

COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

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VICE-CHANCELLOR

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November 15, 2000

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**RE: Craig Mattes v. Checkers Drive-In Restaurants, Inc.**  
**C.A. No. 17775**

Gentlemen:

This is an action under Section 220 of the Delaware General Corporation Law to compel defendant, Checkers Drive-In Restaurants, Inc., to make certain documents available for inspection and copying by plaintiff, Craig Mattes, or his attorneys or agents. Checkers has filed a timely motion to dismiss the Amended Complaint on the ground that Mattes's demand did not comply with the statutory requirements of § 220. Because Mattes's demand failed to comply with the mandate of the statute, the motion to dismiss will be granted and the Amended Complaint will be dismissed. ***Haber v. Harnischfeber.***<sup>1</sup>

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<sup>1</sup> Del. Ch., C.A. No. 6930, Hartnett, V.C. (Feb. 3, 1983).

The demand at issue is dated September 12, 2000. It was made under oath by an attorney purporting to act on behalf of Mattes but was not “accompanied” by a power of attorney, as is mandated by § 220(b). The September 2000 demand was the last in a series of demands made on behalf of Mattes beginning on August 9, 1999. The earlier demands were defective for a variety of different reasons, ranging from the fact that Mattes was not a record owner of Checkers stock before June 2, 2000, to the absence of an oath, to the failure to state a proper purpose for the **inspection**.<sup>2</sup> After suing on the September 2000 demand, Mattes submitted an affidavit in the litigation verifying the demand and confiig that the lawyer who made the demand was acting as his authorized attorney. He did not make a new demand conforming to the statute and sue on it.

My decision on this motion is controlled by the general rule that the express statutory requirements of § 220 as to the form of a stockholder demand should be strictly followed.<sup>3</sup> Among other reasons, strict adherence to those requirements furthers “the interest of insuring prompt and limited litigation” of actions under § 220.<sup>4</sup> Thus, for example, complaints have been dismissed where the demand is not made under oath,<sup>5</sup> or where the complaint is filed less than five days after the demand is delivered.<sup>6</sup> These cases also reveal another reason to strictly adhere to the statutory requirements for form of demand, having to do with the right of the corporation to receive and consider a demand in proper form **before** litigation is initiated. That right of the corporation is defeated and an integral part of the statute rendered nugatory when, as happened here, the demand does not satisfy the statutory mandate and an effort to comply with the

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<sup>2</sup> The only pertinence of the earlier demands is that one of them was accompanied by a power of attorney signed by Mattes on August 24, 1999, authorizing the same lawyer who later signed the September 2000 demand to act on his behalf “to assert my rights as a shareholder in the Checkers Corporation ... to review and copy corporate books and records.” I am unable to conclude that the delivery of this power of attorney in 1999 satisfied the requirement of Section 220 that it “accompany” the September 2000 demand.

<sup>3</sup> *Gay v. Cordon Int’l Corp.*, Del. Ch., C.A. No. 5541, Hartnett, V.C. (Mar. 3 1, 1978).

<sup>4</sup> *Bear Stearns & Co. v. Pabst Brewing Co.*, Del. Ch., C.A. No. 5456, Brown, V.C. (Nov. 23, 1977).

<sup>5</sup> *Haber v. Harnischfeber*, Del. Ch., C.A. No. 6930, Hartnett, V.C. (Feb. 3, 1983).

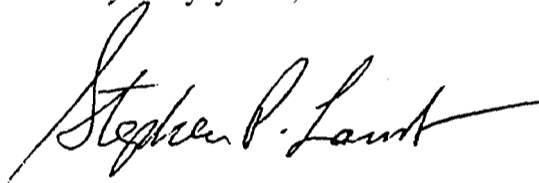
<sup>6</sup> *Frank v. Libco.*, Del. Ch., C.A.. NO. 12412, Hartnett, V.C. (Dec. 8, 1992).

requirements of form is made during the course of the litigation without delivering a new form of demand.

It is important to point out that corporate defendants in § 220 cases must raise their technical defenses to the demand in a timely manner. Those objections should be pleaded with specificity in the answer (or upon later discovery) and should be brought to the attention of the court for its prompt consideration. Otherwise, as the Delaware Supreme Court noted in **Van Leeuvan v. Gas Service Co.**,<sup>7</sup> **this court** should not permit the late assertion of “hypertechnical defenses” unless the defendant is able to make “a good faith, showing . . . that it could not by its own efforts and diligence determine the existence of such defense prior to its actual assertion.” Recently, for example, I refused to permit the eve-of-trial assertion of a defense based on the lack of an oath, where the defendant was unable to make such a showing.<sup>8</sup>

Here, there has been no unreasonable delay. And, while trial is scheduled for December 6, 2000, there remains enough time for the plaintiff to make a demand in proper form and, if necessary, amend his complaint before trial. In the circumstances, I see no reason to excuse plaintiffs failure to comply with the mandated statutory form. For these reasons, I have today entered the enclosed order of dismissal. Under the terms of that order, the matter will be dismissed with prejudice on December 1, 2000 unless plaintiff has first moved for leave to further amend his complaint to allege the corporation’s failure to comply with a demand made in proper form.

Very truly yours,



SPL/caj

Enclosure

oc: Register in Chancery

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<sup>7</sup> Del. Supr., 467 A.2d 455 (July 6, 1983)(ORDER).

<sup>8</sup> **Sahagen Satellite Technology Group, LLC v. Ellipso, inc.**, Del. Ch., C.A. No. 18020, Lamb, V.C. (Sept. 27, 2000).

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

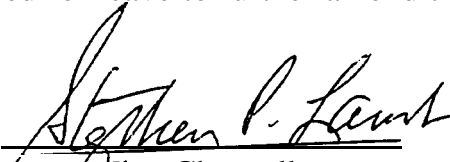
IN AND FOR NEW CASTLE COUNTY

CRAIG MATTES, )  
 )  
 Plaintiff, )  
 )  
 v. ) C.A. No. 17775  
 )  
 CHECKERS DRIVE-IN RESTAURANTS, )  
 INC., )  
 Defendant. )

ORDER OF DISMISSAL

For the reasons stated in the Court's November 15, 2000 letter opinion, the Amended Complaint in this action shall be dismissed with prejudice on December 1, 2000, unless plaintiff shall have first moved for leave to further amend the complaint.

November 15, 2000

  
Stephen P. Lamb  
Vice Chancellor