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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Diamond Foods, Inc., Derivative
Litigation

No. C 11-05692 WHA

This Document Relates to: All actions

**ORDER REGARDING MOTION FOR
ADMINISTRATIVE RELIEF FROM
CASE MANAGEMENT ORDER**

In this derivative action, defendants John Gilbert and Robert Lea have filed a motion for administrative relief from the case management order or, in the alternative, an extension of time. Plaintiffs have opposed. Defendant Deloitte & Touche has filed an objection to the opposition to the motion.

On February 16, 2012, a case management order issued instructing plaintiffs to file a consolidated complaint by March 1. Defendants were instructed to respond to the consolidated complaint within 45 days of receiving service and to file one motion to dismiss noticed on the 35-day track, with the possibility that defendants would be permitted to file multiple motions to dismiss if necessary (Dkt. No. 39 at 3). Plaintiffs filed a consolidated complaint on March 1, and added three new defendants.

Defendants Gilbert and Lea request permission to sequence the motion to dismiss in two phases. In the first phase, they propose that defendant Diamond Foods, Inc, the nominal defendant, be permitted to file on April 16, 2012, a single motion to dismiss for failure to make demand and lack of subject-matter jurisdiction, covering all individual defendants. If that motion is denied, then the second phase will begin, wherein defendants Gilbert and Lea propose

United States District Court
For the Northern District of California

1 that the individual defendants, of which there are eleven, be permitted to file separate motions to
2 dismiss on other grounds, which they refer to as “merits motions.” In the alternative, they
3 request that “each defense counsel for the individual defendants,” of which there are currently 5
4 such counsel, be permitted to file a separate motion to dismiss not to exceed fifteen pages and
5 that the deadline to file said motions be extended to April 30, 2012. Defendants Gilbert and Lea
6 have represented that “all defense counsel . . . agree that merits motions should be briefed only
7 after the court resolves a demand motion, or in the alternative, each defense counsel should be
8 permitted to file a separate motion to dismiss” (Dkt. No. 53 at 2–3). Defendants Gilbert and Lea
9 have not indicated the position of defendants Dennis Mussel and the Estate of Joseph P. Silveira
10 who do not have counsel.

11 Plaintiffs oppose. They contend that there is no basis for a two stage process because
12 they have sufficiently alleged demand futility and subject-matter jurisdiction and that the two-
13 stage process would be inefficient and result in excessive briefing. Plaintiffs also oppose
14 defendants’ alternative request to permit each defense counsel to file a separate motion to
15 dismiss and to extend the deadline for said motions on the grounds that this would permit the
16 filing of too many motions.

17 Defendant Deloitte & Touche, LLP objects to plaintiffs’ opposition to the motion on the
18 grounds that defendant Deloitte was not served with the complaint until March 20 and is
19 therefore not required to respond to the amended complaint until May 4, 2012, 45 days after the
20 date that Deloitte was served.

21 Time to oppose the instant motion has expired. Having considered all submissions, the
22 parties are ordered to proceed as follows: (1) The individual defendants and Diamond Foods,
23 Inc., the nominal defendant, shall file one motion to dismiss for failure to make a demand and for
24 lack of subject-matter jurisdiction. This will be due April 16. (2) Defendant Deloitte shall file
25 its motion to dismiss by May 4, 2012. Both motions shall be noticed on the 35-day track.
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1 A further briefing schedule will be set upon resolution of these motions.
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3 **IT IS SO ORDERED.**

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5 Dated: April 12, 2012.



6 WILLIAM ALSUP
7 UNITED STATES DISTRICT JUDGE
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