



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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R. Bruce McNew, Esquire
Taylor & McNew
3711 Kennett Pike, Suite 210
Greenville, DE 19807

Anne C. Foster, Esquire
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899-0551

Bruce L. Silverstein, Esquire
Young Conaway Stargatt & Taylor, LLP
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, DE 19899-0391

Re: Zimmerman v. Braddock, et al.
C.A. No. 18473-NC
Date Submitted: September 29, 2005

Dear Counsel:

The Defendants have moved, pursuant to Supreme Court Rule 42, for certification of an interlocutory appeal of the Court's order of September 8, 2005. That order, which implemented, *inter alia*, the Court's bench ruling of May 9, 2005, allowed the Plaintiff to file an amended complaint in this derivative action which previously had been dismissed without prejudice because of the Plaintiff's

failure to allege adequately that demand upon the Nominal Defendant's board of directors would have been futile. The Defendants contend that (1) the Court was without jurisdiction to authorize the filing of an amended complaint in this action; and (2) the futility of demand analysis required by Court of Chancery Rule 23.1 should have been performed by reference to the Nominal Defendant's board of directors as of the date of the filing of the proposed amendment, *i.e.*, it should not have "related back" to the date when this action was first filed. If the amendment, assuming that it was properly allowed, does not "relate back" and, instead, futility of demand should have been measured against the board as of the time of the filing of the proposed amended complaint, the Plaintiff would not have been able to allege that demand upon the board would have been futile and, thus, this action would have been dismissed. In short, if either of the Court's conclusions is wrong, this action will be terminated. Accordingly, the requirements and objectives of Supreme Court Rule 42(b)(v) are satisfied.

Before this Court may certify an interlocutory appeal, it must also consider whether or not the challenged order determined a substantial issue and established a legal right. Because the order, by permitting continued proceedings in an action that had been dismissed, provided the foundation that allowed the Court to

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conclude that the Plaintiff could maintain a derivative action and because that order resolved questions as to the authority of this Court to consider the Plaintiff's claims, it follows that the order determined a substantial issue and established a legal right.

Accordingly, for the foregoing reasons, the Court will enter an order certifying the Court's order of September 8, 2005, for interlocutory appeal.¹

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC

¹ The Court's order of September 8, 2005, resulted from consideration of the Plaintiff's motion to amend. The substance of that debate involved the futility of amendment as part of the analysis under Court of Chancery Rule 15(a). As a matter of substance and not of form, whether the motion was one to amend or one to dismiss would seem to make little difference.

The Defendants have also asserted two other grounds to satisfy the requirements of Supreme Court Rule 42(b): that the order resolved a question of law in the first instance in this State, *see* Supr. Ct. R. 41 & Supr. Ct. R. 42(b)(i); and that it sustained the controverted jurisdiction of this Court, *see* Supr. Ct. R. 42(b)(ii). In light of the Court's conclusion that the Defendants have met the requirements of Supreme Court Rule 42(b)(v), it is unnecessary to address those contentions.