Bloomberg BNA

Securities Regulation & Law Report™

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JURISDICTION AND PROCEDURE

Shareholder Derivative Litigation: Keeping an Eye on the Parallel Class Action

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I. Introduction

Shareholder derivative actions rarely proceed in isolation. Typically, other related actions are pending simultaneously, including a parallel securities class action arising out of the same set of operative facts. Given that the potential liability faced by the corporation in these parallel actions will often surpass the possible recovery in a derivative action, a special litigation committee (''SLC'') charged with reviewing the allegations of a derivative complaint is well served to be mindful of the impact its actions may have on parallel litigation.

This article discusses different court-approved approaches for an SLC to adhere to its duty of good faith, while at the same time acting in the best interests of the corporation by not inadvertently undermining the defense of parallel litigation. These approaches include (1) relying on the derivative action's effect on parallel litigation as a basis to terminate the derivative action; (2) staying the derivative action, or at least discovery; (3) preparing the SLC report with an eye towards its possible impact on other litigation; and (4) sealing the report. Finally, we urge the Second Circuit to revisit its holding in *Joy v. North*[1] given that the case law surrounding derivative litigation has evolved since *Joy* was decided in 1982, and many of *Joy*'s overly broad rulings have been overruled by statute or examined and disregarded by courts.

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II. The Effect on Parallel Litigation: A Permissible Basis To Terminate Derivative Litigation or Refuse a Demand

Board committees may properly consider the adverse effects that pursuit of litigation sought by a derivative plaintiff would have on a pending parallel securities class action as part of the committee's analysis as to whether such litigation is in the best interests of the corporation.[2] For example, in *In re Merrill Lynch & Co., Inc., Securities, Derivative & ERISA Litigation*,[3] numerous derivative plaintiffs filed actions against Merrill Lynch and Bank of America in connection with Merrill Lynch's exposure to collateralized debt obligations and merger with Bank of America. In one derivative action, a plaintiff had issued a demand that the company rejected. The plaintiff then brought a wrongful refusal action claiming that the board had rejected the demand in bad faith and conducted an unreasonable investigation. In granting the company's motion to dismiss, the court quoted at length from the board's letter rejecting the de-

[1] 692 F.2d 880, 893 (2d Cir. 1982).

[2] This article focuses on the special litigation committee process as articulated in *Zapata*, *Auerbach*, and the Model Business Corporation Act, but where appropriate also discusses the demand refusal process. *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981); *Auerbach v. Bennett*, 47 N.Y.2d 619 (1979); Model Bus. Corp. Act § 7.44.

[3] 773 F. Supp. 2d 330 (S.D.N.Y. 2011), *aff'd*, *Lambrecht v. O'Neal*, Nos. 11-1285, 11-1589, 2012 BL 317028 (2d Cir. Dec. 4, 2012) (summary order).

mand, including repeated references to concerns of the effects any such litigation would have on not only parallel securities and ERISA class actions, but also on pending governmental investigations:

> The Audit Committee and the [Bank of America] Board have concluded that commencing the litigation outlined in your letters would impair Merrill Lynch's defenses in these various proceedings. . . . The plaintiffs in the securities and ERISA actions would likely argue that Merrill Lynch's assertion of such a claim constitutes and admission of liability by Merrill Lynch. . . . Similarly . . . [the government] . . . would likely seek to use any litigation papers filed by Merrill Lynch against its formers officers and directors against Merrill Lynch itself.[4]

Presiding Judge Jed S. Rakoff took no issue with the emphasis on the impact that pursuit of the claims would have on parallel litigation. As the court correctly pointed out, the issue is not whether the committee or the board was ''wrong'' in declining to pursue the demanded litigation, but rather whether the investigation and analysis was conducted unreasonably or in bad faith.[5] In a summary order the Second Circuit affirmed Judge Rakoff's decision, expressly endorsing ''the possible compromise of pending litigation and ongoing government inquiries'' as a proper basis to decline to pursue derivative claims.[6] Numerous courts have reached similar results.[7] And this is entirely consistent with the well accepted view that SLCs may consider factors other than the narrow issue of the merits of a claim against a director or officer, including ethical, commercial, promotional, employee relations, reputational, and fiscal factors.[8]

III. Keeping SLC Materials from Class Plaintiffs

In a variety of other contexts, courts have recognized the impact a derivative action may have on parallel litigation and endorsed a variety of strategies for SLCs to adhere to their duty of good faith without undermining the company's defense of parallel actions, including a securities class action arising out of the same facts.

A. Stay of the Derivative Litigation. A presumption exists that a court should stay a derivative action during the SLC's investigation: ''It is a foregone conclusion that such a stay must be granted. Otherwise, the entire rationale of *Zapata* [and the SLC], i.e., the inherent right of the board of directors to control and look to the well-being of the corporation in the first instance, collapses.''[9] The MBCA has adopted a similar approach.[10] These stays can vary from several months up to almost a year, during which time other related litigation may be resolved.[11]

B. Preparing the SLC Report with the Class Action in Mind. An SLC, which concludes that derivative litigation is not in the best interests of the corporation, will typically file a report, summarizing its investigation, in support of its motion to terminate the litigation. Given the central importance of the SLC's independence and the reasonableness of its investigation, such reports generally focus on these areas, as well as the underlying allegations and relevant facts. Importantly, courts have recognized the appropriateness of an SLC submitting a narrowly drafted report that does not include a detailed recitation of the underlying facts to avoid prejudicing the company's position in a pending parallel securities class action. However, these narrow reports may result in broader discovery for the derivative plaintiff.

1. Narrowly Drafted Report. Federal courts have approved of narrowly drafted reports. In *In re UnitedHealth Group Inc. Shareholder Derivative Litigation*,[12] the SLC had investigated allegations of stock option backdating and determined that settlement of the claims set out in the derivative action was in the best interests of the corporation. While only a settlement, the court still reviewed the SLC's determination under the *Auerbach* standard.

In its analysis of the SLC's process, the court recognized that the ''SLC [had] opted against explicitly reciting the facts supporting its conclusions concerning the merits of the company's claims against individual defendants . . . [because] doing so would be contrary to the company's best interests and might reveal facts

[4] *Id.* at 348.

[5] *Id.* at 345, 346

[6] *Lambrecht*, 2012 BL 317028, at 4.

[7] *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1444 (N.D. Cal. 1994) (approving of SLC's determination to grant the company's auditor a release in connection with the derivative settlement because of the risk the auditor would rescind its contribution to the pending class action); *In re Consumers Power Co. Derivative Litig.*, 132 F.R.D. 455 (E.D. Mich. 1990) (rejecting demand because of concern that prosecuting the claims in the derivative action may have helped to contribute to losses in other pending litigation, including the parallel class action, that would have dwarfed any possible recovery from prosecution of those claims); *Pinchuck v. State Street Corp.*, No. 09-2930 BLS2, 2011 BL 36297, at 8 (Mass. Super. Ct. Jan. 16, 2011) (SLC expressly declined demand to pursue litigation because of adverse impact any action would have on other pending litigation against the company); *cf. Grosset v. Wenass*, 35 Cal. Rptr. 3d 58, 63 (Cal. Ct. App. 2005) (reciting lower court's dismissal of derivative action based on SLC's determination that the action was not in the best interests of the company because of, among other reasons, insurance coverage implications on the class action), *superseded on other grounds by*, 175 P.3d 1184 (Cal. 2008); *Am. Int'l Group v. Greenberg*, 965 A.2d 763, 810 (Del. Ch. 2009) (SLC declines to oppose or endorse litigation because ''SLC thought it not in the best interest of [the company], given the pending class actions, to ventilate its investigative record''), *aff'd*, 11 A.3d 228 (Del. 2011) (table). Note some courts, however, have disagreed with the weight which should be given to a parallel class action. *See, e.g., Smith v. Sperling*, No. CV-11-0722, PHX-JAT, 2012 BL 8199, at 2 (D. Ariz. Jan. 11, 2012) (rejecting argument that prosecution of claims in the derivative action would undermine class action defense in connection with corporation's motion to stay the derivative action); *In re Pharm., Inc. Derivative Litig.*, 750 F. Supp. 641, 647 (S.D.N.Y. 1990) (expressing reluctance to the consideration of other pending litigation in light of other conflicts of interest).

[8] *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788 (Del. 1981); *Auerbach v. Bennett*, 47 N.Y.2d 619, 633 (1979).

[9] *Kaplan v. Wyatt*, 484 A.2d 510, 510 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985); *see Curtis v. Nevens*, 31 P.3d 146, 154 (Colo. 2001) (applying the New York standard).

[10] Model Bus. Corp. Act § 7.43. At least twenty states have adopted this provision or its substantial equivalent. *Id.* cmt. at 7-327.

[11] *Charal Inv. Co. v. Rockefeller*, No. Civ. 14394 (Del. Ch. Nov. 7, 1995) (ten months).

[12] 591 F. Supp. 2d 1023, 1030 (D. Minn. 2008).

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which might be used in other litigation against the company.''[13] The ''other litigation'' included federal securities fraud actions.[14] The court nevertheless found that the report provided a sufficient record to support a finding of an independent, reasonable, and good faith investigation.[15]

Likewise, in *In re KLA-Tencor Corp. Shareholder Derivative Litigation*[16] the SLC acknowledged that its report had not included '' 'the particular evidence (i.e., documents and information from interviews) that supported each of [its] findings and conclusions . . . because of a pending shareholder class action suit.''[17] The court did not take issue with this strategy.[18] But, because of the omission, the court ordered broader discovery than it otherwise would have into the SLC and its investigation.[19]

2. Detailed Report May Obviate Discovery. While broader discovery is a risk of a narrowly drafted report, a report with a more complete record of the SLC's investigation, as well as the underlying facts, may preclude, or at least limit the scope of, discovery. Whether the plaintiff may engage in discovery, and if so, its scope, is left to the court's discretion.[20] Nevertheless, at most, a derivative plaintiff is only entitled to ''limited discovery'' focused on the SLC's independence, good faith, and reasonableness.[21] This ''limited discovery'' does not include discovery into the underlying merits.[22] Discovery in SLC cases is intended to aid the court during its analysis of the relevant elements of the applicable standard of review rather than serve as a trial preparation tool for the parties.[23]

The scope of the limited discovery depends on the SLC's showing in support of its motion to terminate.[24] The more detailed the report, the narrower the scope of discovery the SLC can expect. Therefore, a detailed report with supporting documentation may obviate the need for any additional production of documents. Even if the court does permit additional discovery, it is typically limited to certain discrete categories of documents, such as SLC minutes, documents reviewed by the SLC, and documents regarding the selection of the SLC members.[25] There is ample support that materials reviewed only by SLC counsel and not the SLC itself are not discoverable.[26] While the SLC must have access to material information to conduct a reasonable and good faith investigation, SLC counsel should nevertheless exercise care with the materials it provides to the SLC, including the form of presentations to the SLC.

C. Stay Derivative Action Discovery. A derivative plaintiff will almost always seek discovery before opposing an SLC's motion to dismiss. To avoid the leakage of information from the derivative action into the parallel class action, the corporation or the individual defendants may obtain a stay of discovery under the Private Securities Litigation Reform Act (''PSLRA'') in a derivative action filed in federal court while a motion to dismiss remains outstanding in the parallel class action.[27] Federal courts may similarly stay discovery in state derivative actions under the Securities Litigation Uniform Standards Act of 1998 (''SLUSA'').[28]

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[13] *Id.*

[14] Report of the Special Litigation Committee, *In re UnitedHealth Group Inc. S'holder Derivative Litig.*, No. 06-CV-01216, at 59 (D. Minn. Dec. 6, 2007).

[15] *In re UnitedHealth*, 591 F. Supp. 2d at 1028-30.

[16] No. 06-CV-03445 (N.D. Cal. May 14, 2008).

[17] *Id.*

[18] The court also subsequently granted a seal order, permitting the parties to redact certain portions of the SLC's report. *In re KLA-Tencor Corp. S'holder Derivative Litig.*, No. 06-CV-03445 (N.D. Cal. Jan. 6, 2009).

[19] *Id. KLA* was governed by the *Zapata* standard, unlike *UnitedHealth* which was governed by *Auerbach*.

[20] *Kaplan v. Wyatt*, 484 A.2d 501, 507, 510 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985); *Parkoff v. Gen. Tel. & Elec. Corp.*, 53 N.Y.2d 412, 417 n.2 (1981). Under the MBCA, the derivative plaintiff must first satisfy a heightened pleading standard before any discovery is allowed. Model Bus. Corp. Act § 7.44 cmt. at 7-334.

[21] *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788 (Del. 1981); *see Auerbach v. Bennett*, 47 N.Y.2d 619, 634 (1979).

[22] *Gen. Elec. Co. v. Rowe*, No. 89-7644 (E.D. Pa. June 18, 1991) (New York standard); *Kaplan*, 484 A.2d at 507, 510.

[23] *Kaplan*, 484 A.2d at 510.

[24] *Auerbach*, 47 N.Y.2d at 634 (''[T]he proper reach of disclosure at the instance of the shareholders will in turn relate inversely to the showing made by the corporate representatives themselves.''); *St. Clair Shore Gen. Emps. Ret. Sys. v. Eibeler*, No. 06-CV-688, 2007 BL 133807, at 3 (S.D.N.Y. Oct. 17, 2007) (''In order effectively to exercise its discretion in this respect, the court should 'read and digest' the committee's report before deciding on requests for discovery. Only in this fashion can the court adequately determine what discovery, if any, will assist its review of the committee's motion to dismiss.'' (citing and quoting *Kaplan*, 484 A.2d at 510, and *Abbey v. Computer & Commc'ns Tech. Corp.*, No. 6941 (Del. Ch. Apr. 13, 1983))).

[25] *See, e.g.*, *Strougo v. Bassini*, No. 97-CV-3579 (S.D.N.Y. May 4, 1999) (interview materials); *In re Take-Two Interactive Software, Inc. Derivative Litig.*, No. 06 Civ. 5279 (S.D.N.Y. Mar. 10, 2008) (minutes); *Abbey*, No. 6941 (documents reviewed by the SLC); *In re KLA-Tencor Corp. S'holder Derivative Litig.*, No. 06-CV-03445 (N.D. Cal. May 14, 2008) (creation and appointment of SLC).

[26] *See, e.g.*, *In re Take-Two*, No. 06 Civ. 5279.

[27] 15 U.S.C. § 78u-4(b)(3)(B); *see also In re Finisar Corp. Derivative Litig.*, No. C-06-07660 RMW (N.D. Cal. Feb. 24, 2012); *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160, 1179 (C.D. Cal. 2008) (collecting cases); *In re Trump Hotel S'holder Derivative Litig.*, No. 96CIV.7820 (S.D.N.Y. Aug. 5, 1997) (plain language of stay provision is not limited to class actions); *In re AOL Time Warner, Inc. Sec. & ''ERISA'' Litig.*, No. 02-CV-8853, 2003 BL 2291, at 4 (S.D.N.Y. Sept. 26, 2003) (staying parallel ERISA action as ''[a]llowing the ERISA plaintiffs to share the fruits of discovery with the Securities plaintiffs would render the PSLRA's stay provision a nullity''). *But see In re First Bancorp Derivative Litig.*, 407 F. Supp. 2d 585, 586 (S.D.N.Y. 2006) (granting stay of discovery in derivative case that did not assert federal securities claim only for period of time necessary to determine motion to dismiss under FRCP Rule 23.1).

[28] 15 U.S.C. § 78u-4(b)(3)(D); *see also In re DPL Inc., Secs. Litig.*, 247 F. Supp. 2d 946, 950-51 (S.D. Ohio 2003) (granting stay because the stay ensured that, among other things, the class plaintiff would not obtain discovery from the state action); *In re Crompton Corp. Secs. Litig.*, No 3:03-CV-1293 (EBB) (D. Conn. Dec. 14, 2005) (staying parallel state court action under SLUSA). *But see In re Gilead Sciences Secs. Litig.*, No. C 03-4999 (MJJ), 2004 BL 1755, at 4 (N.D. Cal. Nov. 22, 2004) (federal court declined to stay parallel state court action, but urged state court to seal report). While SLUSA explicitly carves out derivative actions for preemption purposes, it does not preclude the court from staying discovery ''in any private action in a State court,'' including a state derivative action. 15 U.S.C. § 78u-4(b)(3)(D).

D. Sealing the SLC Report. Given that an SLC report may provide a road map to class plaintiffs and other litigants, the SLC should file it under seal.[29] This is important particularly where an SLC finds that directors or officers have exposure, but still determines that it is in the best interests of the corporation to dismiss a derivative action.[30] While courts routinely accept filing the report under seal, courts have handled challenges to such a seal differently.

One approach favors the confidential nature of the report. In *In re Perrigo Co.*,[31] a corporation moved to terminate a derivative action based on an independent director's investigation and determination that the action was not in the company's best interests. The motion relied on a report summarizing the investigation but the company refused to produce it, claiming that it was protected by the attorney-client privilege and attorney work product. In an opinion ruling on the class and derivative plaintiffs' demands for the report, the Court of Appeals found that only the derivative plaintiff was entitled to the report.[32] The court reasoned that the legislature could not have intended for corporations to be forced to choose between waving privileges and moving to terminate. The court also recognized that automatic disclosure would have a chilling effect on communications between independent directors and their attorneys in derivative actions as well as the preparation of materials related to a derivative action.

Three other aspects of the court's reasoning are especially worthy of note. First, the court countered the claim of the unfairness of selective disclosure by citing the existence of a related securities class action: ''We see no need at this stage . . . in the interest of 'fairness' to give confidential Report information to plaintiffs in a hostile securities action (a part of the public domain).''[33] Second, the court also approved of the district court's analysis that automatic public disclosure of the report would provide shareholders with increased leverage over the company because of the potential harm disclosure could cause the company.[34] Third, the court recognized that some of its reasoning was consistent with the policy underlying the selective waiver doctrine.[35] The selective waiver doctrine permits a party to disclose materials protected by the attorney-client privilege or attorney work product to a third party, generally the government or a regulatory agency, while maintaining these protections as to other parties.

Perrigo also provides that after a court has relied on an SLC's report in connection with a motion to terminate, the court must then hold a hearing to determine whether the report, in whole or in part, should remain under seal. The court will weigh the public interests against the company's interests in maintaining confidentiality.[36] *Perrigo* suggests that an SLC could maintain a report or portions of a report under seal during the pendency of a class action, even after the derivative action were dismissed, provided the SLC could specifically show how disclosure would adversely affect the company, including its defense in the class action. For example, in *In re KLA*, the court ordered that the unredacted SLC report remain under seal after the settlement of the derivative litigation over concerns about the public disclosure of ''detailed information about the SLC's investigation, including confidential information about individual Defendants' compensation and confidential settlement agreements.''[37] Furthermore, Rule 26(c)(1) of the Federal Rules of Civil Procedure provides authority for sealing confidential, proprietary, and commercial information found in SLC reports.[38]

E. *Joy v. North*: Time To Revisit. While courts in the Second Circuit routinely permit the filing of SLC reports under seal, the Second Circuit's decision in *Joy* is widely cited by parties seeking to oppose or lift the seal. In *Joy*, the district court permitted the SLC to seal the report through a decision on the motion to terminate. But the Second Circuit reversed, holding that a motion to terminate essentially compels disclosure:

> [I]f the special litigation committee recommends termination and a motion for judgment follows, the committee must disclose to the court and the parties not only its report but all underlying data. To the extent that communications arguably protected by the attorney client privilege may be involved in that data, a motion for judgment based on the report waives the privilege.[39]

For a number of reasons discussed below, the Second Circuit should revisit its decision in *Joy*. *Joy*, which dealt with several procedural intricacies of SLC litiga-

[29] *In re Perrigo Co.*, 128 F.3d 430 (6th Cir. 1997); *see Wylie v. Stipes*, No. 08-1036 (D.P.R. Dec. 15, 2009) (granting SLC's motion to seal report without opinion where SLC argued, among other things, that a parallel class action was pending and report could be sealed under *Perrigo*).

[30] Courts have approved of this outcome. *Gaines v. Haughton*, 645 F.2d 761 (9th Cir. 1981), *overruled, in part, on other grounds*, *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984); *Gen. Elec. Co. v. Rowe*, No. 89-7644 (E.D. Pa. Sept. 30, 1992); *In re Consumers Power Co. Derivative Litig.*, 132 F.R.D. 455, 485 (E.D. Mich. 1990); *Rosengarten v. Int'l Tel. & Tel. Corp.*, 466 F. Supp. 817, 829 (S.D.N.Y. 1979); *Gall v. Exxon Corp.*, 418 F. Supp. 508, 518 (S.D.N.Y. 1976); *Harhen v. Brown*, 730 N.E.2d 859 (Mass. 2000); *Pinchuck v. State Street Corp.*, No. 09-2930 BLS2, 2011 BL 36297, at 1 (Mass. Super. Ct. Jan. 16, 2011); *cf. Burks v. Lasker*, 441 U.S. 471, 485 (1979) (''There may well be situations in which the independent directors could reasonably believe that the best interests of the shareholders call for a decision not to sue—as, for example, where the costs of litigation to the corporation outweigh any potential recovery. In such cases, it would certainly be consistent with the [Investment Company] Act [of 1940] to allow the independent directors to terminate a suit, even though not frivolous.'').

[31] 128 F.3d 430 (6th Cir. 1997).

[32] *Id.* at 433-34. The Sixth Circuit agreed with the district court that the report had been appropriately sealed. *Id.* at 437-38.

[33] *Id.* at 432, 440.

[34] *Id.* at 439 n.6.

[35] *Id.* at 441 & n.9. The Sixth Circuit would later expressly reject this doctrine. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002).

[36] *In re Perrigo*, 128 F.3d at 440.

[37] No. 06-CV-03445 (N.D. Cal. Jan. 6, 2009).

[38] *Bank of N.Y. v. Meridien Biao Bank Tanzania Ltd.*, 171 F.R.D. 135, 144-45 (S.D.N.Y. 1997) (subjecting various manuals to protective order); *Brookdale Univ. Hosp. & Med. Ctr. v. Health Ins. Plan of Greater N.Y.*, No. 07-CV-1471 (E.D.N.Y. Oct. 7, 2008) (documents that reflect the ''defendants' business structure, operations and policies'' are properly designated as confidential); *Houbigant, Inc. v. Dev. Specialists, Inc.*, No. 01-CV-7388 (S.D.N.Y. July 21, 2003) (company procedures appropriately designated as confidential). New York and Delaware courts also provide a basis to seal SLC reports. 22 N.Y. Comp. Codes R. & Regs. tit. 22, § 216.1(a); D. Ch. Ct. R. 5.1(b)(1)-(2).

[39] *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

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tion, was decided less than four years after *Zapata* and *Auerbach*. The case law surrounding derivative actions has continued to evolve since *Joy* was decided in 1982, and many courts and legislatures have had the opportunity to examine *Joy*'s overly broad rulings. Many of *Joy*'s key elements have been overruled by statute or disregarded by other courts:

- *Joy*'s interpretation of Connecticut law was superseded by a comprehensive statutory scheme adopted by the Connecticut legislature.[40]

- *Joy* predicted that Connecticut would adopt a Delaware-like standard when reviewing an SLC's determination.[41] It did not.

- *Joy* was premised on the continued existence of demand futility in Connecticut.[42] Connecticut has abolished this doctrine and is now a universal demand jurisdiction.[43]

- *Joy* held than an SLC's motion to terminate entitles a derivative plaintiff to discovery as of right.[44] Under Connecticut law limited discovery, if any, is only triggered by a derivative plaintiff's satisfaction of a heightened pleading standard.[45]

- *Joy* suggests that if an SLC moves to terminate a derivative action, all documents reviewed by the SLC must be produced.[46] Since *Joy*, several courts have acknowledged this holding was too broad.[47]

- Under *Joy* the SLC has the burden of establishing its motion to terminate.[48] In contrast, the governing Connecticut statute provides for burden-shifting depending on the board's independence.[49]

- A number of courts have recognized that *Joy* has been superseded or overruled.[50] Notably, *Perrigo* itself distinguished *Joy* on the grounds that *Joy* had predicted that Connecticut would adopt a law authorizing a broad review of SLC determinations, rather than a standard of review similar to Michigan's.[51] Michigan law was based on the MBCA, which Connecticut eventually adopted after *Joy*.[52]

Additionally, a number of public policy reasons, including those articulated by the Sixth Circuit in *Perrigo*, warrant a reconsideration of *Joy*'s broad ruling that SLCs should automatically disclose reports to the public. Restricting the use of the report to the derivative litigation: (1) fosters the SLC's full and candid assessment of plaintiff's allegations; (2) furthers frank communications between SLCs and their counsel; (3) encourages SLCs to produce written materials to assist courts in evaluating the SLC's independence, good faith, and the reasonableness of its investigation; and (4) promotes fairness by allowing SLCs to withhold an internal evaluation of the underlying facts from hostile shareholders, who would threaten the release of the report as leverage. The Second Circuit has also embraced the selective disclosure theory in other contexts.[53]

IV. Conclusion

SLCs considering claims alleged by derivative plaintiffs should always take into account the effects the prosecution of such claims may have on parallel litigation, particularly parallel class actions. By recognizing the various strategies discussed above, SLCs can fulfill their fiduciary duties, while operating in the best interests of the corporation.

[40] *Frank v. LoVetere*, 363 F. Supp. 2d 327, 333 n.2 (D. Conn. 2005).

[41] 692 F.2d at 891.

[42] *Id.* at 887, 889.

[43] Conn. Gen. Stat. Ann. § 33-722.

[44] 692 F.2d at 893.

[45] *Frank*, 363 F. Supp. 2d at 333.

[46] 692 F.2d at 893.

[47] *See, e.g.*, *In re Take-Two Interactive Software, Inc. Derivative Litig.*, No. 06-CV-5279 (S.D.N.Y. Mar. 10, 2008) (''[T]he Delaware courts soon made clear that *Zapata*'s 'limited discovery' is more limited than the Second Circuit thought [in *Joy*]. For example, the Delaware courts soon interpreted *Zapata* not to require all data that was communicated to the committee.''); *cf. St. Clair Shore Gen. Emps. Ret. Sys. v. Eibeler*, No. 06-CV-688 (SWK), 2007 BL 133807, at 4 (S.D.N.Y. Oct. 17, 2007) (''Courts have reached varying results on plaintiffs' entitlement to the production of all materials reviewed and relied upon by special litigation committees.'').

[48] 692 F.2d at 892.

[49] Conn. Gen. Stat. Ann. § 33-724(d).

[50] *Pursuit Partners, LLC v. UBS AG*, No. X05-CV08-4013452S (Conn. Super. Ct. July 13, 2011); *Hill v. State Farm Mut. Auto Ins. Co.*, 166 Cal. App. 4th 1438, 1492 (Cal. Ct. App. 2008); *Finley v. Superior Court*, 80 Cal. App. 4th 1152, 1159 n.8 (Cal. Ct. App. 2000); *Boland v. Boland*, 31 A.3d 529, 555 (Md. 2011); *see also* Transcript of Oral Opinion, *Trustees of the Police & Fire Ret. Sys. v. Clapp*, No. 08-CV-01515 (S.D.N.Y. Dec. 14, 2010) (questioning *Joy*'s applicability).

[51] *In re Perrigo Co.*, 128 F.3d 430, 437 (6th Cir. 1997).

[52] *Frank v. LoVetere*, 363 F. Supp. 2d 327, 333 n.2 (D. Conn. 2005).

[53] *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (holding that a voluntary disclosure to the government of work product may not result in a waiver where the parties have entered into a confidentiality agreement); *Gruss v. Zwirn*, 276 F.R.D. 115, 140-42 (S.D.N.Y. 2011) (permitting party to share information with a regulator under an express confidentiality agreement without waiving privilege). *But see In re Initial Public Offering Sec. Litig.*, 249 F.R.D. 457 (S.D.N.Y. 2008) (finding a waiver despite the existence of a confidentiality agreement).