

October 2019

When First Strikes Should Be Out: The Premature Special Litigation Committee

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Recommended Citation

Joseph A. Pull & Scott A. Benson, *When First Strikes Should Be Out: The Premature Special Litigation Committee*, 16 U. ST. THOMAS L.J. 69 (2019).

Available at: <https://ir.stthomas.edu/ustlj/vol16/iss1/6>

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ARTICLE

**WHEN FIRST STRIKES SHOULD BE OUT:
THE PREMATURE SPECIAL LITIGATION
COMMITTEE**

JOSEPH A. PULL & SCOTT A. BENSON*

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The special litigation committee, or SLC, developed as a defensive mechanism for corporations to protect themselves against negative effects of shareholder derivative litigation. This defensive mechanism is now being deployed by some corporations offensively, as a means of attempting to preempt shareholder rights before derivative litigation is even threatened. Such “first strike” use of an SLC runs contrary to the principles and policies that underlie the Minnesota law for SLCs.

In this article, we consider the question of how early a Minnesota corporation may appoint a special litigation committee. We conclude that

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the decision of an SLC appointed by a Minnesota corporation should be given no deference by a court *unless* the SLC is appointed after the corporation receives a written threat or demand from a shareholder alleging wrongful conduct upon which the shareholder relies as the basis for a potential derivative action. A “First Strike” SLC—an SLC appointed prior to the receipt of a written threat or demand from a shareholder—should be treated as a nullity, or alternatively as a breach of the directors’ fiduciary obligation not to waste corporate resources. These conclusions flow from the structure and function of the special litigation committee because Minnesota statutory and case law do not expressly address the question of how early a special litigation committee may be appointed.

THE PROBLEM

Before considering the nuts and bolts of Minnesota law as it applies to a First Strike SLC, it is helpful to sketch a typical context in which an SLC might be deployed. The abbreviated three-scene drama begins:

For three years, Corporation has paid no shareholder distributions. Its business appears strong. Tom owns 20 percent of the stock and resents the lack of tangible return on his investment. He believes the CEO and directors are diverting Corporation’s cash into their own pockets through contracts with other entities owned by them and through improper expense reimbursements. At the annual shareholder meeting, Tom blows his top, excoriating the lack of distributions and questioning the use of funds. The directors assure him Corporation is being managed properly and he just needs to be patient for distributions to come—but they make no promises.

Traditionally, Scene 2 of this script would show Tom meeting with an attorney and the attorney writing a letter to Corporation. The letter would allege breaches of fiduciary duty and threaten “appropriate legal action” if Corporation did not take action against the CEO and directors to recover its damages from the breaches. The CEO and directors would respond by denying any misdeeds, and Tom would file a derivative lawsuit attempting to bring claims against them on behalf of Corporation.

In Scene 3, the board would appoint a special litigation committee to investigate and evaluate Tom’s allegations. The SLC would eventually issue a report either:

- absolving the directors and recommending dismissal of the derivative lawsuit;
- concluding that there could be merit to some of the claims, but the claims were not worth pursuing; or
- affirming that the claims had merit, and the case should be pursued.

Recently, however, we have seen companies vault from Scene 1 (dissatisfied minority shareholder) to Scene 3 (appointment of an SLC) without

litigation or the threat of litigation in Scene 2 ever happening. This troubling development constitutes an abuse of the special litigation committee. Further, it discredits the institution of the SLC by playing into and substantiating the stereotype that an SLC is merely a charade by which the law allows majority shareholders, without ever being held accountable, to bury wrongs they have committed against minority shareholders.

SPECIAL LITIGATION COMMITTEES

Legally, a corporation is a person.¹ It may sue or be sued like any other person, and a legal action by or against it does not directly implicate its shareholders, for they also are separate persons. Absent extremely unusual circumstances, when a corporation is sued as a defendant its shareholders are not liable. And when a corporation files suit as a plaintiff, the shareholders do not (directly) receive any money recovered as damages. “As a general rule, ‘an individual shareholder may not assert a cause of action that belongs to the corporation.’”²

Though a corporation is a legal person, it has no physical body. It cannot act on its own. It acts only through others—through the officers who manage it, through the employees who carry out its business, and (most importantly in this context) through the directors who alone control its decision-making.³ When individuals who act on behalf of the corporation manipulate affairs for their own personal benefit at the corporation’s expense,⁴ the corporation is harmed, and the shareholders who own the corporation suffer because the value of their stock declines.

These principles create a quandary. The directors control the corporation’s actions, but if the directors commit a wrong against the corporation, they will never cause the corporation to sue themselves.⁵ The value of the minority shareholders’ investment will be diminished, but the minority shareholders lack the power to right this wrong because the corporation is outside their control.

To resolve this quandary, corporate law allows shareholders, under limited circumstances, to bring a “derivative” lawsuit on behalf of the cor-

1. See *Corcoran v. P. G. Corcoran Co.*, 71 N.W.2d 787, 795 (Minn. 1955).

2. *Blohm v. Kelly*, 765 N.W.2d 147, 153 (Minn. Ct. App. 2009) (quoting *Nw. Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 617 (Minn. 1995)).

3. “[C]ourts recognize the authority of corporate directors and want corporations to control their own destiny.” *Janssen v. Best & Flanagan*, 662 N.W.2d 876, 881 (Minn. 2003) [hereinafter *Janssen II*].

4. For example, one shareholder plaintiff alleged the defendant “abused his position in the corporation by paying himself excessive compensation and by using corporate assets to discharge personal debts and debts of another business.” *Blohm*, 765 N.W.2d at 153.

5. “[I]f the duties of care and loyalty which directors owe to their corporations could be enforced only in suits by the corporation, many wrongs done by directors would never be remedied.” *Janssen II*, 662 N.W.2d at 882 (quoting *Barrett v. S. Conn. Gas Co.*, 374 A.2d 1051, 1055 (Conn. 1977)).

poration. In a proper derivative lawsuit, the shareholder files the action and controls it, but the actual party to the litigation is the corporation itself, and any recovery that is made accrues to the benefit of the corporation, not the individual shareholder.⁶

A derivative lawsuit wrenches power to govern the corporation (with respect to the lawsuit) away from the directors. Accordingly, it is a dramatic exception to the rule that the directors alone govern the corporation. The filing of a derivative action typically initiates a struggle between the directors and the plaintiff shareholders over who will speak for the corporation in the lawsuit. The directors wish to dismiss the action (if they had initially agreed with it, they would have caused the corporation to file the action directly, without any needed derivative filing by the shareholders), while the plaintiff shareholders want the action to proceed.

Courts apply a number of complex rules to resolve the struggle between directors and shareholders over control of a derivative lawsuit. Generally, a shareholder must, before filing a derivative action, present the directors with a demand that the corporation pursue the claims advocated by the shareholder. If the shareholder does not first present a demand, the derivative action will ordinarily be dismissed.⁷ Presentation of a shareholder demand allows the directors an opportunity to voluntarily pursue direct claims on behalf of the corporation and obviate any need for shareholders to bring derivative claims. Demand “gives the management of the corporation an opportunity to consider the merits of the dispute and to determine, in the interests of the corporation and shareholders, whether it might be disposed of without the expense and delay of litigation.”⁸ After receiving a shareholder demand, the directors must exercise their business judgment in deciding whether to (i) accede to the demand and cause the corporation to follow the course demanded by the shareholder, or (ii) reject the demand and cause the corporation to pursue some other course.⁹

6. See *In re Medtronic, Inc. S'holder Litig.*, 900 N.W.2d 401, 408 (Minn. 2017).

7. “[A] shareholder must make a demand for relief to a company’s board of directors before filing a derivative action on the company’s behalf. The demand requirement is excused only upon a showing that it is plain from the circumstances that [demand] would be futile. A derivative suit is available to a shareholder strictly as an extraordinary remedy when there is no other road to redress.” *In re Patterson Companies, Inc. Sec., Derivative & ERISA Litig.*, 479 F. Supp. 2d 1014, 1037–38 (D. Minn. 2007) (citations omitted) (quotations omitted); see also *Markewich ex rel. Medtronic, Inc. v. Collins*, 622 F. Supp. 2d 802, 807, 814 (D. Minn. 2009). “Futility of demand” or “demand excused” cases are discussed below.

8. *Winter v. Farmers Educ. & Coop. Union of Am.*, 107 N.W.2d 226, 233 (Minn. 1961).

9. “The business judgment rule means that as long as the disinterested director(s) made an informed business decision, in good faith, without an abuse of discretion, he or she will not be liable for corporate losses resulting from his or her decision.” *Janssen II*, 662 N.W.2d at 882. For many reasons, business judgment might counsel against the corporation pursuing litigation demanded by a shareholder. There may not be any arguable claim. There may be a claim—but of value too low to justify the negative consequences of litigation—or distraction from the corporation’s focus on other business, negative publicity, exposure to claims by third parties, and financial expense. “[D]ismissal of meritorious litigation may be justifiable, such as when pursuit of the

If a shareholder demands that the corporation pursue litigation against the very directors who would ordinarily evaluate the shareholder's demand, the self-interest of those directors requires that they not participate in the decision concerning that demand. The directors may therefore delegate their decision-making authority concerning the demand to a special litigation committee.¹⁰ In Minnesota, the members of an SLC may be "one or more independent directors or other independent persons."¹¹

The SLC investigates the proposed claims and makes an impartial determination whether the corporation ought to pursue them.¹² In theory, an SLC solves the problem of how directors, vested with sole power to govern a corporation, can make an independent and impartial decision whether the corporation, in its best interest, should sue the directors themselves without the directors' self-interest affecting the decision but also without infringing upon their governing authority. "Special litigation committees thus enable a corporation to dismiss or settle a derivative suit despite a conflict of interest on the part of some or all directors."¹³ Special litigation committees "provide for an independent evaluation of a derivative action" and "balance the rights and duties of the board and the dissenting shareholder" by allowing the corporation to "rid itself of meritless or harmful litigation," yet also preventing directors from seizing control of "bona fide derivative claims away from well-meaning plaintiffs."¹⁴

To summarize, a derivative action filed without the shareholder first presenting a demand to the corporation's directors will ordinarily be dismissed. If a shareholder presents a demand, the corporation appoints an SLC, the SLC recommends that the corporation *not* pursue the shareholder's demand, and the shareholder files a derivative action, then the court will defer to the decision of the SLC that the corporation should not pursue litigation *if* the corporation can show the SLC members "possessed a disinterested independence" and conducted an "adequate, appropriate" investigation "pursued in good faith."¹⁵ On the basis of the SLC's report and

claim will prove more costly than beneficial." *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 559 (Minn. 2008) [hereinafter *In re UnitedHealth Grp. Inc.*]; see, e.g., DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 5:18, at 822 (Thomson Reuters, 2018–2019 ed., 2018) ("The suit was settled a year after it was filed; the company recovered a total of \$23 [million] Although \$23 million is a large monetary recovery, it is dwarfed by the legal fees paid by the company, reportedly more than \$30 million to its own litigation counsel and \$8 million to two shareholder plaintiffs' firms.").

10. *Blohm v. Kelly*, 765 N.W.2d 147, 153 (Minn. Ct. App. 2009).

11. MINN. STAT. § 302A.241, subd. 1. The name "special litigation committee" may conjure the image of a group of investigators, but the statute clearly allows a committee to consist of "one" individual if the corporation chooses not to have "more."

12. *Janssen II*, 662 N.W.2d at 884.

13. *In re UnitedHealth Grp. Inc.*, 754 N.W.2d at 550–51 (Minn. 2008).

14. *Janssen v. Best & Flanagan*, 645 N.W.2d 495, 498–99 (Minn. Ct. App. 2002) [hereinafter *Janssen I*].

15. *In re UnitedHealth Grp. Inc.*, 754 N.W.2d at 561.

recommendation, the court will preclude the disgruntled shareholder from proceeding with her derivative claims.¹⁶

STRUCTURAL BIAS?

The fact that an SLC is selected and appointed by the directors the SLC is tasked to investigate means that the selection of the SLC members will sometimes be influenced by the directors' consideration of whether particular individuals are likely to recommend dismissal of the derivative action. Directors cannot dictate the SLC's decision—but they can appoint an SLC that they believe will be inclined to reach a conclusion the directors approve. The directors can select individuals with known views, individuals similarly situated to themselves, or individuals with an established positive relationship with the corporate counsel, who acts as the liaison to gather documents and answer questions for the SLC during the course of its investigation. Under such circumstances, the board may reasonably expect that its carefully-selected SLC is likely to recommend the corporation not pursue litigation of the derivative claim.

“It is unusual, but not altogether unknown, for a committee to recommend action against incumbent directors and employees.”¹⁷ As a result, plaintiff shareholders often maintain, sometimes not unreasonably, that an SLC was predisposed to favor the directors over the shareholders. However, in Minnesota, a shareholder must show a lack of independence by the specific individuals who made up the SLC in order to attack an SLC's conclusion. The Minnesota Supreme Court has rejected the argument that generalized considerations of “structural bias”¹⁸ allow a court to infer a lack of independence and scrutinize the business merits of an SLC's decision.¹⁹

Given this background Minnesota law concerning SLCs, and giving due consideration to self-interest in the sharp-elbowed business world, we should expect that:

- directors accused of wrongdoing by a shareholder will consider the SLC a useful tool for disposing of the accusations;
- directors and the attorneys who advise them will understand that selecting SLC members favorably disposed toward the directors can have a material effect on the SLC's conclusions; and

16. *See id.*

17. DEMOTT, *supra* note 9, at 818.

18. “[T]he ‘structural bias’ argument suggests that it is unrealistic to assume that the members of independent committees are free from personal, financial or moral influences which flow from the directors who appoint them.” *In re UnitedHealth Grp. Inc.*, 754 N.W.2d at 558 (quotation omitted).

19. The Court concluded that judges should not question the business rationale of an SLC's recommendation because “judges *really* are not equipped either by training or experience to make business judgments,” and “careful scrutiny of an SLC's independence and investigative procedures is a sufficient protection against any structural bias.” *Id.* at 556, 558.

- potential SLC candidates, particularly individuals in the business of routinely and regularly serving on SLCs for various and sundry corporations, or routinely at the behest of certain law firms on behalf of those firms' clients, will understand that a reputation for siding with shareholders against directors may result in fewer future engagements.

These considerations ought to color our analysis of the First Strike SLC and how early a Minnesota corporation may appoint an SLC. A corporation undertaking the inconvenience and expense of establishing an SLC without even having received a written threat or demand from a shareholder has the appearance of an entity seeking to obtain a specific result desired by the directors—not an entity disinterestedly acting for the benefit of all shareholders.

EXPANSION OF THE SLC DEVICE

The use of SLCs appears to be growing in Minnesota. Eleven Minnesota appellate decisions contain the phrase “special litigation committee.” Three were decided in the 1990s.²⁰ Three concerned the same action, *Janssen v. Best & Flanagan*, and were decided in 2002, 2003, and 2005.²¹ Five were decided in 2008 or thereafter.²² One additional case, from 1988, addressed the concept of an SLC but called it a “committee of disinterested persons” rather than an SLC.²³ Search of Minnesota trial court orders searchable in Westlaw as of August 15, 2019 shows thirty-six orders using the phrase “special litigation committee.” Of these thirty-six, fully twenty-nine were issued in 2008 or later. The federal court for the District of Minnesota has issued twenty-three opinions using the phrase “special litigation committee.” Thirteen were issued in 2008 or thereafter, with the other ten between 1978 and 2007.

As directors and corporate counsel become familiar with and accustomed to the use of an SLC, they may resort to the appointment of an SLC earlier and earlier in the process of resolving a dispute with a minority shareholder. Twice in recent years we have personally encountered situations where a corporation or company appointed an SLC without receiving any formal demand or threat of litigation from a shareholder. These companies convened SLCs based merely on the emergence of disagreement be-

20. *Drilling v. Berman*, 589 N.W.2d 503 (Minn. Ct. App. 1999); *Wessin v. Archives Corp.*, 581 N.W.2d 380 (Minn. Ct. App. 1998), *rev'd* 592 N.W.2d 460; *Skoglund v. Brady*, 541 N.W.2d 17 (Minn. Ct. App. 1995).

21. *Janssen I*, 645 N.W.2d 495 (Minn. Ct. App. 2002); *Janssen II*, 662 N.W.2d 876 (Minn. 2003); *Janssen v. Best & Flanagan*, 704 N.W.2d 759 (Minn. 2005) [hereinafter *Janssen III*].

22. *Blum v. Thompson*, 901 N.W.2d 203 (Minn. Ct. App. 2017); *Toretta v. Lachinski*, No. A12-0779, 2013 WL 491523 (Minn. Ct. App. Feb. 11, 2013); *Ring v. Kaplan*, No. A11-804, 2012 WL 763582 (Minn. Ct. App. Mar. 9, 2012); *Blohm v. Kelly*, 765 N.W.2d 147 (Minn. Ct. App. 2009); *In re UnitedHealth Grp. Inc.*, 754 N.W.2d 544.

23. *Black v. NuAire, Inc.*, 426 N.W.2d 203, 205 (Minn. Ct. App. 1988).

tween a minority shareholder and the controlling shareholder or bloc of shareholders. In one instance, the controlling owner caused the company to appoint an SLC purportedly in response to oral allegations of wrongdoing articulated by the non-controlling owner. However, the non-controlling owner denied making any such allegations. In the SLC report that was ultimately issued, the SLC claimed that threats of litigation had been made by representatives of the non-controlling owner. The SLC purported to rely on “interviews with key witnesses”—not including the non-controlling owner—to ascertain the substance of the non-controlling owner’s purported threats. In a second instance, the controlling shareholder bloc caused the company to appoint an SLC allegedly in response to a letter from the non-controlling shareholder’s attorney demanding a buyout of his shares. The letter alleged various forms of shareholder oppression by the controlling shareholder bloc but did not threaten litigation.

In both of these instances, the companies’ quick resort to the appointment of an SLC surprised the non-controlling shareholders. The disputes had not yet ripened to the point of any non-controlling shareholder sending a demand letter or a written threat of litigation. From the non-controlling shareholders’ perspectives, there was not yet any subject for the SLCs to investigate. The companies’ hasty appointments of SLCs appeared to be first-strike, strategic aggressions intended to give the controlling shareholders a broad-brush exculpation and to deprive the non-controlling shareholders of rights before the non-controlling shareholders were even aware of what their rights might be or made any attempt to assert them. The controlling shareholders apparently saw the early appointment of SLCs as get-out-of-jail-free cards for themselves, which could be wielded to thwart any attempt by the non-controlling shareholders to initiate litigation, absolving the controlling shareholders of any potential claims whether those claims could be clearly articulated or not.

MINNESOTA CASE AND STATUTORY LAW PROVIDES NO GUIDANCE CONCERNING FIRST STRIKE SLCs

These two instances are a disturbing development. Experienced corporate counsel manipulated the SLC—a legal device outside the familiarity of many lawyers and certainly outside the familiarity of the non-controlling owners—to create an impression or appearance of legal invulnerability, where that was not actually the case at all. How many other minority shareholders have been intimidated into abandoning legitimate grievances against their corporations by directors’ premature deployment of an SLC cloaked in the purported armor of judicial deference? That empirical question is impossible to answer, but we can analyze the related legal questions “How early may a corporation appoint an SLC?” and “How early is too early?” under existing Minnesota law. Doing so reveals that case and statu-

tory law do not yet provide clear answers, but the principles and purposes underlying SLCs provide useful guidance.

Case Law

Our analysis begins with a quick tracing of the high points in Minnesota case law related to SLCs. The number of cases is not large.²⁴

In 1961, the Minnesota Supreme Court affirmed that only a corporation, not the shareholders, may bring a lawsuit for wrongs committed against the corporation, and that a shareholder seeking to address a wrong committed against the corporation generally must first present a demand to the board of directors before commencing derivative litigation.²⁵

In 1988, the Minnesota Court of Appeals upheld the constitutionality of Minnesota's statutory authorization for corporations to use SLCs and followed Delaware, California, and New York in limiting judicial review of an SLC's decisions to the questions of whether the SLC was disinterested and whether it conducted its investigation in good faith, expressly precluding judicial consideration of the merits of the SLC's recommendation.²⁶

In 1995, the Court of Appeals affirmed that Minnesota judicial consideration of an SLC's decision is limited to assessing the independence of the SLC and whether its investigation was conducted in good faith.²⁷ The court again reaffirmed this principle in 1999²⁸ and 2009.²⁹

In 2003, the Minnesota Supreme Court held that a corporation gets only one bite at the SLC apple. If the corporation relies upon an SLC report which a court finds to be deficient either for lack of independence from the board's control or for inadequate investigation, the court must disregard the SLC and allow the shareholder's derivative action to proceed, and the corporation may not go back and re-do the SLC report to try to remedy its deficiencies.³⁰

In 2008, the Minnesota Supreme Court resolved whether Minnesota law allows a court to review the substantive business merits of an SLC's decision. This opinion was delivered in response to a question certified by the U.S. District Court for the District of Minnesota. The Minnesota Supreme Court framed this question as a choice between the approach followed by New York (which prohibits consideration of the merits of an SLC's decision) and the approach followed by Delaware (which permits the

24. "[S]hareholder-derivative litigation is not an everyday occurrence in Minnesota's courts." *Janssen II*, 662 N.W.2d at 882; *Markewich ex rel. Medtronic, Inc. v. Collins*, 622 F. Supp. 2d 802, 808 (D. Minn. 2009) ("Derivative actions are uncommon in Minnesota.").

25. *Winter v. Farmers Educ. & Coop. Union*, 107 N.W.2d 226, 266–67 (Minn. 1961).

26. *Black*, 426 N.W.2d at 214.

27. *Skoglund v. Brady*, 541 N.W.2d 17, 21 (Minn. Ct. App. 1995).

28. *Drilling v. Beraman*, 589 N.W.2d 503, 507 (Minn. Ct. App. 1999).

29. *Blohm v. Kelly*, 765 N.W.2d 147, 156 (Minn. Ct. App. 2009).

30. *Janssen II*, 662 N.W.2d 876, 889 (Minn. 2003).

court to apply its own business judgment to evaluate an SLC's decision). The Court opted to follow New York, explaining, "courts are not qualified to evaluate the business judgment of an SLC."³¹

None of these opinions, directly or indirectly, address the issue of the First Strike SLC. Nor do state or federal cases from outside of Minnesota provide any discussion of a First Strike SLC. To date, the issue of the timing of an SLC appears to have been litigated solely in the context of *late*-formed SLCs. For reasons of efficiency, courts will generally grant a corporation's request to stay an already-commenced derivative action to allow time for a newly-appointed SLC to conduct an investigation and make a decision whether the corporation should pursue the derivative claims.³² A stay may be granted even if the corporation delays appointing the SLC for some time as the litigation proceeds, but if the corporation allows the proceedings to advance too far before appointing an SLC, the court may decline to grant a stay.³³ In any event, the considerations of delay and waiver that attend a late-filed SLC provide no guidance concerning the permissibility of a First Strike SLC.

Statute

Minnesota's statutory provisions governing SLCs also fail to provide unambiguous direction concerning the permissibility of a First Strike SLC.

The most relevant statute, Minn. Stat. § 302A.241, subd. 1, does not state any threshold prerequisite for a corporation to appoint an SLC. It provides that a corporation's board may "establish committees having the authority of the board in the management of the business of the corporation only to the extent provided in the resolution," and that

Committees may include a special litigation committee consisting of one or more independent directors or other independent persons to consider legal rights or remedies of the corporation and

31. *In re UnitedHealth Grp. Inc.*, 754 N.W.2d 544, 556 (Minn. 2008).

32. *See, e.g.*, *Abbey v. Comput. & Comm'n Tech. Corp.*, 457 A.2d 368, 375 (Del. Ch. 1983); *Milliken v. Am. Realty Capital Hosp. Advisors, LLC*, No. 18-CV-1757, 2018 WL 3745669, at *5 (S.D.N.Y. Aug. 7, 2018) ("Under these circumstances, courts almost always stay proceedings to afford SLCs 'a reasonable time to carry out [their] function.'"); *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, No. 06-CV-1216, 2007 WL 803048, at *2 (D. Minn. Mar. 14, 2007); *Warren v. Acova, Inc.*, No. 27-CV-18-3944, 2018 WL 8950613, at *3 (Dist. Ct. Minn. Oct. 17, 2018).

33. *See, e.g.*, *Katz v. Renyi*, 722 N.Y.S.2d 860, 861 (N.Y. App. Div. 2001) ("Given the bank's delay in appointing the SLC and the makeup of the SLC, which includes members whose impartiality is suspect, the motion court's exercise of discretion in denying the requested stay was appropriate."); *Rosenbloom v. Pyott*, No. SA CV 10-1352-DOC (MLGx), 2014 WL 10988342, at *2 (C.D. Cal. Dec. 8, 2014) ("Stays are usually only denied under 'unusual circumstances,' such as when the corporation unduly delayed establishing an SLC until after significant motions practice and discovery had occurred or if the SLC members themselves are biased."). In *Blohm v. Kelly*, the Minnesota Court of Appeals held that a trial court did not abuse its discretion by entering a stay to allow an SLC investigation one week before the scheduled trial. 765 N.W.2d at 155.

whether those rights and remedies should be pursued. Committees other than special litigation committees . . . are subject at all times to the direction and control of the board.

Similar statutory provisions apply to cooperative associations and nonprofit corporations.³⁴

On its face, the language of Section 302A.241, subd. 1 might appear to allow a corporation to establish an SLC at any time the corporation deems it necessary for “consider[ing] legal rights or remedies of the corporation,” but such a negative inference is not supportable here. Other constraints imposed on SLCs by case law are not included in the statute,³⁵ and the legislature has indicated that it wishes the courts to develop Minnesota law concerning SLCs.³⁶ There is no reasonable basis to freight Section 302A.241, subd. 1 with a negative inference based on the absence of language addressing the possibility of a First Strike SLC.

The limited legislative history available for the current version of Section 302A.241 sheds no light on the question of a first-strike SLC. A prior version of Section 302A.243 contained language that implied an SLC could only be established in response to a “particular proceeding”—implicitly, a derivative action:

Unless prohibited by the articles or bylaws, the board may establish a committee composed of two or more disinterested directors or other disinterested persons to determine whether it is in the best interests of the corporation to pursue a particular legal right or remedy of the corporation and whether to cause the dismissal or discontinuance of a particular proceeding that seeks to assert a right or remedy on behalf of the corporation.³⁷

This provision was repealed in 1989 with the instruction by the legislature that repeal “does not imply that the legislature has accepted or rejected the substance of the repealed Section,” and that the revised law “must be interpreted in the same manner as if Section 302A.243 had not be[en] enacted.”³⁸ Based on that instruction, the Minnesota Court of Appeals concluded that its jurisprudence prior to the repeal remained good law.³⁹ Accordingly, neither the language of the old Section 302A.243 nor the fact of its repeal provides useful guidance concerning the meaning of the current statutory provisions governing SLCs appointed by Minnesota corporations.

34. MINN. STAT. § 308B.451, subd. 1; MINN. STAT. § 317A.241, subd. 1.

35. The one-SLC-chance-only rule articulated in *Janssen I* is a prime example.

36. *Drilling v. Berman*, 589 N.W.2d 503, 506 (Minn. Ct. App. 1999) (modification of SLC statute by legislature indicated “a commitment to let the caselaw develop” and “a desire to give our courts flexibility”).

37. See 1981 Minn. Laws 1168; 1982 Minn. Laws 546.

38. 1989 Minn. Laws 429.

39. *Skoglund v. Brady*, 541 N.W.2d 17, 21 (Minn. Ct. App. 1995); *Drilling*, 589 N.W.2d at 506.

Comparison of Minnesota's authorization for corporations to use SLCs with the state's authorization for other types of business entities to use SLCs reveals interesting but ultimately unreliable contrasts. The old Minnesota Limited Liability Company Act, Minn. Stat. ch. 322B, tracked the language of the current corporate statute, Section 302A, providing that a limited liability company could appoint a "special litigation committee consisting of one or more independent governors or other independent persons to consider legal rights or remedies of the limited liability company and whether those rights and remedies should be pursued."⁴⁰

However, in 2014 the legislature replaced chapter 322B,⁴¹ adopting in its place the Minnesota Revised Uniform Limited Liability Company Act, Minn. Stat. ch. 322C.⁴² The revised statute provides, "*If a limited liability company is named as or made a party in a derivative proceeding, the company may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the company.*"⁴³ This language seems to require the actual commencement of derivative litigation before an LLC may appoint an SLC.

Based on the difference between Sections 322C.0905, subd. 1 and 302A.241, subd. 1, one might argue that corporations are *not* required to wait until the commencement of derivative litigation to appoint an SLC, because the corporate statute omits the specific language contained in the LLC statute. Such an argument would be unfounded. The Minnesota Supreme Court has held that language differences between different Minnesota enabling statutes with respect to SLCs do not necessarily indicate the legislature intended to treat different types of entities differently.⁴⁴ In 2003, the statute governing for-profit corporations (Section 302A.241) expressly authorized the use of an SLC, while the statute governing non-profit corporations (Section 317A.241) omitted this provision, ultimately leading to the court addressing whether omission of the SLC language from the non-profit corporation statute indicated that non-profit corporations could not rely upon an SLC.⁴⁵ The lower court had concluded, from the difference in language, that non-profit corporations could not.⁴⁶ The Minnesota Supreme

40. Minnesota Limited Liability Company Act, MINN. STAT. § 322B.66, subd. 1 (repealed 2018).

41. Chapter 322B is being phased out. Chapter 322C provided that LLCs formed on or after August 1, 2015 had to be formed under Chapter 322C, but allowed a transitional window in which LLCs formed prior to August 1, 2015 were allowed to elect between remaining subject to chapter 322B or becoming subject to chapter 322C. The transitional election window closed on January 1, 2018, when LLCs that had elected to remain subject to chapter 322B became subject to chapter 322C with certain exceptions. *See* MINN. STAT. § 322C.1204 (2018).

42. 2014 Minn. Laws 1.

43. MINN. STAT. § 322C.0905, subd. 1 (emphasis added).

44. *Janssen II*, 662 N.W.2d 876, 886 (Minn. 2003).

45. *Id.* at 886.

46. *Id.*

Court disagreed, deciding there were “no characteristics of nonprofits that justify treating nonprofit and for-profit corporations differently in terms of their ability to delegate board authority to independent committees to review the merits of derivative suits.”⁴⁷ Noting that the law of derivative litigation, the business judgment rule, and SLCs developed through judicial decisions rather than statutes, the Minnesota Supreme Court allowed Minnesota non-profit corporations to use SLCs notwithstanding the sharp contrast between Sections 302A.241, subd. 1, and 317A.241.⁴⁸ In light of *Janssen*, one cannot confidently conclude that the difference between the LLC statute and Section 302A.241, subd. 1 supports a negative inference about when a corporation may form an SLC.

THE FUNCTION OF THE SLC PRECLUDES USE OF A FIRST STRIKE SLC

In the absence of reliable direction from case law or statute, consideration of the function of an SLC provides the best available guidance concerning how early an SLC may be appointed by a Minnesota corporation and whether a First Strike SLC is permissible. Underlying principles support the conclusion that a corporation should not rely upon an SLC formed prior to the receipt from a shareholder of a written threat of litigation or demand that the board take action concerning an identifiable derivative claim.

To begin, it is clear that an SLC may be formed prior to the actual commencement of a derivative action, because “a shareholder bringing a derivative action must first demand that the board itself pursue the action.”⁴⁹ A board of directors presented with such a demand must decide whether to accede to it. If directors have a conflict of interest that prevents them from participating in the decision concerning the demand, then appointment of an SLC is the appropriate means—perhaps the *only* appropriate means—for the board to analyze the shareholder’s demand in an impartial fashion. Because the shareholder’s demand must precede filing of a derivative action, necessarily the appointment of an SLC prior to filing must also be permissible.

On the other hand, it is also clear that a corporation cannot appoint an SLC until it particularly identifies a potential derivative claim for the SLC to investigate. To see this, consider whether a board of directors could appoint a standing SLC for the corporation in the same way that it might appoint a standing finance committee, compensation committee, or executive committee. A standing SLC is impossible because the defining characteristic of an SLC is impartiality. SLC members must be free from any conflict of interest arising out of the allegations they are tasked to investi-

47. *Id.* at 886–87.

48. *Id.* at 888.

49. *In re UnitedHealth Grp. Inc.*, 754 N.W.2d 544, 550 n.5 (Minn. 2008).

gate. Until the nature of the allegations and claims is known, the corporation cannot determine whether any particular individual is free from a conflict of interest with respect to those allegations and claims, so no particular individual can be appointed to a standing SLC. Until a set of potential allegations and claims is defined, it is not knowable who is eligible to serve on the SLC.⁵⁰

Identification of a specific potential derivative claim for the SLC to investigate carries critical importance. It is not enough to charge an SLC to investigate any and all potential wrongdoing. Such a commission would not give the SLC any direction concerning who to interview, what questions to ask, what documents to request, what conduct or harm to search for, and when to conclude the investigation. An SLC lacking specific claims to investigate would be a blind watchman. In practice, an undefined mandate would not at all be useful in actually unearthing wrongdoing, but—perversely—a report issued by an SLC with an undefined mandate could be argued by the board of directors to preclude any and all derivative actions, since in theory the undefined mandate would cover *every* type of potential wrongful conduct within the company.

Thus in purely theoretical terms the earliest point at which a corporation could establish an SLC would be the point at which a derivative claim is defined and understood well enough to allow the corporation to identify SLC members who are disinterested in that claim and to generally identify the potential wrongdoing the SLC is supposed to investigate. We can go one step further. As a practical matter, there are at least three reasons a corporation must defer appointing an SLC until the corporation receives a written demand or threat of litigation from a shareholder.

Fiduciary Factor

The first reason is the expense of an SLC investigation. A properly conducted investigation will likely require the retention of qualified professionals to gather and review documentation related to the claim and to interview potential witnesses. These procedures are expensive. Because the board of directors owes a fiduciary duty to all shareholders not to waste corporate resources,⁵¹ the directors have an obligation to refrain from incur-

50. Could a corporation select individuals with no connection whatsoever to the corporation to serve as a standing SLC, on the theory that no derivative action could ever implicate those individuals? No. The corporation still could not know in advance whether these individuals would be eligible to serve on an SLC because it cannot know what future events might transpire to draw these individuals into a conflict of interest, even if no conflict exists at the moment of selection. Moreover, the very act of identifying those individuals as a standing SLC would establish a connection between them and the corporation. That relationship could become relevant to a derivative claim. Further, the corporation could not be certain, at the time of appointment, that the selected individuals would be willing and able to act as an SLC for a hypothetical future derivative claim.

51. See, e.g., MINN. STAT. § 302A.751, subd. 1 (court may grant equitable relief if shareholder establishes “corporate assets are being misapplied or wasted”).

ring the expense of an SLC until it becomes clear that the expense is reasonably necessary. Prior to receipt of a written threat or demand from a shareholder, the expense of an SLC is not a reasonable use of corporate funds because (except for limited circumstances discussed below) the shareholder *cannot* file a derivative action without first presenting the board with a written demand that the board pursue the claims advocated by the shareholder.

The directors will have an opportunity to appoint an SLC *after* they receive a written demand; therefore, a board that leaps ahead to the appointment of an SLC prior to receiving a written threat or demand causes the company to unreasonably incur the significant expense of the SLC and signals a lack of good faith. It may be that no derivative litigation or shareholder threat or demand will ever occur, in which case the SLC expense will have been unnecessary. “[G]ood faith is a prerequisite to the application of the business judgment rule,” and the business judgment rule is the foundation on which the device of the SLC stands.⁵² A written articulation of shareholder allegations that contains an express or implied request or demand that the corporation take action regarding the allegations is the point at which the expense of an SLC becomes reasonably justifiable in good faith.

Consistency Factor

The interdependent relationship between SLCs and derivative litigation provides a second reason that a corporation should be precluded from relying on an SLC appointed before the board receives a written threat or demand from a shareholder. The *raison d’être* of an SLC is to provide a conflicted board of directors with a means of dealing with the threat of derivative litigation. The legal principles limiting SLCs should, therefore, be consistent with the legal principles limiting derivative actions. Demand is a prerequisite for a derivative action; accordingly, a written threat or demand should be a prerequisite for the device of the SLC, which is designed to *respond* to the possibility of derivative litigation.

It might be argued that a shareholder could make demand upon the board of directors without providing a written communication. While Minnesota cases do not address this possibility, it is extremely unlikely. The Delaware courts, to which Minnesota courts often look for guidance on matters of corporate law, have developed a jurisprudence defining what qualifies as a shareholder demand. Delaware has imposed stringent requirements that to qualify as a shareholder demand, a shareholder communication must identify wrongdoers, describe the factual basis of the allegedly

52. *In re UnitedHealth Grp. Inc.*, 754 N.W.2d at 553; *see id.* at 553–54, 559 (“the business judgment rule requires, at a bare minimum, that an SLC be independent and act in good faith”).

wrongful acts and the harm caused, and request remedial relief.⁵³ The consequences of treating a communication as a shareholder demand are quite weighty. Courts applying Delaware law accordingly do not treat a communication as a shareholder demand unless the communication clearly discharges the function of identifying the action sought by the shareholder from the directors and the factual basis for seeking the action.⁵⁴ The exactitude of this inquiry is illustrated by a case in which the court concluded that a letter written to the board of directors did *not* qualify under Delaware law as a demand letter, notwithstanding that the letter asked the company to commence litigation and identified alleged wrongdoers. The letter's shortcoming? Its description of alleged wrongful conduct by reference to a pending antitrust class action lawsuit did not "sufficiently identify" the factual basis of the allegedly wrongful acts.⁵⁵ There is no reason to believe that Minnesota will chart a radically different course allowing a shareholder demand to be presented through the informal, inexact, and unpreserved method of oral communication. Thus it is difficult to imagine how a non-written communication could fulfill the function of demand and clear the path for a shareholder to file a derivative lawsuit.

It might also be objected that Minnesota law theoretically allows a shareholder to file a derivative action without first making a demand under certain limited circumstances that are said to "excuse" demand.⁵⁶ These circumstances occur when the alleged wrongdoers "constitute a majority of the board."⁵⁷ The theory of "demand excused" or "demand futile" derivative litigation in Minnesota is questionable, since a conflicted board of directors can appoint an independent SLC in response to a shareholder's demand even if a majority of the board is accused of wrongdoing. The federal court in Minnesota has more than once in recent years questioned

53. See *Allison v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1117 (D. Del. 1985); *Iron Workers Mid-S. Pension Fund v. Davis*, Civ. No. 13-289 (JRT/JJG), 2013 WL 6858567, at *5 (D. Minn. Dec. 30, 2013); *Shenk v. Karmazin*, 867 F. Supp. 2d 379, 382 (S.D.N.Y. 2011).

54. "Given the significant consequence of making a demand under Delaware law, the Court of Chancery has expressed serious reservations about 'construing ambiguous communications to be demands.'" *Nemazee v. Premier, Inc.*, 232 F. Supp. 2d 172, 180 (S.D.N.Y. 2002). "To interpret an ambiguous communication as a demand would discourage a shareholder from bringing potential wrongdoing to the corporation's attention in a forum other than the courtroom, for fear that his position, should he later decide to sue derivatively, would procedurally be more difficult to support. Furthermore, to require a board to investigate claims asserted ambiguously in an equivocal communication would not be an efficient use of corporate resources, because the board would lack the information necessary to make a good faith inquiry. Therefore, an ambiguous communication (i.e., one which does not clearly and specifically embody the three essential elements discussed above) ought not to be considered a demand within the meaning of Rule 23.1." *Yaw v. Talley*, Civ.A. No. 12882, 1994 WL 89019, at *8 (Del. Ch. Mar. 2, 1994).

55. *Shenk*, 867 F. Supp. 2d at 382.

56. *In re UnitedHealth Grp. Inc.*, 754 N.W.2d at 550 n.5.

57. *Winter v. Farmers Educ. & Coop. Union*, 107 N.W.2d 226, 233 (Minn. 1961).

whether demand can *ever* be excused in Minnesota,⁵⁸ and at least two Minnesota trial courts have held or implied that demand is never futile because an SLC can always be appointed.⁵⁹

Even assuming that “demand excused” litigation is a possibility in cases where a majority of the directors are conflicted because they are alleged wrongdoers, these cases present the maximum likelihood that a board will attempt to use an SLC to bury director misconduct. Accordingly, the possibility of “demand excused” litigation does not weigh against a rule requiring the directors to receive a written threat or demand from a shareholder prior to establishing an SLC. If demand truly is excused because a majority of the board is conflicted, then that majority should be forced to wait until demand is made or a derivative action is initiated before deploying an SLC. The looming supervisory presence of the court is highly desirable in such cases to motivate the appointment of a truly impartial SLC and the conduct of a truly impartial investigation. If a majority of the board believes a majority of the board has engaged in wrongdoing, the board’s response should be to have the company initiate action to remedy the wrongdoing or to appoint an independent investigatory committee,⁶⁰ not to appoint an SLC. The threshold requirement for establishment of an SLC by a corporation to address a perceived threat of derivative litigation should match the threshold requirement for a shareholder to actually file a derivative action—a written demand.

Deference Factor

The third reason that a corporation should be precluded from relying on an SLC appointed before the board receives a written threat or demand is the weighty importance of judicial deference to a body appointed outside

58. “According to § 10.3 of *Minnesota Corporation Law and Practice*, because Minnesota law enables a corporation to establish an SLC, ‘it is arguable that demand in Minnesota is never futile since someone not implicated in the lawsuit (*i.e.*, one or more outsiders) always can be commissioned to investigate and to decide whether to pursue or to seek the dismissal of derivative actions initiated by shareholders against directors or officers.’” *In re Medtronic, Inc. Derivative Litig.*, 68 F. Supp. 3d 1054, 1067 (D. Minn. 2014) (citing JOHN H. MATHESON & PHILIP S. GARON, 18 MINN. PRAC., CORPORATION LAW & PRACTICE § 10:3 (3d ed. 2013); *Kococinski v. Collins*, 935 F. Supp. 2d 909, 917 n.13 (D. Minn. 2013) (“In fact, it is arguable that demand is never futile in Minnesota because Section 302A.241, subdivision 1, may allow a board with no disinterested members to appoint an independent nonboard member to serve on a special litigation committee.”)).

59. “In light of Minn. Stat. § 302A.241, demand is not futile even if a majority of a Minnesota corporation’s directors are implicated in the alleged wrongdoing, because a special litigation committee of disinterested directors and/or unaffiliated persons can always be appointed to consider a demand.” *La. Mun. Police Employees Ret. Sys. v. Finkelstein*, No. 27-CV-11-23986, 2012 WL 10057353, at *4 (Dist. Ct. Minn. May 29, 2012); *see also In re BUCA, Inc. S’holder Derivative Litig.*, No. 05-4418, 2005 WL 6750825 (Dist. Ct. Minn. Nov. 9, 2005) (“It is not inconceivable that even the most rogue board given these circumstances might upon receipt of a demand, decide to cut their losses and, for example, appoint a special litigation committee.”).

60. See the discussion of *In re UnitedHealth Grp. Inc.* below.

the judicial system, which has a recognized tendency to exculpate majority shareholders and directors.

The role played by an SLC in the judicial system is quite remarkable. When a dispute between a minority shareholder and the board of directors arrives before a judge, Minnesota law instructs the judge to defer to the decision made regarding that dispute by a body which has been *selected by one of the litigants*. As noted above, there are good reasons for this practice, rooted in the business judgment rule, but that does not change the uncomfortable fact that one party has been given the power to select the judge in its own case. Judicial deference in effect (though not in theory) amounts to a delegation of judicial authority.

The power of a board of directors to select SLC members opens a door to the insidious arrangement of friends retaining friends to acquit them. If a board leaps to the use of an SLC before it receives even a written request or demand from a shareholder, the board's haste suggests that the board is seeking to bury allegations before they can be fully developed and clearly articulated in a fair, accountable, and open process.

An SLC appointed in the absence of a written shareholder demand or litigation threat also implicates considerations of the directors using their own self-interested judgment to define the SLC's scope of investigation, another means by which the directors could influence the decision in their own case. An SLC appointed with a mandate that is too narrow or that is pointed in the wrong direction may easily yield an investigation that fails to find wrongdoing that a properly directed SLC would find. An SLC appointed with a mandate that is too broad or indeterminate may not know where to look, thereby allowing wrongdoing to remain undetected while issuing an exculpating report. In either instance, the directors may rely upon the SLC report finding no wrongdoing as justification for the corporation not pursuing subsequent derivative allegations brought by a shareholder—even if the shareholder correctly identifies wrongdoing that the SLC failed to find. Unless an SLC's scope and focus of investigation is the direct result of a shareholder's written allegations, a court should not, in deference to the SLC, preclude the shareholder from bringing derivative claims related to those allegations.

A corporation's directors may appoint whatever committees they wish at any time they wish, subject to their fiduciary duties. The corporation may appoint an investigatory committee to investigate anything the directors deem necessary. But committees other than SLCs have no intrinsic power aside from whatever corporate powers are delegated by the directors.⁶¹ SLCs are different. They should be limited accordingly. Given the weighty significance of judicial deference to SLC decisions, it is necessary to cabin

61. See MINN. STAT. § 302A.241, subd. 1 (2018).

the deployment of the SLC in bright-line fashion. A clear boundary for how early an SLC may be appointed is an appropriate limitation.

A rule that courts will only defer to an SLC appointed after the corporation receives a written demand or threat of litigation from a shareholder would best accommodate the competing considerations of the directors' authority to govern the corporation, the directors' fiduciary obligation not to waste corporate resources on an unnecessary SLC, and the legal framework that requires a shareholder to send a demand to the corporation before bringing a derivative action. It would further the Minnesota Supreme Court's policy of limiting judicial review of SLC decisions to consideration of the SLC's "independence and investigative procedures," and it would flesh out the court's jurisprudence that an "improperly constituted SLC" is entitled to "no deference" from the courts, by helping define a properly constituted SLC.⁶² Such a rule would limit the use of the SLC in a salutary way, cutting against a too-hasty deployment of the device in a manner that smacks of abuse, while also providing clarity and comfort to boards of directors seeking clear guidance concerning their rights and responsibilities related to the use of an SLC.

GOOD FAITH INVESTIGATION

What of the board's fiduciary duty? Isn't a board that learns of potential wrongdoing obligated to investigate the matter? Indeed. But a distinction can be drawn between *investigation of a matter* and *appointment of an SLC*. Prior to receipt of any written demand or threat of litigation from a shareholder, a board of directors may investigate potential wrongdoing by the company without establishing an SLC.

The *In re UnitedHealth Group, Inc.* litigation provides an example. When "a *Wall Street Journal* article reported that certain executives, some of whom were employed at UnitedHealth Group, Inc. . . . had received advantageously-timed stock options," the company's board of directors made an "initial public response to these disclosures" of "appoint[ing] a committee of independent directors . . . to investigate the allegations."⁶³ This investigatory committee was not an SLC; nevertheless, the investigatory committee retained a law firm to interview relevant individuals and issue a report.⁶⁴ Separately, "[i]n further response to the shareholder derivative actions," the UnitedHealth board of directors appointed an SLC with authority to decide "whether to pursue the action on the company's behalf."⁶⁵ A board seeking to fulfill its fiduciary duty and investigate allegations of wrongdoing can and should appoint a committee of independent

62. *In re UnitedHealth Grp. Inc.*, 754 N.W.2d 544, 554, 558–59 (Minn. 2008).

63. *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 591 F. Supp. 2d 1023, 1026–27 (D. Minn. 2008).

64. *Id.* at 1027.

65. *Id.*

directors to accomplish that task without treating the investigatory committee as an SLC.

CONCLUSION

Special litigation committees were never intended by the legislature or the courts to be used offensively. Weaponized use of an SLC as a first strike to deter shareholders from asserting their rights is inconsistent with the purpose and function of the SLC within the structure of Minnesota corporate law, as defined by judicial decisions and statute. It does violence to the spirit of the SLC. It indulges the basest motives of directors accused of wrongdoing, allowing those very directors to guide the SLC's investigation so as to assure they will be preemptively absolved of wrongdoing.

The decision or recommendation of an SLC appointed by a Minnesota corporation should be given no deference by a court unless the SLC is appointed after the corporation receives a written threat or demand from a shareholder that identifies alleged wrongful conduct upon which the shareholder relies as the basis for a potential derivative action. A First Strike SLC should be treated as a nullity or as a breach of the directors' fiduciary obligation not to waste corporate resources, not as a disinterested voice authoritatively speaking on behalf of the corporation's shareholders and directors.