

1 SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : CIVIL TERM PART 48
 2 -----X
 CULLIGAN SOFT WATER COMPANY; CECIL R.
 3 HALL; C&D OF ROCHESTER, LLC; DRIESSEN
 WATER, INC.; MICHAEL A. BANNISTER; T&B
 4 ENTERPRISES, INC.; CALIFORNIA WATER &
 FILTER, INC.; SHAR SHER I, INC.; WATER
 5 QUALITY IMPROVEMENT, INC.; CULLIGAN
 SOUTHWEST, INC.; CAREY WATER
 6 CONDITIONING, INC.; MICHAEL CAREY; ERIC
 B. CLARKE; CULLIGAN WATER CONDITIONING
 7 (BARRIE) LIMITED; ARTHUR H. COOKSEY, JR.;
 CORBETT'S WATER CONDITIONING, INC.; GLEN
 8 CRAVEN; QUALITY WATER WORKS, INC.; DONALD
 R. DAMMEL; MAYER SOFT WATER COMPANY;
 9 TIMOTHY FATHEREE AND SUE FATHEREE; CLEAN
 WATER, INC.; CATHERINE GILBY; CANATXX,
 10 INC.; QUALITY WATER ENTERPRISESE, INC.;
 ROBERT R. HEFFERNAN; CHARLES F. HURST;
 11 KARGER ENTERPRISESE, INC.; KEPPLER WATER
 TREATMENT, INC.; ROBERT KIZMAN AS TRUSTEE
 12 OF THE ROBERT AND TRACY KITZMAN TRUST;
 LADWIG ENTERPRISES, INC.; RICHARD LAMBERT
 13 AND MARIANNE CONRAD; LOW COUNTRY WATER
 CONDITIONING, INC.; JEFFREY L. LARSON;
 14 MICHAEL G. MACAULAY; VETTERS, INC.;
 ROBERT W. MCCOLLUM AND BARBARA N.
 15 MCCOLLUM; RICHARD C. MEIER; DONALD E.
 MEREDITH; MILLER'S WATER CONDITIONING,
 16 INC.; CLEANWATER CORPORATION OF AMERICA;
 JOHN MOLLMAN AS TRUSTEE OF THE MOLLMAN
 17 FAMILY TRUST; THE GOOD WATER COMPANY
 LTD.; E&H PARKS, INC.; MAUMEE VALLEY
 18 BOTTLERS, INC.; SCHRY WATER CONDITIONING,
 INC.; SCHRY WATER TREATMENT, INC.;
 19 WINSLOW STENSENG; STEWART WATER
 CONDITIONING, LTD.; BRET P. TANGLEY;
 20 B.A.R. WATER CORPORATION; TRILLI
 HOLDINGS, INC.; BRUCE VAN CAMP; WALTER C.
 21 VOIGT AS TRUSTEE FOR THE WALTER C. VOIGT
 REVOCABLE FAMILY TRUST; MARIN H2O, INC.;
 22 ALLAN C. WINDOVER,

Plaintiffs,

- against -

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24
25

1 CLAYTON DUBILIER & RICE, LLC; CLAYTON
 2 DUBILIER & RICE, INC.; CLAYTON DUBILIER &
 3 RICE FUND VI LIMITED PARTNERSHIP; GEORGE
 4 W. TAMKE; DAVID H. WASSERMAN; MARK SEALS;
 5 BRUNO DESCHAMPS; NATHAN K. SLEEPER;
 6 MICHAEL J. DURHAM; DANIEL R. FREDRICKSON;
 7 THOMAS A. HAYS; JAMES USELTON; ANGELO,
 8 GORDON & CO., L.P.; SILVER OAK CAPITAL,
 9 L.L.C.; CENTERBRIDGE SPECIAL CREDIT
 10 PARTNERS, L.P.; CCP ACQUISITION HOLDING,
 11 L.L.C.; CCP CREDIT ACQUISITION HOLDINGS,
 12 L.L.C.; CULLIGAN LTD, as nominal
 13 defendant; and JOHN DOES 1-50,

Defendants.

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 14 INDEX NO. 651863/12 60 Centre Street
 15 New York, New York
 16 May 28, 2015

17 BEFORE:

18 THE HON. JEFFREY K. OING, J.S.C.

19 APPEARANCES:

20 FOR THE PLAINTIFFS:

21 EINBINDER & DUNN
 22 104 West 40th Street
 23 New York, New York 10018
 24 BY: STEPHANIE BLUMSTEIN, ESQ.

25 SINGLER P.C.
 127 South Main Street
 Sebastopol, California 95472
 BY: PETER A. SINGLER, ESQ.
 THEO S. ARNOLD, ESQ.

FOR THE DEFENDANTS:

DEBEVOISE & PLIMPTON
 919 Third Avenue
 New York, New York 10022
 BY: SHANNON ROSE SELDEN, ESQ.
 DAVID GOPSTEIN, ESQ.

JACK L. MORELLI
 Senior Court Reporter

m m seq.
no. 007

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1 THE COURT: The Court has before it the matter
2 of Culligan Soft Water Company, et al. versus Clayton
3 Dubilier & Rice, et al., index 651863 of 2012. This is
4 Motion Sequence Number 7, which is a motion by certain
5 defendants to dismiss the action against them. I note for
6 the record that this is a third amended verified
7 complaint. This is the fourth complaint that's being
8 served in this action here.

9 Having said that, parties enter their
10 appearances for the record. For the plaintiff.

11 MS. BLUMSTEIN: Stephanie Blumstein, from
12 Einbinder & Dunn, for the plaintiffs.

13 MR. SINGLER: Good morning. Peter Singler,
14 appearing for pro hac for the derivative plaintiffs,
15 plaintiff Culligan Soft Water, et al. and on behalf of
16 Culligan Limited. I also have with me Theo Arnold, an
17 associate in my office.

18 THE COURT: Thank you. For the defendants.

19 MS. SELDEN: Good morning. Shannon Selden of
20 Debevoise & Plimpton, for Clayton Dubilier & Rice, LLC,
21 for the individual director defendants for Culligan
22 Limited, the nominal defendant, and for CD&R Fund VI,
23 which is a party that has been dismissed from this
24 litigation.

25 THE COURT: Thank you.

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1 So, for the record, I was reading over the
2 briefs yesterday. I just have to get one thing clear that
3 I make sure of, this action is based on a 2007
4 recapitalization, correct? This action is based on that
5 2007 recap?

6 MR. SINGLER: Primarily, not entirely, no.

7 THE COURT: The dividends that flow from there,
8 the management fees, but all stem around the 2007
9 activities, correct?

10 MR. SINGLER: The main distribution, yes.

11 THE COURT: The only reason I ask that, I was
12 reading the briefs here, something jarred me and I thought
13 that I missed something. Where, unless tell me if I'm
14 wrong, in your reply brief you had mentioned a 2012
15 restructuring, that's not -- that's a typo or there was a
16 2012 restructuring?

17 MS. SELDEN: There was a 2012 restructuring.
18 That was the deal in which Centerbridge and Angelo Gordon,
19 the former lenders were involved. There were allegations
20 related to that restructuring. But they are out now so
21 what remains is the allegations related to the 2007
22 dividend.

23 THE COURT: I just wanted to clarify that I
24 didn't miss a transaction in this whole thing.

25 MS. SELDEN: No, you're exactly right, Your

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1 Honor.

2 THE COURT: Got it. Thank you. All right, so
3 we got that out of the way. All right, this is now the
4 fourth complaint you have in this derivative lawsuit. I
5 have one question to ask you -- well, let's just put for
6 the record how many causes of action are being asserted
7 here.

8 There are seven causes of action being asserted.
9 The first is breach of fiduciary duty against the director
10 defendants and CD&R. The second is for illegal dividend
11 against of the director defendants. The third is for
12 fraudulent conveyances against the director defendants and
13 other defendants. And the fourth is for aiding and
14 abetting breach of fiduciary duty. The fifth is for
15 corporate waste. The sixth is for unjust enrichment. And
16 the seventh is for constructive trust. Those are the
17 seven causes of action that are in play in this action.

18 I also note for the record that this case is now
19 back here subsequent to an appeal which was modified with
20 respect to my decision -- my prior decision was to dismiss
21 the action in total. The 1st Department modified that
22 saying that I needed to look at New York law with respect
23 to certain of these claims and also because certain of
24 these defendants the Bermuda law didn't apply to them. So
25 they said issues of plaintiffs' standing to bring a

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1 shareholder derivative action is governed by New York law
2 and not Bermuda law. And we're back here. The issue is
3 standing. This case did not say that you had standing.
4 Because they couldn't have said that because I never
5 addressed the standing issue under New York law on the
6 first go around. So when you said in your briefs here
7 that the standing issue has been decided by the 1st
8 Department; I don't think so. So just want to clarify
9 that. Right?

10 MR. SINGLER: Well, Your Honor, I think that the
11 Appellate Department did address it. And --

12 THE COURT: Where do they say that? Where do
13 they say that you have standing? Because they couldn't
14 have said that because I never, I never addressed the New
15 York law issue because they said that because I just only
16 focused on Bermuda law. And then they said go back
17 because it found, the Court found that Bermuda law didn't
18 apply to this case. "And the motion Court did not reach
19 defendants' arguments that the complaint should be
20 dismissed even if New York law applied. We remand so that
21 the Court may consider those arguments."

22 So where does it say that you've got standing so
23 that we don't need to talk about that on the first one
24 right now?

25 MR. SINGLER: Like in particular the second

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1 cause of action. It said under 626 and 626 (a) provides
2 the standing of 719, 510.

3 THE COURT: 626 provides three branches (a),
4 (b), (c). (C) is the derivative portion. (C) is where
5 you have to make demand and demand futility. (a) and (b)
6 talk about other issues. So when they satisfy 626
7 generally, they don't say 626 (c), do they? I don't think
8 that they said 626 --

9 MR. SINGLER: I think that they came out and
10 said we've alleged an illegal dividend which we have a
11 right to bring under 626, incorporating 510. It's
12 somewhat academic.

13 THE COURT: It's not academic. We're going to
14 get to that in a minute. It's not academic, it's very
15 important. That's why we're addressing that issue first.
16 Because whether or not they decide a standing is very
17 important. Because at this point this decision, this 1st
18 Department decision 118 AD3d 422, while you may have a
19 claim for illegal dividend, while you may have a claim for
20 breach of fiduciary duty under 626 or BCL 1317, BCL 1317
21 and 1319, while you may have those claims the question is,
22 do you have the right to assert those claims. Those are
23 two separate analyses that have to be done. So that I'm
24 not disagreeing with you that the 1st Department says you
25 may have those claims, the question is do you have the

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1 right to assert those claims now.

2 MR. SINGLER: I understand, Your Honor. I think
3 we're kind of splitting hairs. We're probably saying the
4 same thing.

5 THE COURT: Oh no.

6 MR. SINGLER: If I may. So, I think that what
7 defendants are bringing up right now is whether or not we
8 have met the requirements of 626.

9 THE COURT: (C).

10 MR. SINGLER: (C). If we made a demand and pled
11 futility have we met those standard. Assuming that we met
12 those standards then I believe that the standing issue is
13 resolved because the --

14 THE COURT: That's a big if. The question is,
15 have you met or have you pleaded sufficiently to get over
16 626 (c), which is now in play, which is now what I'm
17 required to analyze this action or the remaining causes of
18 action under in terms of whether or not you have standing
19 to assert those causes of action. That's where we're at.

20 Your response?

21 MS. SELDEN: Yes, Your Honor. I think that
22 you're exactly right with respect to the 1st Department
23 decision on standing, where there is no substantive
24 decision that these plaintiffs have standing to bring
25 claims on behalf of Culligan Limited.

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1 THE COURT: I think that they merely said that
2 you may have those causes of action under 626 illegal
3 dividends, whatever. That is a far cry from saying that
4 you can assert those claims. Just because you have them
5 doesn't mean that you can assert them.

6 MS. SELDEN: Your Honor, on that point I think
7 that this is exclusively a choice of law decision. The
8 1st Department decided that New York law rather than
9 Bermuda law should apply to the threshold question of
10 plaintiffs' standing to assert derivative claims. And
11 then it went a little bit further than Your Honor did on
12 the motion to dismiss to say, that with respect to certain
13 of the substantive claims, New York law would also apply.
14 But I don't think that on those substantive claims for
15 illegal dividend, for example, that it reached the
16 conclusion that plaintiffs have adequately pled a cause of
17 action or have stated a claim for illegal dividend.

18 THE COURT: That's why I'm using the word "may"
19 have a claim. I didn't say that you do have a claim, I'm
20 saying that you may have a claim. Because you still have,
21 if we get over the standing issue, I still have to be
22 convinced that you properly pleaded all of the allegations
23 that would support that claim for illegal dividend, for
24 breach of fiduciary duty for all the seven causes of
25 action.

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1 I read the 1st Department case and sometimes I
2 have a hard time reading cases, but it was pretty clear I
3 didn't say that you got a claim. It's just there were a
4 lot of may's in there, you know. So at the end of the day
5 they didn't give them a pass saying you can just get
6 past -- let's put it this way, if they had said what they
7 had said or what the plaintiff is arguing they said, this
8 would be a summary judgment motion instead of a motion to
9 dismiss. Why bother wasting our time here, right? So
10 that's where I'm going.

11 Now turning to the standing issue. So I don't
12 believe -- my finding is that the 1st Department did not
13 decide that the plaintiff in this case had standing under
14 New York BCL 626 (c). That issue clearly was not decided
15 by me in the first go around. I didn't address it. And
16 they made a point to remind me that I didn't address it.
17 So that now it's my turn to take another crack at it in
18 terms of whether or not 626 (c) has been satisfied. So
19 that 626 (c) is very clear, it says you have to make a
20 demand or you have to -- what's the exact wording for it?
21 I don't have it. I don't have it.

22 MR. SINGLER: I have it here if you like.

23 THE COURT: Thank you. 626 (c) says, "In any such
24 action the complaint shall set forth with particularity
25 the efforts of plaintiff to secure the initiation of such

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1 action by the board or the reason for not making such
2 effort." It's a demand or demand futility.

3 So I look at the allegations in this complaint
4 here with respect to the derivative nature of this
5 lawsuit. First of all, you're pleading in the
6 alternative. In the first instance you say demand
7 futility. And then that the second instance several
8 paragraphs later you say that I did make a demand. Unlike
9 causes of action where you can plead in the alternative, I
10 think when it comes to derivative action you have to take
11 one or the other, you can't pick and choose, it's this way
12 or this way and either case it's satisfied. That's not
13 how I read pleadings as being liberally construed, you
14 have to pick a position. You either made a demand or you
15 didn't make a demand.

16 In this case here the record is clear you did
17 make a demand. There is no question about it, it's
18 sprinkled throughout your briefs and throughout this
19 record that a demand was made back in May of 2012.
20 Several demands were made. And, in fact, you even pleaded
21 in your complaint that in April and May of 2012 several
22 demands were made, right? So a demand was made.

23 MR. SINGLER: I agree. I think that an adequate
24 demand was made. I think what we're saying is that even
25 if for some reason, which we don't believe it is,

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1 defendants assert that it was inadequate or whatever,
2 we're saying it wouldn't matter because even if it was
3 inadequate they had notice and it would have been futile.

4 THE COURT: I look at your demands. And your
5 demands to me, the way I look at it now, are sufficient,
6 all right, to put the corporation -- it satisfied in my
7 mind the prerequisites that you need to make for a demand.

8 My next question to you is, on May 31, 2012 the
9 corporation sent you a rejection of your demand. And they
10 clearly said right here, "Based on our analysis and report
11 to the limited board as well as their own review and
12 evaluation, both the limited board as a whole and each of
13 the affiliated directors have determined that it is not in
14 the best interest of Limited to do further investigation
15 or to take any corporate action in response to the matters
16 raised in your letter."

17 Then they go on to specifics why they addressed
18 or they address specifically why they thought that all the
19 points that were made in the several demand letters were
20 unavailing to them. So you have a rejection of the
21 demand, right?

22 MR. SINGLER: We do, Your Honor. But I think
23 it's also important to note the date.

24 THE COURT: It's May 31, 2012.

25 MR. SINGLER: And the complaint was filed

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1 several days prior to that, so.

2 THE COURT: No. My response to you now in
3 response to that is, this is the fourth attempt of this
4 complaint. This is filed -- let me make sure that I've
5 got it. October 31, 2014. So that's way after this
6 rejection letter. So that my question to you is, why
7 didn't you plead -- because I read your pleadings with
8 respect to the derivative action, paragraphs 130 through
9 149. First of all, you couldn't make up your mind whether
10 or not it was demand futility or demand, that's number
11 one. Number two, you make no mention here of the refusal
12 or the rejection of your demand, unless I missed it or
13 misread it. Because the way I looked at it, my road map
14 to this case is set forth in by Justice Bransten's
15 decision which is a very, very, good decision. It's
16 Kenney versus Immelt. And that's at 41 Misc.3d 1225 A.
17 And that was on November 7, 2013, a year before you filed
18 this complaint, a year before you filed the third amended
19 complaint here.

20 She lays out the road map in terms of what
21 happens when you make a demand and there is a rejection.
22 And she took the position and her finding was that you
23 need to plead everything with specificity. Because there
24 was a whole argument about whether or not how specific you
25 need to do this. Whether or not this has to be done, that

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1 has to be done. If you read it it was it's an excellent
2 decision. It's a road map for every plaintiff to take in
3 terms of how to do a shareholder derivative lawsuit.
4 Because that's your -- in all the cases that I've read
5 with the shareholder derivative lawsuits -- have a seat,
6 you don't have to stand for this. I'm lecturing you. The
7 Achilles' heel for all the plaintiffs, it's the standing
8 issue, okay? This case now explains under New York law
9 626 (c) what you've got to do.

10 So as of November 7, 2013 this decision was out
11 there. So why didn't you look at this decision to now
12 file this October 31, 2014 third amended derivative
13 complaint? It doesn't do any of that. Tell me what
14 happened.

15 MR. SINGLER: Your Honor, I wasn't going to
16 belabor the point earlier, but I think in Kenney versus
17 Immelt the Court, what you're referring to earlier which
18 you had to pick or choose futility or demand, and I
19 believe that's the Delaware standard in Lerner that this
20 case specifically rejected.

21 THE COURT: Kenney -- well, no, Kenney -- what
22 Kenney rejected was if you made a demand Justice Bransten
23 said, under Delaware law if you make a demand you have now
24 relinquished your argument that you don't have a
25 disinterested board. And she rejected that. She said,

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1 You know what? I don't accept that. That if you make a
2 demand that you waived or you've given up your right to
3 argue that you have an interested board.

4 So that is what she rejected in terms of looking
5 at Delaware law. But in terms of requiring 626 (c), she
6 crafted or she explained why you need to plead not only
7 with specifics on the demand issue, but when there is a
8 rejection you have to plead specifics with respect to why
9 it's a wrongful refusal. And if you don't do that, that's
10 your Achilles' heel with respect to standing.

11 Then she went through the analysis of why -- she
12 first went through the demand and said two of the three
13 demands were fine. They were specific enough to get over
14 the properness of the demand. And then she went through
15 the wrongful refusal, the specifics of the wrongful
16 refusal and she found them to be insufficient. Then as a
17 result of that she dismissed the complaint for lack of
18 standing. That's what she did.

19 She looked at 626 New York law all around,
20 didn't even look at Delaware law. She only looked at
21 Delaware law when it came to comparing Delaware's position
22 says, when you make a demand you've given up the not
23 interested argument. She goes, no, that's not the case in
24 New York, you still have, even if you make the demand, you
25 still have the argument to say that the board is

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1 interested. That's the distinction. I read this case
2 backwards and forwards five times.

3 MR. SINGLER: I understand, Your Honor. But I
4 think that the timing issue on this is because the
5 rejection did come in after filing. I don't know if there
6 is any authority that says every time that you amend or
7 every time that there is a change of circumstances you
8 would then have to go back and remand or --

9 THE COURT: No, no.

10 MR. SINGLER: Or I have to plead away something
11 that happened after the fact.

12 THE COURT: No, no. But you missed the point
13 though. Because this is -- they're taking the position
14 that you have failed to still plead properly standing,
15 okay? So that you saw that motion -- this is the motion
16 to dismiss this third amended complaint. You saw that
17 motion. The first thing that said standing. What should
18 have rang a doorbell is like, okay, you know what? I'm
19 going to serve a fourth amended verified complaint and
20 this is what I'm going to say, that I made a demand and
21 here are the specifics of demand. And then they rejected
22 my demand and here are the specifics of why I believe it's
23 wrongful, that the rejection was wrongful. And here it
24 is, boom, done. Now I have standing. Now let's get to
25 the heart of the case. You didn't do that. And the

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1 timing of it is incredible. I'm glad you said that
2 because the timing, you had all the time, it's on your
3 side.

4 On top of that, this third amended complaint was
5 served after they took issue with your second amended
6 complaint because you kept in there the 717 or 7 -- I
7 forget what cause of action. The 717, you virtually
8 copied over the complaint, you didn't change anything.
9 After the 1st Department made its ruling you just
10 re-served the complaint with the same causes of action.
11 They're like, wait a minute.

12 MR. SINGLER: Actually we added a couple of
13 causes of action. But the 717 was, and we voluntarily
14 took it --

15 THE COURT: That tells me, look, you've got to
16 do the work if you want it. I'm reading this derivative
17 action here, the pleadings from paragraphs 130, just so I
18 have it, to 149. It's wholly deficient, it's totally
19 deficient. I can't tell you anyway -- when you read it,
20 I'll give you the demand, that your demand is proper
21 because I read it. But it doesn't tell -- I can't look at
22 that to the exclusion of what happened because this
23 happened back in May of 2012. You commenced this action
24 sometime around that time. But then after that time
25 you've amended this complaint three times. You still

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1 haven't gotten the standing issue down pat yet. Because
2 you're going to ask me to ignore the rejection. You're
3 going to ask me to say that that didn't even take place.
4 I can't do that. That's not the law.

5 MR. SINGLER: If Your Honor is then leaning
6 towards, it sounds like you are, dismissing the complaint
7 on that grounds, I would absolutely ask for leave to amend
8 because it's very curable. If you look at the Young
9 Conaway letter it is a 12 page investigation.

10 THE COURT: Let's not go there in terms of we'll
11 see what happens. But if you were going to do that, well,
12 before I even tell you what I want to do next --

13 Your response to this?

14 MS. SELDEN: Your Honor, if there were one case.
15 I would point to on the question of standing it would be
16 Kenney versus Immelt. I think you're exactly right to
17 look at that.

18 THE COURT: You couldn't ask for a better,
19 clearer case in terms of a road map as to how a plaintiff
20 in a derivative lawsuit can get over the standing issue.
21 Whether or not they can do it, that's another story but it
22 lays out what you've got to do.

23 MS. SELDEN: Exactly. It lays out exactly what
24 you have to do. And the only place where plaintiffs make
25 any attempt to address this letter that they have had

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1 since May 31, 2012, three years ago, is paragraph 136 of
2 their third amended complaint which just says, "Subsequent
3 to filing, Culligan's board did notify, call for
4 individual plaintiffs that it was refusing to act on the
5 demand." That is --

6 THE COURT: What's that?

7 MS. SELDEN: That's not enough to establish
8 standing.

9 THE COURT: There is a question mark.

10 MS. SELDEN: Exactly, Your Honor. Kenney versus
11 Immelt, 626 by Auerbach, all of New York law requires a
12 plaintiff who is seeking to displace the board of
13 directors of a company and bring litigation on its behalf
14 to allege why the demand was wrongful, you have to look
15 specifically at some reason that the board's decision was
16 wrongful and displace their judgment on that call. Here
17 you have the Young Conaway letter. It lays out all of the
18 things that the board had considered when it looked at
19 this hard and decided not to bring this litigation for all
20 kinds of reasons. And for similar reasons to the reasons
21 that the demand was refused.

22 THE COURT: You heard what he said. Counsel's
23 argument is he wants to, if he believes there is
24 deficiencies here that he should be permitted to serve a
25 fourth amended derivative complaint.

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1 I have a question to ask you, counsel. Who is
2 paying for this lawsuit on your end, on the defense side?

3 MS. SELDEN: Your Honor, this lawsuit is paid
4 for in a variety of ways. But as you'll see in the Young
5 Conaway letter, and I think that Your Honor is putting
6 your finger on it, on the bottom of page two, Exhibit F to
7 affidavit, it notes one reason the board did not elect to
8 pursue these claim is that Culligan Limited indemnifies
9 CD&R LLC for these claims, such if claims succeed on
10 behalf of Culligan Limited and CD&R, LLC, CD&R is
11 indemnified for those claims. That's a reason the board
12 often elects not to pursue claims likes these. That's the
13 reason the board didn't pursue them in Auerbach and I
14 believe in Kenney. But that is a fair consideration for a
15 board to take into account.

16 THE COURT: The bottom line is the money is
17 coming out of the corporation's pocket?

18 MS. SELDEN: Yes.

19 THE COURT: Not money from insurance carriers,
20 the insurance carriers are not involved in this. There is
21 no other proceeds coming in separately. That doesn't
22 affect your bottom line.

23 MS. SELDEN: There is also insurance coverage
24 which covers defense costs. But ultimately as you see in
25 the Young Conaway letter and, frankly, as was disclosed to

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1 these plaintiffs in the offering memorandum when they
2 bought shares in 2006 on page 61 of that offering
3 memorandum, clearly states that Culligan Limited
4 indemnifies CD&R and its directors. So this lawsuit is
5 circular.

6 MR. SINGLER: That's interesting because when a
7 year or two ago when Culligan went into liquidate, the
8 most they could possibly have is \$474,000, I believe. And
9 so if they have been fighting this lawsuit the entire
10 time -- I don't think that Ms. Selden answered the
11 question. She didn't reference defense coverage because
12 at the end of the day I don't think that they have any
13 money and I think it's the CD&R guys that are ultimately
14 paying, but I'm speculating.

15 If I may?

16 THE COURT: What I'm approaching is that I have
17 to tell you, last night when I was reading all this I was
18 not happy about where that is, basically where this is a
19 fourth attempt for serving an amended complaint. Because
20 the way I look at it is, when I went to grammar school if
21 you made a mistake once, the teacher reprimands you. But
22 if the made a mistake twice, the nun would rap your
23 knuckles.

24 You've had four chances to get this right. And
25 it's not as if you didn't have or at least -- look, if I

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1 can find -- if I can read it you've got to be able to do
2 that. Because I was on that side too for a short period
3 of time. You have to get it right at least at some point.

4 So when are you going to get it right? So now
5 you're asking me for permission to serve another
6 complaint, another verified, another amended derivative
7 complaint, the fourth one which is your fifth attempt to
8 do it right.

9 MR. SINGLER: Well, Your Honor --

10 THE COURT: Let me finish.

11 MR. SINGLER: All right.

12 THE COURT: There is a cost attached to this and
13 it's not a free ride, as they say, at some point. And
14 that last night I was thinking, I was inclined to say, you
15 know what? I'm done with this. I'm going to dismiss it
16 with prejudice. But then I thought again, having slept on
17 it, that perhaps that's not the right way to go. So that
18 what I'm thinking --

19 Before I say what I'm going to say, what's your
20 response.

21 MR. SINGLER: Well, Your Honor, I think in all
22 due fairness to the plaintiffs and to us --

23 THE COURT: Fairness? What's fairness? You did
24 it four times, where is the fairness? These guys are in
25 here four times already.

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1 MR. SINGLER: First amended complaint was
2 because circumstances changed from the time we filed and
3 then they closed the deal.

4 THE COURT: I give you that. Second and third
5 then?

6 MR. SINGLER: Well, that the second time was
7 after the --

8 THE COURT: After the appeal.

9 MR. SINGLER: After the appeal. And we added a
10 couple of causes of action. The third it was a clerical
11 because we were arguing over -- we left 717 in there, so.

12 THE COURT: My position is, you know, I hear
13 your arguments. I was an associate a long time ago. And
14 I was always worried when things left my desk that it was
15 insufficient. That I made sure that it was to the T, to
16 the letter right on. Somebody on your side has to read
17 this stuff. Because if I could read this stuff at 2:00 in
18 the morning and figure out that something is not right,
19 someone younger than me can read it and say, you know
20 what? We're missing a lot of stuff here, especially
21 derivative.

22 I hear your argument, I'm not buying it. That
23 is the frustration on my part when you're saying where is
24 the fairness, when it comes to defendants being dragged in
25 here all the time because you serve another complaint.

PROCEEDINGS

1 And they are going to come back in here again.

2 So that, you know, at some point -- you know
3 what I'm going to do? If you want to serve the fourth
4 amended complaint, the fifth time to take a crack at it,
5 I'm going to hit you with the costs. You're going to have
6 to pay what they had to do to oppose this motion, because
7 they have laid it right out in the front what the problem
8 is. The first problem was standing. And right there that
9 should have set off an incredible alarm bell to say, let's
10 take a look at standing to make sure that we're clean.
11 Any kindergartner can read this and say, we have to clean
12 this up, it doesn't make any sense. Especially with Judge
13 Bransten's decision out there, Judge Oing is going to read
14 that, unless he's a dingbat and he doesn't read that
15 decision. We better make sure because he reads his cases.

16 So at that point that's what I'm going to do.
17 You want to take a fifth crack at it, I'll let you take a
18 fifth crack at it but you're going to have to pay them the
19 cost for making this motion which clocks in -- the time
20 that you're going to clock in is the first time that you
21 put pen to paper with respect to this motion to dismiss,
22 to the time right now where we finish oral argument.
23 That's the cost and attorneys fees that you're going to
24 pay the defendant for you to serve a fourth amended
25 complaint, a fifth crack at it. That's my position.

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1 You've got it?

2 MR. SINGLER: And if we can put reasonable in
3 there.

4 THE COURT: Reasonable, sure.

5 MR. SINGLER: Because you're going to be
6 reviewing it.

7 THE COURT: Of course I'll review whatever bill
8 they submit to you. If you decide to go that route, I
9 will take a look at. If you believe it's reasonable, you
10 don't have to get me involved. But if you believe it's
11 unreasonable, you bring it to my attention and I'll look
12 it over. But I already told them what the timeline is,
13 first time they put pen to paper to this motion to dismiss
14 to the time that they are here making this oral argument
15 when they clock out and say thank you and leave the
16 courtroom. That's the timeline we're looking at in terms
17 of the cost that you're going to pay, including attorneys
18 fees that you're going to have to pay them if you want to
19 take a fifth crack at this. Because at the end of the day
20 the phrase is enough is enough. You either get it right
21 or you don't get it right. But you're not going to keep
22 coming back and back, you know, no. A lot of jurists
23 wouldn't even have given you that many times. I'm going
24 to give you the fifth time, sure. But you're going to
25 have to pay for that, okay? That's my decision.

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1 Okay, this is my decision and order with respect
2 to the defendants' motion to -- I'm sorry, have a seat,
3 counselor. Any comments before I call it a day?

4 MS. SELDEN: Your Honor, my additional comments
5 would be this, there are multiple other reasons to dismiss
6 this complaint with prejudice for failure to state a claim
7 because all of the decisions that they challenge are
8 precluded by the business judgment rule. Because these
9 plaintiffs are coming in here as the worst kind of Monday
10 morning quarterbacks, objecting to decisions that they
11 knew about and agreed to, that they got \$30 millions from
12 at the time. Enough is enough. And at this point this
13 should be dismissed with prejudice.

14 THE COURT: I heard what you said and I thought
15 about whether or not to dismiss with respect to the seven
16 causes of actions. I don't necessarily, because I'm not
17 sure if they are going to take an appeal of this which
18 they may, I don't necessarily need to clutter the record.
19 There is only one issue I decide, one single issue. If
20 the appellate review is sought, that's all that the 1st
21 Department has to look at. I learned my lesson. I'm not
22 going to start doing all these multi-things because that
23 clutters the record. So that the only singular issue on
24 appeal right now is, if appellate review is sought, is the
25 standing issue. And my position is with respect to the

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1 standing issue, the allegations set forth in this third
2 amended complaint is just wholly deficient in terms of
3 demonstrating to me or sufficiently alleging that the
4 demand was made and that the refusal or rejection of that
5 demand was wrongful. That's it. I hear what you're
6 saying but we'll take it another day, all right?

7 So that's my decision. So my decision and order
8 with respect to the defendants' motion to dismiss is as
9 follows: I'm going to grant the motion to dismiss on the
10 ground that the plaintiffs here have failed to
11 sufficiently allege that they have standing to maintain
12 this derivative lawsuit. In that regard, with respect to
13 that those allegations in paragraph 130 to 149, those
14 allegations, if you read it, they had alternative
15 allegations. On the one sense they were saying that, they
16 were alleging that the demand was futile and on the other
17 sense they were saying that the demand was made. The
18 result is clear, the demands, plural, have been made upon
19 on the corporation. The record is also clear a rejection
20 of that demand was also provided. Because of that they
21 needed, under the Kenney decision that I recited, they
22 needed to plead with specificity the demands. And they
23 needed also to plead with specificity the rejection of
24 that demand. In other words, whether or not that
25 rejection was wrongful, those allegations are missing. I

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1 looked at the demands here. Ostensibly the demand appears
2 to be getting sufficient in terms of form to have proper
3 demands. They got to now plead it with specificity. They
4 have to take what they said in those demand letters and
5 put it in the complaint. And I'm not here to do it for
6 them. At the end of the day the missing key, missing
7 component in this complaint here is the rejection and
8 whether or not it was wrongful and why it was wrongful.
9 There is nothing in these allegations that tell me that.

10 So under those circumstances they have failed,
11 plaintiffs have failed to set forth sufficient allegations
12 to demonstrate that they have standing in conformity with
13 the Kenney decision that I cited for the record. Having
14 said that, I'm dismissing this action without prejudice to
15 the plaintiffs to replead for the fifth time in a fourth
16 amended verified complaint. They're going to look it over
17 carefully because if it comes to me again and it's wholly
18 deficient again, then I will dismiss it with prejudice.
19 I'm not going to keep going on with this case.

20 The second thing is, that if they do decide to
21 plead again and serve a fourth amended complaint, they
22 will have to first pay the costs to the defendants for
23 them to oppose or made a motion to dismiss this amended
24 complaint. The timeline that's to be calculated is from
25 the time that they put pen to paper, the defendants put

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1 pen to paper on the motion to dismiss, to the time today
2 when they leave this courtroom. That's the timeline that
3 I'm looking at in terms of the costs and attorneys fees
4 that are going to be recoverable.

5 Of course if plaintiffs believe that the bill is
6 unreasonable, they can make an application to the Court
7 for me to look it over. I suspect we'll see where it goes
8 from there when I take a look at that. But that is the
9 condition to serving a fourth amended complaint, which is
10 their fifth time doing it. And I only say that because, I
11 take that hard stand because there is enough in this
12 record here, timeline wise with respect to decisions,
13 judicial decisions to permit, to have permitted plaintiffs
14 to actually sit down and figure out what allegations were
15 necessary to get over the standing issue. I just don't
16 understand why it wasn't done.

17 That's my decision and order. It's dismissed.
18 It's dismissed without prejudice on the condition if they
19 serve another complaint, that they pay for the attorneys
20 fees, reasonable attorneys fees and costs with respect to
21 the defendants' application to continue and decide the
22 balance of the motions. With respect to the seven causes
23 of action, that branch of the motion is denied without
24 prejudice. My position is that I want a singular issue
25 that is dealt with here so in case the plaintiffs do seek

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1 appellate review, the Appellate Court will have this one
2 issue that they can have in front of them without me
3 cluttering the record, without the other causes of action.
4 That's my decision and order. Anything else?

5 MR. SINGLER: Other than could we have some
6 timeframes possibly for defendants to provide that and for
7 us to file a complaint all within --

8 THE COURT: First of all, when do you think that
9 you can serve the fourth amended complaint by? Give
10 yourself enough time to look it over.

11 MR. SINGLER: I do actually have a family
12 vacation.

13 THE COURT: I wouldn't mess with that.

14 MR. SINGLER: If I may, I would say certainly by
15 July 1st.

16 THE COURT: July 1st. You have until July 1st
17 to serve the fourth amended complaint. If you do not
18 serve and file the fourth amended complaint by July 1st,
19 then this action will be dismissed or is dismissed with
20 prejudice without further order of the Court. You then
21 will, I guess if they're planning to do July 1st -- they
22 are not going to really know, I guess that you can serve
23 them. You can serve them any time between now and
24 July 1st the amount, the reasonable attorneys fees and
25 costs for opposing this or for making this motion, you can

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1 serve it to them.

2 MR. SINGLER: Could I ask that it be done a
3 little ahead of time? Because you would also have to, if
4 you think it's unreasonable, you would have to take a look
5 at it.

6 THE COURT: How much time? You just have to
7 press a button. How much time do you need?

8 MS. SELDEN: Your Honor, I don't think that it
9 would take much time for us to prepare and submit our bill
10 for attorneys fees and costs incurred in total between the
11 moment at which we first put pen to paper on the motion to
12 dismiss and the close of oral argument today, if that
13 includes all attorneys fees and costs on this litigation
14 within that timeframe, we can do that very quickly within
15 the next two weeks.

16 THE COURT: Okay, two weeks. Today is -- all
17 the costs and attorneys fees that are related to this
18 motion from the time period I discussed, okay? Not
19 everything else that preceded that.

20 MS. SELDEN: Right, Your Honor. And I guess one
21 question then to clarify is, you know, while this
22 litigation was pending we have also during the pendency of
23 this motion obviously incurred the costs in connection
24 with the motion that was before Your Honor last week for
25 approval of the settlement and our --

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1 THE COURT: Take that out, that's the carve out.

2 MS. SELDEN: That may take a little bit of extra
3 time.

4 THE COURT: I'm only interested in this motion
5 to dismiss which you made, which you clearly put in your
6 motions why you thought it should be dismissed. So that
7 for them to keep going is something that I'm not happy
8 with. So that's what I'm looking at at this point.

9 Yes, counsel?

10 MR. SINGLER: And a fair portion of this motion
11 is repetitive of the earlier motion as well.

12 THE COURT: No, it doesn't matter. It's from
13 the time that you put pen to paper when this started, this
14 motion, even if they cut and paste, it doesn't matter.
15 You guys -- you guys were the driving force. You could
16 have seen the motion and said, you know what? We see
17 where we have a problem here. We'll take care of it so we
18 don't have to go down the next few yards. But you didn't
19 do that. So today is May 21st -- today is May 28th.
20 And that puts it over a week. June 12 serve the
21 plaintiffs' counsel with your bill. And if you believe
22 it's not reasonable -- send it with a copy to the Court
23 and then I will wait to hear from plaintiffs' counsel.
24 And if need be, I will call everybody in to have a quick
25 conference on that.

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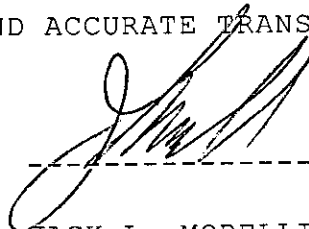
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Okay, so that's my decision and order. Counsel, you're the moving party. Please order the transcript and I'll so order it for your records. And include the cost of this transcript in the bill. Thank you. Have a good afternoon.

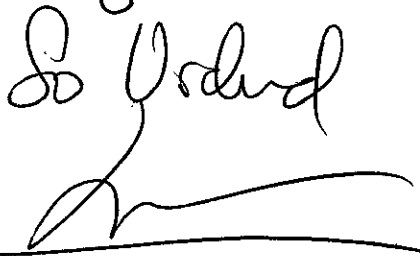
MS. SELDEN: Thank you, Your Honor.

* * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.



JACK L. MORELLI, CM, CSR

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JEFFREY K. OING
J.S.C.