

■ Sutherland v. Sutherland
 Del.Ch.,2008.

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UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.
 Martha S. SUTHERLAND

v.

Perry H. SUTHERLAND, Todd L. Sutherland, and
 Mark B. Sutherland, and Dardanelle Timber Co., Inc.
 and Sutherland Lumber Southwest, Inc.

C.A. No. 2399-VCL.

Submitted: Feb. 7, 2008.

Decided: Feb. 14, 2008.

[J. Travis Laster](#), Esquire, Abrams & Laster, LLP,
 Wilmington, DE.

[A. Gilchrist Sparks](#), Esquire, Morris, Nichols, Arsht
 & Tunnell, LLP, Wilmington, DE.

[Robert S. Saunders](#), Esquire, Skadden Arps Slate
 Meagher & Flom, LLP, Wilmington, DE.

[STEPHEN P. LAMB](#), Vice Chancellor.

*1 Dear Counsel:

I have reviewed and considered your letters of February 7th (Mr. Sparks) and February 8th (Mr. Laster), concerning the Report of the Special Litigation Committees ("SLC") of the Boards of Directors of Dardanelle Timber Co., Inc. and Sutherland Lumber-Southwest, Inc., dated March 26, 2007 ("Report"). In his letter, Mr. Sparks, on behalf of the SLC, seeks leave to revise and supplement the Report and to submit an extensive additional appendix. Mr. Laster opposes this request. I conclude that the pending motion to dismiss should, in fairness to the plaintiff, be determined on the basis of the extensive record developed in discovery into the SLC's independence and good faith-without any further supplementation or revision to the SLC's Report. In that connection, I do not anticipate that resolution of the motion to dismiss will be based in any material respect on the form in which the SLC chose to present its findings. Thus, the denial of the

request to revise and supplement the Report should not work any hardship on the SLC or the nominal defendants.

I.

The Report was prepared by Bryan Jeffrey, a newly appointed director of both corporations, acting as a one-man SLC, with the assistance of his counsel, Morris, Nichols, Arsht & Tunnell. The Report forms the basis for the nominal defendants' motion to dismiss this derivative and double derivative action, argued February 7, 2008. Notably, the plaintiff and her brother who supports this litigation each hold 25% of the outstanding common stock of Dardanelle, which is itself the 100% owner of Southwest. Two of the individual defendants, who are the plaintiff's other brothers, own the other 50% of the common shares in equal shares. One of the defendants also holds a proxy to vote certain voting preferred stock owned by their mother's trust. Thus, the two individual defendants, by voting together, are able to control the corporations and elect all directors. The third individual defendant is their cousin.

At the time the SLC was formed, the court agreed to impose a brief stay of proceedings to permit the SLC to do its work without the interference that would be caused by the simultaneous conduct of discovery by the plaintiff. The court did so reluctantly, and only after observing that the use of a one-person SLC in the context of these closely held corporations pressed the theory of [Zapata](#)^{FN1} to the extreme. The court made it plain that both the independence of the SLC and the good faith of its inquiry would be the subject of close scrutiny if the investigation resulted in a recommendation that the litigation be dismissed.

[FN1. See Zapata Corp. v. Maldonado, 430 A.2d 779 \(Del.1981\).](#)

The Report summarizes the investigation done and factual conclusions reached by the SLC in a format that entirely omits any record citation, either to documentary evidence or to the witness summaries the SLC's counsel prepared in the course of its

investigation. The Report does contain an appendix but it is limited to certain analyses of one particular aspect of the complaint. None of the source documents or testimonial evidence is found therein. Nonetheless, as sometimes happens in situations of this kind, the Report is relied upon by the nominal defendants as if it were itself evidence of both the good faith of the SLC's investigation and the factual conclusions it reached. This shortcoming was the central argument around which the plaintiff developed her opposition brief.

*2 In reply, the SLC submitted a lawyer's affidavit that appended select witness summaries and deposition transcripts. Even with these additional submissions, however, the Report remains less than fully documented. At oral argument, the paucity of record citation or documentation in the Report remained a focal point of contention. Counsel for the SLC explained that the Report comported with his understanding, based on past practice, of the format such reports should take. In support, counsel offered to, and ultimately did, submit a report similarly devoid of citation and documentation that this court relied on in dismissing the derivative complaint in *Kindt v. Lund*.^{FN2} Plaintiff's counsel maintained that the lack of citation or documentation of any kind in the Report left the SLC unable to meet its burden of proof with respect to good faith, independence, and reasonableness.

^{FN2}. No. 17751, [2004 WL 21453879 \(Del. Ch. May 30, 2003\)](#).

As noted, Mr. Sparks submitted the *Kindt* SLC report, as well as a letter making the present request for leave to revise and supplement the Report and to submit an extensive additional appendix. Plaintiff's counsel objected, arguing it would be unfair and prejudicial to the plaintiff to allow the SLC to supplement the record, and sought to distinguish the case from *Kindt*.

II.

A motion to supplement the record is addressed to the discretion of the trial court.^{FN3} Among the factors the Delaware courts have considered in deciding this and similar types of motions are 1) when the evidence came to the moving party's knowledge,^{FN4} 2) whether the exercise of reasonable

diligence would have caused the moving party to discover the evidence earlier,^{FN5} 3) whether the evidence is so material and relevant that it will likely change the outcome,^{FN6} 4) whether the evidence is material and not merely cumulative,^{FN7} 5) whether the moving party has made a timely motion,^{FN8} 6) whether undue prejudice will inure to the nonmoving party,^{FN9} and 7) considerations of judicial economy.^{FN10} Ultimately, a motion to supplement the record turns on the interests of fairness and justice.^{FN11}

^{FN3}. *Carlson v. Hallinan*, 925 A.2d 506, 519 (Del. Ch.2006) (citing *Fitzgerald v. Cantor*, No. 16297, 2000 WL 128851, at *1 (Del. Ch. Jan. 10, 2000)).

^{FN4}. *Id.* (citing *Poole v. N.V. Deli Maatschappij*, 257 A.2d 241, 243 (Del. Ch.1969) (motion to reopen record to conform to appellate court's ruling)).

^{FN5}. *Id.*

^{FN6}. *Id.* at 519-20.

^{FN7}. *Id.* at 520; see also *Procter & Gamble Co. v. Paragon Trade Brands, Inc.*, 15 F.Supp.2d 406, 409 (D.Del.1998) (motion for a new trial or, alternatively, to alter or amend the judgment).

^{FN8}. See *Carlson*, 925 A.2d at 520; *Fitzgerald*, 2000 WL 128851, at *2).

^{FN9}. *Id.*; see also *Kahn v. Tremont Corp.*, No. 12339, 1997 WL 689488, at *5 (Del. Ch. Oct. 28, 1997) (motion to reopen record on remand after appellate court shifted burden of proof).

^{FN10}. *Carlson*, 925 A.2d at 520; *Fitzgerald*, 2000 WL 128851, at *2; *Tremont Corp.*, 1997 WL 689488, at *5.

^{FN11}. *Carlson*, 925 A.2d at 520 (citing *Tremont Corp.*, 1997 WL 689488, at *5).

In this case, the limited probative value of the proffered evidence is far outweighed by the prejudice

the plaintiff would face were the court to grant the SLC's request. That is not to say that the offered supplemental evidence is without any probative value. Although the SLC argues that a report need not cite to documents entered into the record, such citations would undoubtedly aid the court's evaluation of the report.^{FN12}The cases cited by the SLC in support of its position do not suggest otherwise. In *Kindt*, the good faith and independence of the three-person SLC in that case were not seriously challenged, and the report's lack of record citation was not raised or considered.^{FN13}In *Kaplan v. Wyatt*, the court noted that the SLC in that case submitted a "156-page report, supplemented by appendixes and affidavits," suggesting that the report cited to documents entered into the record.^{FN14}Still, the court does not anticipate that either the absence of such evidence from the record or the format of the Report will materially affect resolution of the motion to dismiss. Thus, the denial of this motion will not prejudice the SLC or the nominal defendants in any significant way.

^{FN12}.See *St. Clair Shore Gen. Employees Ret. Sys. v. Eibeler*, No. 688, 2007 WL 3071837, at *5 (S.D.N.Y. Oct. 17, 2007) (stating "insofar as the Report contains conclusory statements without discussion or direct citation, the plaintiff may bring such inadequacies to the Court's attention. Undoubtedly, these alleged flaws and inadequacies-if any-will influence the Court's evaluation of the SLC's independence and good faith, and the reasonableness of the bases for its conclusions."); see also *Kaplan v. Wyatt*, 484 A.2d 501, 507, 519 (Del. Ch. Nov. 5, 1984) (noting that the SLC bears the burden of proving its good faith, independence, and reasonableness, and stating that "what the Committee did or did not do, and the actual existence of the documents and persons purportedly examined by it, should constitute the factual record on which the decision as to the independence and good faith of the Committee, and the adequacy of its investigation in light of the derivative charges made, must be made").

^{FN13}.2003 WL 21453879, at *2, 4.

^{FN14}.1984 WL 8274, at *1.

*3 In contrast, the motion is untimely and granting it would subject the plaintiff to prejudice. The plaintiff has conducted this stage of litigation, which included review of over 14,000 documents, three depositions, an opposition brief, and oral argument, based largely on her argument that the Report's lack of record citation prevented the SLC from meeting its burden of proof on the motion to dismiss. As a result, allowing the SLC to supplement the Report now would force the plaintiff to start anew-developing a new strategy, briefing a new opposition, preparing for another oral argument, and possibly taking further discovery. Clearly, granting the SLC's motion at this late date would unfairly prejudice the plaintiff.^{FN15}

^{FN15}.See *Carlson*, 925 A.2d at 521; *Fitzgerald*, 2000 WL 128851, at *2 (concluding that allowing supplementation of the record would be "unfairly prejudicial to [the non-movants] in that they would now be forced to galvanize yet another major effort to gather evidence to explain their view of the inferences to be drawn from the [proffered evidence] if it were admitted").

This prejudice is all the more burdensome because the SLC became aware of the plaintiff's argument when she filed her opposition brief, and could have moved to supplement the record at that time. Instead, it chose to defend its Report as written, albeit with the aid of certain interview memoranda and supporting documents submitted with the reply brief.

In addition, the court has already presided over oral argument of this case and reviewed extensive briefing. The motion is ready for decision. Therefore, granting the SLC's motion would waste judicial resources.^{FN16}This is especially so in the context of a *Zapata* motion, which this court has previously recognized as inefficient due to its tendency to create "litigation within litigation."^{FN17}For the reasons stated above, the motion is denied. IT IS SO ORDERED.

^{FN16}.See *Carlson*, 925 A.2d at 521.

^{FN17}.*Kaplan*, 484 A.2d at 510-512 (noting that there is litigation, first, over the SLC's

motion for a stay pending its investigation, then, over the amount of discovery a plaintiff may take in order to challenge the SLC's investigation, and, finally, over the SLC's motion to dismiss. "In short, the new *Zapata* procedure ... has the pragmatic effect of setting up a form of litigation within litigation.").

/s/ Stephen P. Lamb

Vice Chancellor

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Not Reported in A.2d, 2008 WL 571253 (Del.Ch.)

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