

Report and Resolution,¹ finding that it is in the best interests of Navarre that the derivative complaints be dismissed. Although there is no question that the SLC conducted a thorough good faith investigation independent of the Board of Directors of Navarre, the three remaining named Plaintiffs² seek additional discovery regarding the SLC's independence and good faith beyond the information disclosed by the SLC to the parties. Because all of the remaining discovery requests exceed the limited scope of the Court's review of the SLC's decisionmaking process, the Court should deny Plaintiffs' Motion to Compel.

FACTUAL AND PROCEDURAL BACKGROUND

These shareholder derivative actions each allege insider stock sales, gross mismanagement, breach of fiduciary duty, waste of corporate assets, and unjust enrichment, as well as violations of the Sarbanes-Oxley Act. The named Defendants are the entire Board and several officers. The alleged factual basis for these claims involves Navarre's June 2005 restatement of its financial statements for the third fiscal quarter ending December 31, 2003, its fiscal year ending March 31, 2004, and three fiscal quarters of fiscal 2005, due to Navarre not having recorded an expense associated with a post-retirement incentive deferred compensation arrangement with Defendant Eric

¹ The Report was updated and slightly revised on February 23, 2006, in light of a letter requesting information that Navarre received from the U.S. Securities and Exchange Commission on February 16, 2006.

² Two other named Plaintiffs, Shannon Binns and Karel Filip, have voluntarily dismissed their derivative complaints pursuant to Stipulations of Dismissal. *See* Stipulation of Dismissal by Plaintiffs Shannon Binns and Karel Filip (Doc. 65 in *Evans*, Doc. 62 in *Brewster*, Doc. 53 in *Block*).

Paulson, Navarre's Chairman and Chief Executive Officer, and an incorrect inclusion of a deferred tax benefit in income rather than assigning it to shareholders' equity.³

On or about August 3, 2005, the Board of Directors of Navarre met to consider whether to appoint an independent Special Litigation Committee, pursuant to Minn. Stat. § 302A.241, to conduct an independent and good faith investigation and to determine whether the prosecution of the derivative actions was in the best interest of Navarre. (Aff. of Geoffrey P. Jarpe, ("Jarpe Aff.") (Doc. 43 in *Evans*, Doc. 42 in *Brewster*, Doc. 33 in *Block*) at ¶ 3.) The Board appointed a committee, which interviewed three SLC candidates and unanimously recommended Richard Solum, a retired Minnesota District Court Judge and currently Of Counsel at Dorsey & Whitney, LLP, to the Board. The Board, in turn, unanimously adopted a resolution appointing Mr. Solum to the SLC. (*Id.* ¶ 4.) After the cases were transferred to Judge Magnuson, Defendants filed a Motion to Stay Further Proceedings (Doc. 16 in *Evans*, Doc. 20 in *Brewster*, Doc. 12 in *Block*) pending the report of the SLC. Judge Magnuson stayed the case pending the issuance of the SLC's report based on the agreement of the parties. *See* Order (Doc. 40 in *Evans*, Doc. 39 in *Brewster*, Doc. 30 in *Block*).

After undertaking an exhaustive investigation, performing witness interviews, document review, and seeking feedback from Plaintiffs' Counsel, among other things, the SLC determined that: (i) the legal rights and remedies of Navarre as claimed and alleged

³ A consolidated putative class action alleging securities fraud based on substantially the same facts is also pending. *In re Navarre Corp. Securities Litigation*, Civil Action No. 05-cv-01151 (PAM/RLE). In that action, Lead Plaintiff's motion to lift

in the Derivative Complaints are not meritorious and should not be pursued, and (ii) it is in the best interests of Navarre that such Derivative Complaints be dismissed. (See Navarre Corporation Special Litigation Committee Resolution Dated January 19, 2006, Jarpe Aff. (Doc. 43 in *Evans*, Doc. 42 in *Brewster*, Doc. 33 in *Block*) Ex. 2.) The SLC issued a Report and Resolution, detailing its investigative procedure, documents relied upon, witnesses interviewed, claims of the derivative Plaintiffs, legal standards, evaluation of the claims, utilization of experts, input from Plaintiffs' counsel, conclusions, and appendices of relevant documents. See Resolution, Report and Appendix of the Special Litigation Committee, Ex. 1 to Jarpe Aff. ("SLC Rep.") (Doc. 43 in *Evans*, Doc. 42 in *Brewster*, Doc. 33 in *Block*).⁴ On February 27, 2006, Defendants brought motions to dismiss all actions. Oral argument on those motions remains pending until the present discovery dispute is resolved.

Subsequently, Plaintiffs Binns and Filip propounded discovery related to the SLC's investigation that was responded to in part and otherwise objected to by Defendants. As a result of a March 23 status conference before Judge Magnuson, Plaintiffs Evans, Brewster, and Block propounded proposed discovery. Because most of the discovery requests either sought documents beyond the limited scope of the Court's review of the SLC's decision, or because the information sought was already

the discovery stay was denied by Chief Magistrate Judge Erickson on May 15, 2006, and Defendants' motion to dismiss was argued before Judge Magnuson on May 10.

⁴ The document is extremely lengthy and has been filed on ECF in multiple parts and multiple documents in each case. See (Docs. 43-47 in *Evans*, Docs. 42-46 in *Brewster*, Docs. 33-37 in *Block*). For the Court's convenience, Defendants will provide a courtesy copy of the document that has already been filed.

substantially disclosed in the SLC report, Defendants objected to most of Plaintiffs' Proposed Document Requests.⁵ These responses were provided to Plaintiffs in accordance with the timetable set by Judge Magnuson at the status conference. *See* Notice of Status Conference (Doc. 54 in *Evans*, Doc. 54 in *Brewster*, Doc. 44 in *Block*). Plaintiffs did not object to the responses by April 3, 2006, and thus Judge Magnuson entered an Order resetting the hearing on the still-pending Motions to Dismiss pursuant to the recommendation of the SLC. *See* Order at 3-4 (Doc. 56 in *Evans*, Doc. 54 in *Brewster*, Doc. 45 in *Block*). Thereafter, Plaintiffs Evans, Brewster, and Block filed a Motion for Extension of Time to Respond to Defendants' Motion to Dismiss (Doc. 59 in *Evans*, Doc. 56 in *Brewster*, Doc. 47 in *Block*), and Motion to Compel Discovery (Doc. 60 in *Evans*, Doc. 57 in *Brewster*, Doc. 48 in *Block*), arguing that more time was needed to respond to the Motion to Dismiss and that insufficient time had been given to them to object to Defendants' discovery responses. Judge Magnuson granted the extension of time to respond to the motion to dismiss, struck Plaintiffs' Motion to Compel for failure to comply with the Local Rules, and referred the matter to this Court. *See* Memorandum and Order (April 24, 2006) (Doc. 68 in *Evans*, Doc. 65 in *Brewster*, Doc. 56 in *Block*). Finally, on May 9, 2006, Plaintiffs noticed and re-filed their Motion to Compel (Doc. 70 in *Evans*, Doc. 67 in *Brewster*, Doc. 58 in *Block*) that is now pending.

⁵ Defendants' specific responses to Plaintiffs Evans, Brewster, and Block's discovery requests are discussed, *infra*.

LEGAL BACKGROUND—SPECIAL LITIGATION COMMITTEES

The present discovery dispute concerns the applicable scope of discovery to which a plaintiff in a shareholder derivative action is entitled once an independent Special Litigation Committee has determined that maintenance of the derivative action is not in the best interests of the corporation. Nominal Defendant Navarre is a Minnesota corporation, and Minnesota state law applies to the underlying substantive dispute. *See generally Foy v. Klapmeier*, 992 F.2d 774 (8th Cir. 1993) (applying Minnesota law to shareholder derivative suit).

Minnesota law permits a shareholder to file a derivative suit as a means to hold directors and officers accountable to the company they serve. *See, e.g., Janssen v. Best & Flanagan*, 662 N.W.2d 876, 882 (Minn. 2003). However, because the claims asserted in a derivative action belong to the company, not to any individual shareholder, Minnesota law likewise permits a company to appoint a special litigation committee “to consider legal rights or remedies of the corporation and whether those rights and remedies should be pursued.” Minn. Stat. § 302A.241, subd. 1. The Special Litigation Committee may be composed of independent directors “or other independent persons,” and, under Minnesota law, may be only one person. *Id.* The SLC acts in the place of the Board of Directors to exercise its independent business judgment to determine whether a particular suit is in the best interests of a company. *Janssen*, 662 N.W.2d at 882.

When such a committee is established and the committee conducts a good faith investigation that yields a conclusion that pursuit of a derivative action is not in the

company's best interests, the company may move to dismiss the derivative action, and the court should rely on the well-established business judgment rule to defer to the committee's conclusion. *Id.* at 884; *Drilling v. Berman*, 589 N.W.2d 503, 508-09 (Minn. Ct. App. 1999); *Skoglund v. Brady*, 541 N.W.2d 17, 20-21 (Minn. Ct. App. 1996); *Black v. NuAire, Inc.*, 426 N.W.2d 203, 209-11 (Minn. Ct. App. 1988).

Minnesota corporate law “preclude[s Minnesota] courts from reviewing the merits of a recommendation to dismiss a shareholder’s derivative action when that recommendation is made by a disinterested committee conducting its investigation in good faith.” *Black*, 426 N.W.2d at 209-10. This standard, similar to the “New York” rule, allows the court to “properly inquire as to the adequacy and appropriateness of the committee’s investigative procedures and methodologies, [but it] may not under the guise of consideration of such factors trespass in the domain of business judgment.” *Auerbach v. Bennett*, 47 N.Y.2d 619, 634, 393 N.E.2d 994 (1979), *cited in Black*, 426 N.W.2d at 210; *see also Drilling*, 589 N.W.2d at 507 (recognizing that Minnesota courts had adopted the New York approach articulated in *Auerbach* and distinguishing authority requiring a substantive review of the SLC’s decision).⁶ Thus, under Minnesota law, if the special litigation committee is both independent of the board and conducts a good faith

⁶ This is in contrast to other jurisdictions that permit or require the court to determine whether the committee made a “reasonable and principled decision” or evaluate the SLC’s decision using the court’s own business judgment. *See, e.g., Zapata Corp. v. Maldonado*, 430 A.2d 779, 787 (Del. 1981) (providing a two-step test where the court first examines the independence and good faith of the committee and then, may, applying its own business judgment, determine whether the motion should be granted).

investigation, then the court must to defer to its decision and dismiss the action. *Skoglund*, 541 N.W.2d at 21.

In this case, Defendants appointed a Special Litigation Committee to investigate Plaintiffs' allegations. Because all of the Navarre Board of Directors were named in Plaintiffs' derivative actions, after reviewing and interviewing several potential candidates, the Board appointed Richard Solum to the SLC. After conducting a thorough investigation, the SLC determined that maintenance of the derivative lawsuits would not be in Navarre's best interests. The SLC also thoroughly documented its results and conclusions in a Resolution, Report and Appendix. Prior to dismissal of the suit under Minnesota law, Plaintiffs now seek discovery, purportedly to test the independence and good faith of the SLC's investigation. However, it is clear that Plaintiffs seek information broadly related to the substance of the SLC's decision, and not merely whether the SLC was independent and conducted a good faith investigation. Defendants have objected to the nature and scope of the discovery requests. For the following reasons, Plaintiffs are only entitled to the discovery that Defendants have heretofore provided and the information currently in their possession. Thus, Plaintiff's Motion to Compel should be denied.

ARGUMENT

I. Any Permissible Discovery Is Limited to the Narrow Issues of SLC Independence and Good Faith.

As Plaintiffs recognize in their memorandum, the only issues before the Court are whether the SLC was independent of the Navarre Board of Directors—that is, whether

the Special Litigation Committee lacked a prior relationship with the Board and the Company and has been delegated the Board's power to investigation and control the litigation, *see Drilling*, 589 N.W.2d at 506; *Black*, 426 N.W.2d at 206; *Janssen*, 662 N.W.2d at 888; and whether the SLC conducted its investigation in good faith—that is, not “so pro forma or halfhearted as to constitute a pretext or sham.” *Auerbach*, 419 N.Y.S 920, 393 N.E.2d at 100. This is because, under Minnesota law, if the SLC was independent of the Board and conducted its investigation in good faith, a court may not second guess the SLC's independent business judgment. The Court must follow the SLC's recommendation to dismiss any suit that is not in the best interests of the company. Thus, any discovery must be narrowly tailored *only* to the discrete issues of independence and good faith, and not to the substance of the SLC's decision.

A plaintiff is not entitled to discovery to develop facts that support the merits of the case, or for the Court (or Plaintiffs) to review the substantive business judgment of the Committee. *See, e.g., Ungerleider v. One Fifth Ave. Apartment Corp.*, 623 N.Y.S.2d 711, 714 (N.Y. Sup. Ct. 1995); *Kaplan v. Wyatt*, 9 Del. J. Corp. L. 205, 1984 WL 8274 at *1-2 (Del. Ch. 1984) (restricting discovery even under the more liberal, two-step *Zapata* analysis under Delaware law). Plaintiffs bear the burden of raising genuine issues related to independence and good faith, and Plaintiffs cannot engage in a fishing expedition in hopes of turning up adverse facts where there is no reasonable basis for such inquiry in the first instance. *See Gen. Elec. Co. v. Rowe*, Civ. A. No. 89-7644, 1991 WL 111173 at *1-3 (E.D. Pa. June 18, 1991) (applying the New York Rule and denying derivative

plaintiff access to “virtually every document connected with or considered during the special committee’s investigation”).

Further, the nature, quality, and thoroughness of the SLC’s report also affects the scope of discovery available to a derivative plaintiff. A thorough report that sets forth information related to the investigation, background, reasoning, and findings itself may provide the necessary information related to the SLC’s independence and good faith. *See Ungerleider*, 623 N.Y.S.2d at 714. The *Kaplan* court succinctly stated Plaintiff’s burden when an SLC’s report is comprehensive:

The report itself discloses in detail the breadth of the Committee’s investigation and the reasons for its recommendation. Plaintiff has the Committee’s position and its bases therefor[. ... If the plaintiff has evidentiary matter which tends to contradict the facts relied upon and disclosed by the Committee...the time has come for the plaintiff to bring them forth and develop them on his own as opposed to culling through hundreds or thousands of documents previously reviewed by the Committee on the pretense of attempting to satisfy himself that the Committee has done a good faith job....

Kaplan, 9 Del. J. Corp. L. at 210-11; 1984 WL 8274 at * 3. Thus, Plaintiffs here may not seek discovery that is not related to independence of the SLC or whether its investigation was conducted in good faith, or discovery for information Plaintiffs already have, such as the facts, data, investigation, and reasoning disclosed in the SLC’s Report.

II. The Discovery Provided by Defendant Is Sufficient for Plaintiffs to Review and/or Challenge the SLC’s Independence and Good Faith.

Plaintiffs argue, in facile and conclusory fashion, that “each group of Plaintiffs’ discovery requests are narrowly targeted at uncovering the information on which the SLC based its decision in order to determine the adequacy and reliability of the SLC’s

investigation.” Mem. of Law in Supp. of Pls.’ Mot. to Compel (Doc. 71 in *Evans*, Doc. 68 in *Brewster*, Doc. 52 in *Block*). Plaintiffs do not identify which Requests or Interrogatories should be answered or answered more fully, and Plaintiffs do not provide the Court with the discovery at issue.⁷ Nor do they explain how their far reaching requests for “all documents relating to...” are narrowly tailored to the question of good faith an independence. Defendants are therefore left to guess how to respond to Plaintiffs’ Motion to Compel. After reviewing each Interrogatory and Request for Production, along with the SLC Report, it is clear that Defendants have provided Plaintiffs all the information necessary to review and argue the pending Motions to Dismiss, and no further discovery is necessary or proper.

A. Plaintiff’s Interrogatories.

Plaintiffs do not cite or even describe their Interrogatories in their Motion to Compel. Thus, the Court need not consider them as part of the discovery dispute. In addition, Defendants have adequately answered each interrogatory.⁸

⁷ For the Court’s convenience, Plaintiffs Jeffrey Evans, Joan Brewster, and William Block’s [Proposed] First Set of Interrogatories and Requests for Production of Documents are attached as Exhibit A to the Affidavit of Kyle J. Kaiser (“Kaiser Aff.”), and Defendants’ [Proposed] Answers to Plaintiffs Jeffrey Evans, Joan Brewster, and William Block’s [Proposed] First Set of Interrogatories to or Pertaining to the Special Litigation Committee, and Defendant [Proposed] Answers to Plaintiffs Jeffrey Evans, Joan Brewster, and William Block’s [Proposed] First Set of Requests for Production of Documents from or Pertaining to the Special Litigation Committee are attached as Exhibits B & C to the Kaiser Affidavit.

⁸ Interrogatory Number 1 asked “whether the Special Litigation Committee has ever received any campaign contributions from any of the Individual Defendants or Nominal Defendant Navarre or its subsidiaries.” Defendant responded that, subject to the General Objections, the SLC had not run for office since 1994, and Defendants are not aware of any campaign contributions made by any Defendants to the SLC. Interrogatory No. 2

B. Plaintiff's Requests for Production of Documents.

It appears that Plaintiffs' Motion to Compel rests on the responses and objections to their Requests for Production of Documents. However, as is clear, Defendants have provided appropriate responses considering the limited nature of the permissible inquiry. Although Plaintiffs failed to analyze each response, to demonstrate the reasonableness of each answer, Defendants shall do so.

1. Request No. 1 – *All documents considered by any director on the Board in connection with the appointment of the Special Litigation Committee.*

Defendants agreed, subject to the General Objections, to produce responsive, non-privileged documents in their control. However, those documents only contain what Plaintiffs already have—Mr. Solum's curriculum vitae. (*See* Ex. 3 to Jarpe Aff. Doc. 43 in *Evans*, Doc. 42 in *Brewster*, Doc. 33 in *Block*); SLC Rep. App'x 17.) The only other documents considered by the Board included a Memorandum prepared by Navarre's counsel discussing the formalities of a Special Litigation Committee, which is protected by the attorney/client and work product privileges, and the résumés of two additional

required Defendants to provide the name and address of each individual that the SLC interviewed and whether such person was an employee of Navarre. Defendants provided such a list. Interrogatories Number 3 and 4 asked for the amount of time, in hours, the SLC and its consultants spent conducting their investigations, the dates of such investigation, and the amount charged by the SLC and its experts. Defendants provided time and billing records submitted to Navarre by the SLC and/or its consultants or experts in response to those interrogatories. Accordingly, the interrogatories are fully answered and should not be an issue in this Motion. For the complete Requests for Production and Answers thereto, see Exs. A & C, Kaiser Aff. For the complete Interrogatories and Answers thereto, see Exs. A & B, Kaiser Aff.

applicants for the SLC position, which are irrelevant, as Mr. Solum is highly qualified for the position and lacks any previous connection with the Board.

2. Request No. 2 – *All documents concerning or comprising any file maintained by Navarre regarding the Special Litigation Committee.*

Plaintiffs' request is overbroad and far exceeds the permissible scope of discovery of the SLC's independence and good faith performance of its duties. Such a request is focused on Navarre, not the SLC, and seeks to discover more about the *contents* of documents and other materials provided to the SLC. Furthermore, Plaintiffs already have all the documents related to the appointment of the SLC (SLC Rep. App'x 18), and the information communicated to the SLC from Navarre (SLC Rep. App'x 9). Therefore, the documents Plaintiffs seek in Navarre's "file" would be related only to the content of the SLC Report, and not the SLC's independence or good faith investigation.

3. Request No. 3 – *All documents concerning the activities of the Special Litigation Committee and/or its counsel and/or any consultants, including, but not limited to, all receipts, invoices, expense vouchers submitted or incurred in conjunction with those activities, including all documents evidencing payment by Navarre of any such receipts, invoices, and expense vouchers.*

This is the first of several requests propounded by Plaintiffs seeking documents specifically related to the substantive activities and judgment of the SLC. "All documents concerning the activities of the SLC and its consultants and experts" include and relate to the substance of the SLC's analysis, reasoning and business judgment. This is exactly the type of inquiry that is prohibited by the limited review in *Auerbach*, *Drilling*, *Skoglund*, and *Janssen*. See *Rowe*, 1991 WL 111173 at *1; *Kaplan*, 9 Del. J.

Corp. L. at 208-09; 1984 WL 8274 at *1. Plaintiffs, through this type of all-encompassing discovery, seek an end-run around the business judgment rule and their and the Court's proper deference to the determination of an SLC.

Plaintiffs already have a comprehensive list of the materials relied upon by the SLC—it was provided by the SLC in the Report itself. (*See* SLC Rep. at 3-4.) Discovery of the actual documentation would only be relevant to the substance of the SLC's recommendation not to pursue the litigation. It is therefore irrelevant to the Motion to Dismiss and its production should not be compelled.

In this request, Plaintiffs have also requested documents related to expenses incurred by the SLC and its experts. Defendants agreed to, and have, produced documents in their possession responsive to this portion of the Request. Thus, the Court should decline to compel beyond the material already provided.

4. Request No. 4 – *All documents, including but not limited to, notes, minutes, interview transcripts, and other internal Navarre records considered by the Special Litigation Committee.*

Request Number 4, in what appears to be a repetition from Request Number 3, specifically requests the documentation underlying the SLC's analysis, reasoning, and business judgment. This is the same type of request that numerous courts have denied because it simply does not relate to the SLC's independence or good faith exercise of its duties. *See Rowe*, 1991 WL 111173 at *1; *Kaplan*, 9 Del. J. Corp. L. at 208-09, 1984 WL 8274 at *1. Once again, the list of documents relied upon was provided by the SLC in the Report. Producing the underlying documents would merely allow Plaintiff to attempt to second-guess the SLC's exercise of its business judgment. For the same

reasons that Plaintiffs are not entitled to the documents requested in Request Number 3, Plaintiffs are not entitled to the documents requested in Request Number 4.

5. Request No. 5 – *All documents and reports provided or prepared concerning legal opinions and factual findings considered by the Special Litigation Committee, including, but not limited to, opinions concerning the existence of coverage of insurance policies, the conduct of Navarre or any of its employees, officers or directors, and/or the requirements and procedures for determining whether maintenance of the derivative proceeding would be in the best interest of Navarre or its subsidiaries.*

Here again, Plaintiffs request documents underlying the SLC’s decision. For the same reasons stated above, Plaintiffs are not entitled to the documents. Furthermore, the “requirements and procedures for determining whether maintenance of the derivative proceeding would be in the best interest of Navarre” is well documented in the SLC Report. Therein, the SLC described its investigative procedure (*id.* at 2), discussed the governing law (*id.* at 6-8), discussed the law relating to indemnification of Board members by Navarre (*id.* at 8), and described its inquiry, conclusions, and bases therefor (*id.* at 9-40). No further discovery on this issue is necessary or proper.

6. Request No. 6 – *All documents concerning the selection or retention of any law firm by the Special Litigation Committee, including, but not limited to, all documents concerning representation or solicitation of representation received by any defendant from such law firm. There is no time limit to this request and it includes such documents received by current subsidiaries and affiliates of Navarre even if received prior to their having become a subsidiary of Navarre.*

Subject to Defendants’ General Objections, and the fact that this request greatly exceeds the scope of discovery, Defendants advised that there were no responsive

documents. Defendants “cannot produce a document [they do] not possess,” *Eley v. Herman*, No. 04-cv-00416, 2006 WL 276741, at * 4 (N.D. Ind. Feb. 2, 2006) (quotations and citations omitted), and therefore any motion to compel production of these documents is moot. *See, e.g., In re Interco Inc.*, 137 B.R. 1008, 1011-12 (Bankr. E.D. Mo. 1992).

7. Request No. 7 – *All documents, including, but not limited to, directories related to membership rolls concerning any Board membership or trustee positions held by any Individual Defendant and any clubs, organizations or associations to which any Individual Defendant has belonged since 1995, including, but not limited to, public and private or corporate boards, associations and charitable foundations.*

Without waiving objections, Defendants advise that since the SLC had no prior business, professional, or personal relationships with any Individual Defendant or with Navarre Corporation, there are no responsive documents. Any motion to compel production of these documents is moot.

8. Request No. 8 – *All documents, including, but not limited to, directories related to membership rolls concerning any Board membership or trustee positions held the Special Litigation Committee and any clubs, organizations or associations to which any the Special Litigation Committee has belonged since 1995, including, but not limited to, public and private or corporate boards, associations and charitable foundations.*

Without waiving objections, Defendants advise that since the SLC had no prior business, professional, or personal relationships with any Individual Defendant or with Navarre Corporation, there are no responsive documents. Further, any membership rolls or other similar documents would be in the possession of the individual organization or

the SLC, and not in the possession of Defendants. Any motion to compel production of these documents is moot.

9. Request No. 9 – *All interview notes and/or transcripts of the witnesses interviewed by the Special Litigation Committee and/or its counsel in connection with its investigation.*

This request is yet another example of Plaintiffs' attempt to seek information to challenge the substance of the SLC's decision. Plaintiffs want to see what witnesses *said* to the SLC in hopes of finding information to support Plaintiffs' legal positions for their derivative claims. Plaintiffs want to see what the SLC wrote about the interviews to gauge his mental impressions as to credibility and consistency. This is precisely the type of inquiry prohibited under *Auerbach*, *Janssen*, and *Skoglund*. Further, the SLC identified the interviews it conducted in its Report, and included specific factual findings and information gleaned from those interviews (SLC Rep. 4, 9-23). Defendants should not be required to produce any documents in response to Request Number 9.

10. Request No. 10 – *All documents including reports and billing statements, and all communications between the Special Litigation Committee and any consultant or expert retained by the Special Litigation Committee and/or its counsel in connection with the investigation.*

Once again, Plaintiffs seek discovery that, at its heart, relates to the SLC's analysis, reasoning, and business judgment, not its independence or good faith. The communications among the SLC and its experts relates to just that. As to how the experts were utilized, the SLC Report lists materials provided to its accounting expert Rholan Larson, discloses that Mr. Larson and the SLC engaged in many discussions and two

lengthy meetings, reveals that the substance of their discussions centered largely around the performance of James Gilbertson, Navarre's former CFO, and the outside auditors, and lists nine numbered paragraphs of "concluding discussions." (SLC Rep. 23-26.) As to the corporate attorney retained by the SLC, Phillip Garon of Faegre & Benson L.L.P., the discussion contained in the report is likewise more than adequate. Additionally, Defendants provided time and billing records submitted to Navarre by the SLC and/or its experts.

The utilization of the experts, the degree to which their opinions were relied upon, and the effect of the experts' opinions upon the SLC's decisionmaking have been completely disclosed to Plaintiffs. No further discovery is necessary considering the limited review required for the pending Motion to Dismiss.

11. Request No. 11 – *All documents reviewed by the Special Litigation Committee and/or its counsel when conducting the investigation.*

This request appears duplicative of Request Number 4. For the same reasons as articulated in response to Requests 3, 4, and 9, Defendants should not be compelled to respond to the request. The documents requested relate to the substance of the SLC's analysis, and information related to the SLC's good faith investigation have been disclosed to Plaintiffs through the SLC Report.

12. Request No. 12 – *All documents concerning conflicts checks including all documents evidencing any prior relationship between the Special Litigation Committee and/or its counsel and/or any consultants and any of the Individual Defendants or Navarre or its subsidiaries.*

Essentially, Plaintiffs request the documents confirming the SLC's conflicts check performed at Mr. Solum's law firm, Dorsey & Whitney, LLP. First, such a document is not in the possession or control of Defendants. Second, it includes information that is confidential and proprietary to Dorsey & Whitney, LLP and its clients. Plaintiffs are not entitled to such a document, especially in light of the fact that each Navarre Board member affirmed that he had no business or social relationship with the SLC or with Dorsey & Whitney as a firm. Defendants have no such documents, and Plaintiffs are not entitled to them in any event.

13. Request No. 13 – *All copies of the minutes of the Board where the Board appointed the Special Litigation Committee to conduct its investigation and all minutes of the Board when the Special Litigation Committee reported its findings, either preliminarily or finally.*

Defendants have already produced all such documents—they were attached as Exhibit A to the Affidavit of David A. Davenport in Support of the Motion to Stay Case Pending Report of the Special Litigation Committee (Doc. 23 in *Evans*, Doc. 23 in *Brewster*, Doc. 15 in *Block*). No other documents exist, so Plaintiffs' motion to compel production of any other documents is moot.

14. Request No. 14 – *All documents concerning any document retention and/or destruction policies of the Special Litigation Committee including, without limitation, documents reflecting how electronically stored or recorded documents are kept, including electronic mail.*

Subject to objections, including Defendants’ objection that the request exceeds the scope of discovery, Defendants advised that upon information and belief no such documents exist. Therefore, Plaintiffs’ request is moot.

CONCLUSION

The Court’s review of an SLC’s decision to dismiss a shareholder derivative lawsuit is very limited—the Court must examine whether the SLC was independent of the Board of Directors and whether the SLC conducted its investigation in good faith. *Drilling*, 589 N.W.2d at 507; *Skoglund*, 541 N.W.2d at 21. Thus, discovery afforded to Plaintiffs must be similarly limited to those two discrete issues. To the extent that Plaintiffs already have material, whether it be from a report of a special litigation committee or from another source, no further discovery is needed.

In this case, Plaintiffs’ discovery requests drastically exceed the limited scope of the Court’s review, delving into either the SLC’s substantive business judgment and decisionmaking, or attempting to acquire information to pursue Plaintiffs’ derivative claims. In essence, they improperly seek to substitute themselves for the SLC, and needlessly prolong this litigation.

Without specifically delineating what production should be compelled, and without citing one case in support of their overreaching requests, Plaintiffs argue that every piece of paper created or reviewed by the SLC should be disclosed to determine whether the SLC acted independently and carried out its investigation in good faith. In

effect, Plaintiffs seek documents to see whether the SLC did a “good job,” rather than whether the SLC did its job in “good faith.” That is simply not the standard.

Moreover and in any event, Plaintiffs already have all the information necessary to review and challenge (if appropriate) the SLC’s independence and good faith. The SLC has provided much of the necessary information to test its good faith and independence. Its methodology, documents and witnesses examined, use of experts, conclusions, and reasoning are well documented in the substantive report. The information requested by Plaintiffs that truly relates to independence and good faith exists in the Report, either as discussed by the SLC or as appendices to the Report. Defendants have produced additional information reflecting the SLC’s good faith and independence. Because no additional discovery is necessary, warranted, or permitted, Defendants respectfully request that Plaintiffs’ Motion to Compel be denied.

Respectfully submitted,

Dated: May 16, 2006

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