II*, the court also considered the fact that the SLC was granted, and exercised, complete power and authority to investigate, and each member personally prepared for and interviewed 50 witnesses, reviewed thousands of pages of documents, and reviewed cases and other materials to develop an understanding of the law governing the derivative claims while also

¹²⁵ *UnitedHealth II*, 591 F. Supp. 2d at 1029.

¹²⁶ *Id.* (citing *Drilling*, 589 N.W.2d at 509).

¹²⁷ *Kokocinski Order* at 34 (quoting *UnitedHealth II*, 591 F. Supp. 2d at 1029) (internal quotation omitted).

¹²⁸ *UnitedHealth II*, 591 F. Supp. 2d at 1029.

employing independent counsel and independent financial experts as evidence of its good faith investigation.¹²⁹

In *Kokocinski*, the comprehensive scope of the investigation included the SLC's preparation for and interview of 60 witnesses over the course of eighteen months.¹³⁰ Chief Judge Tunheim noted in *Kokocinski* that the SLC's counsel conducted even more interviews and noted the number of pages of documents the SLC reviewed as evidence of its good faith investigation.¹³¹ The defendants' involvement in both *UnitedHealth II* and *Kokocinski*, like this one, was limited to responding to requests for information and participating in interviews that the SLC requested.¹³² And in each of those cases, it was shown that the SLC had full access to documents it requested, including those subject to a claim of attorney-client or attorney-work-product privilege.¹³³

Similarly, the SLC here undertook a comprehensive investigation that lasted twenty-one months. It was granted and exercised complete power and authority to investigate the allegations, claims, and requests for relief, it employed independent counsel and independent experts, it reviewed thousands of pages of documents, and it interviewed scores of witnesses. The SLC developed an understanding of the applicable legal standard and the law governing derivative claims. Target's and the individual defendants' involvement was limited to responding to requests for information and participating in interviews of witnesses that were selected by the SLC. The SLC had full

¹²⁹ *Id.*

¹³⁰ *Kokocinski* Order at 34.

¹³¹ *Id.*

¹³² *Id.* at 35; *UnitedHealth II*, 591 F. Supp. 2d at 1029.

¹³³ *Kokocinski* Order at 35; *UnitedHealth II*, 591 F. Supp. 2d at 1029.

access to documents it requested, including those subject to a claim of attorney-client privilege or attorney-work-product privilege and had full access to the database in the MDL. In addition, the SLC did not share the information it gathered or its conclusions with Target, the individual defendants, the plaintiffs, or their respective counsel until the issuance of its report. All of the foregoing factors demonstrate that the SLC's investigative procedures and methodologies were adequate, appropriate, and pursued in good faith.

Conclusion

Under Minnesota law, courts do not second-guess an SLC's conclusions or re-examine the merits of its decisions; rather, the Court's inquiry is limited to determining whether the SLC's members are disinterested and independent and whether the SLC's methodology indicates that its decision was the product of a good faith investigation.¹³⁴ Here, the Report and the SLC members' affidavits establish that the investigation was independent, extensive, and focused on the best interests of the company. Thus, the SLC has established the necessary factual predicate for the Court to approve the dismissal of the above-captioned action. Therefore, the SLC respectfully requests the Court to grant its motion for approval and dismissal and to enter judgment dismissing this matter with prejudice.

¹³⁴ *UnitedHealth II*, 591 F. Supp. 2d at 1030.

Respectfully submitted,

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