

APPENDIX A



SCHOOL OF LAW
UNIVERSITY of WASHINGTON

February 17, 2009

Kristopher I. Tefft
General Counsel and Employment Law Director
Association of Washington Business
1414 Cherry Street SE
PO Box 658
Olympia, WA 98507

Dear Mr. Tefft,

I am a professor at the University of Washington School of Law. I am aware that the Association of Washington Business is planning to submit an amicus briefing to the Washington Supreme Court, regarding a question of Washington's demand requirement in shareholder derivative litigation that has been certified to the Supreme Court in *Glenn Hutton, et al., v. John McAdam, et al., and F5 Networks, Inc.*, Washington State Supreme Court No. 81817-7. My experience with Washington corporate law is extensive, including teaching courses in the subject at UW Law School for over 40 years, authoring numerous publications on the topic, and serving on the Washington State Bar Association Corporate Act Revision Committee since 1975. I have reviewed the briefs submitted in the F5 Networks matter, and, in light of my intimate familiarity with Washington corporate law, and my service on the Corporate Act Revision Committee when it recommended that the Washington Legislature adopt the provision of the Revised Model Business Corporation Act (1984) at issue, I wanted to offer the following observations for your consideration as you finalize the AWB's amicus briefing.

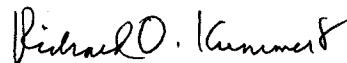
- In recommending adoption of RMBCA Section 7.40, which the Legislature adopted and codified as RCW 23B.07.400 in 1989, the Corporate Act Revision Committee did not intend to suggest that the Legislature by such action would adopt a substantive demand futility standard. Rather, the Committee recommended Section 7.40 as a purely procedural statutory provision, which establishes pleading standards for shareholder derivative litigation against Washington corporations. The Committee left to Washington courts the task of articulating the substantive demand standards through subsequent case law. Indeed, it is well-established that the Federal Rule of Civil Procedure 23.1, from which RMBCA Section 7.40 and RCW 23B.07.400 are derived, sets forth merely procedural standards. It is therefore my opinion that, in certifying the question to the Washington Supreme Court, Judge Robert Lasnik correctly observed that RCW 23B.07.400 is purely procedural and does not codify a substantive demand futility standard.
- Universal demand is now generally accepted as far superior to demand futility regimes. Requiring demand from shareholders in all derivative cases avoids long, drawn-out litigation during the pleadings stage, thus, making derivative suits more efficient and less

costly than such suits in states with demand futility exceptions. Similarly, requiring demand also deters meritless strike suits and avoids the collateral litigation present in demand futility states, such as Delaware. Finally, requiring universal demand is a simple, repeatable rule that is readily applied by lower courts and litigators alike; it eliminates the confusing and convoluted application and interpretation of a demand futility exception.

- Washington courts have never routinely applied Delaware's corporate case law. Indeed, at no point have our courts evinced a pattern or practice of following, or even looking to, only Delaware corporate case law when deciding corporate law issues in Washington. In fact, the opposite is true. When Washington courts seek guidance in deciding corporate law issues not resolved by our common law, they survey decisions in other states and national commentary and try to emulate authorities considered best. The national consensus has clearly been away from Delaware's standards on the issue of demand futility and toward universal demand.
- I have been on the Washington State Bar Association Corporate Act Revision Committee since its inception. The Committee's core responsibility is to consider changes to the Washington Business Corporation Act, and to recommend appropriate revisions to the Legislature. The Committee has never squarely considered the issue of universal demand versus demand futility, but when it does I will personally advocate for a universal demand standard. In the interim, Washington courts have not only the authority but, I believe, the duty to articulate the substantive shareholder demand standards.

Thank you in advance for considering these observations.

Sincerely yours,



Richard O. Kummert
Professor of Law