

No. 09-3443

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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THE BOOTH FAMILY TRUST, Charles Federman, Trustee, Derivatively on  
Behalf of Nominal Defendant, Abercrombie & Fitch; ALFRED FREED,

Plaintiffs-Appellants,

v.

MICHAEL S. JEFFRIES; ROBERT S. SINGER; RUSSELL M. GERTMENIAN;  
ARCHIE M. GRIFFIN; JAMES B. BACHMANN; LAUREN J. BRISKY;  
JOHN W. KESSLER; JOHN A. GOLDEN; EDWARD F. LIMATO;  
SAMUEL N. SHAHID, JR.; ALLAN A. TUTTLE,  
and ABERCROMBIE & FITCH CO.,

Defendants-Appellees.

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On Appeal from the United States District Court  
for the Southern District of Ohio

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**PETITION FOR REHEARING *EN BANC* OF NOMINAL  
DEFENDANT-APPELLEE ABERCROMBIE & FITCH CO.**

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## I. INTRODUCTION AND RULE 35(b) STATEMENT

A divided panel of this Circuit has created new standards for the conduct of a Special Litigation Committee (“SLC” or “Committee”) that are wholly unsupported by precedential law. *The Booth Family Trust v. Jeffries*, 2011 U.S. App. LEXIS 6814, at \*22 (6th Cir. Apr. 5, 2011) (Griffin, J., dissenting) (“[t]he majority fails to cite any authority for its holding . . .”). The Panel Majority admitted as much: “there is very little case law to guide us on this issue and nothing from the Delaware courts in the unique context of special litigation committees . . . . [I]t is not clear that Delaware would approve of a committee member’s decision to recuse himself or herself from considering claims against a particular director.” *Id.* at \*22 n.4 (Martin, J., Duggan, D.J.). No court has ever determined, as the Panel Majority did, that partial recusal by one member of a two-member SLC caused the SLC as a whole to lack independence. *Id.* at \*22.

Even more troubling is the Panel Majority’s perplexing rationale that had the SLC member *not* recused himself, the Panel Majority “might agree with the district court’s conclusion that he was independent.” *Id.* The recusal—which was undertaken by the SLC member to preserve independence, *id.* at \*34 (Griffin, J., dissenting)—somehow caused the Panel Majority to conclude that the SLC lacked independence, *id.* at \*31.

In reaching its unsupported decision, the Panel also misapplied Delaware precedent. *Id.* at \*34 (Griffin, J.) (“[the majority’s] conclusion is inconsistent with Delaware law . . .”). Not only did the Panel Majority disregard a long line of cases finding that friendship alone does not eviscerate director independence, *id.* at \*36, it also ignored Delaware statutory and case law that allows for one-member SLCs, *id.* at \*39, and failed to resolve any questions as to the independence of the remaining member of the SLC, *id.* at \*38.

The Panel’s decision to issue an opinion unattached to precedent and contrary to Delaware law is of great import because the vast majority of publicly traded corporations in the United States are incorporated in Delaware and are bound by Delaware law. “Indeed, viewed realistically, Delaware corporation law is national corporation law.” Ernest L. Folk, III, *The Delaware General Corporation Law -- a Commentary and Analysis* (1st ed. 1972). “As the ‘corporate home’ for thousands of corporations in the United States, Delaware’s regulations have nation-wide political and economic impact.” *Lee v. Minner*, 369 F. Supp. 2d 527, 534 (D. Del. 2005). “Delaware corporate law is national in scope.” *Minstar, Inc. v. Laborde*, 626 F. Supp. 142, 147 (D. Del. 1985).<sup>1</sup>

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<sup>1</sup> Although this Court does not generally utilize the en banc procedure to determine issues of state law (*see* 6 Cir. R. 35(c)), under 6 Cir. R. 2, the Court for good cause may relax that rule and may follow its sister circuits in considering state law issues of exceptional importance. *See Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc) (considering California law); *Todd v. Societe*

Delaware law permits a corporate board to create an independent SLC to investigate the claims set forth in a derivative lawsuit. *See Zapata v. Maldonado*, 430 A.2d 779, 780-81 (Del. 1981). It is of vital importance to establish clear, understandable standards for boards to follow when faced with derivative litigation. Rehearing en banc is critically important here because the Panel Majority's decision establishes new, precedent-setting errors in Delaware law that are of national import.<sup>2</sup> The Panel's opinion also turns the law of recusal on its head and creates a reverse incentive that effectively forecloses recusal based on respect for appearances. Nominal Defendant-Appellee Abercrombie & Fitch Co. ("Abercrombie") therefore requests rehearing en banc to address these issues of exceptional national importance.

## II. FACTUAL AND LEGAL BACKGROUND

The underlying action is a consolidated shareholder derivative lawsuit in which Plaintiffs-Appellants ("Plaintiffs"), purporting to act on behalf of Abercrombie, allege that certain present and former directors of Abercrombie

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*BIC, S.A.*, 21 F.3d 1402 (7th Cir. 1994) (en banc) (considering Illinois law); *Murdock v. United States*, 951 F.2d 907 (8th Cir. 1991) (en banc) (considering Nebraska law). In this vein, the En Banc Court may also vote to vacate the Panel Majority's decision and certify the relevant issues of Delaware law to the Supreme Court of Delaware. Del. Sup. Ct. R. 41.

<sup>2</sup> In shareholder derivative suits, the substantive law of the state of incorporation governs. *Kamen v. Kemper Fin. Serv., Inc.*, 500 U.S. 90, 108-09 (1991). Abercrombie is incorporated in Delaware; Delaware law applies.

breached their duties to the company. A derivative action is a case in which a shareholder asserts, on behalf of a corporation, a claim belonging to the corporation, and any recovery from the suit comes to the corporation. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548-49 (1949); *In re M&F Worldwide S'holder Litig.*, 799 A.2d 1164, 1174 n.31 (Del. Ch. 2002) (The “real party in interest” in derivative suits is the corporation, not the shareholder.) Given the unique nature of a derivative suit, special corporate law rules have been adopted to address such suits. *See Burks v. Lasker*, 441 U.S. 471, 486 (1979); *Zapata*, 430 A.2d at 780-81.

Delaware law allows for the creation of an SLC in response to a derivative suit. The corporate board forms an independent SLC to investigate the charges raised in a derivative complaint and (upon completion of the investigation) to decide whether the corporation should prosecute the litigation, settle it, or dismiss it as detrimental to the corporation’s best interests. *Kaplan v. Wyatt*, 484 A.2d 501, 509 (Del. Ch. 1984). Numerous courts have dismissed derivative suits after an SLC concluded that proceeding with litigation would not be in the best interest of the corporation. *See, e.g., Burks*, 441 U.S. at 471; *Clark v. Lomas & Nettleton Fin. Corp.*, 625 F.2d 49 (5th Cir. 1980); *Lewis v. Anderson*, 615 F.2d 778 (9th Cir. 1979); *Strougo v. Bassini*, 112 F. Supp. 2d 355 (S.D.N.Y. 2000); *Kindt v. Lund*, No. Civ. A. 17751-NC, 2003 WL 21453879 (Del. Ch. May 30, 2003).



Here, soon after Plaintiffs brought suit, Abercrombie's Board of Directors charged an SLC with the responsibility of investigating Plaintiffs' claims and considering whether proceeding with the litigation would or would not be in the best interests of the company. *See Zapata Corp.*, 430 A.2d at 779. The delegation by Abercrombie's Board to the SLC was absolute, and the Board retained no authority to review the conclusions of the SLC. At all times, the Committee was comprised of directors Abercrombie deemed independent. The SLC also hired independent legal counsel, Cahill Gordon & Reindel LLP, which spent over 4,800 hours on the engagement. In an investigation that lasted more than sixteen months, the SLC or its counsel or both reviewed more than 100,000 pages of documents, interviewed fifty-three witnesses (including each of the named defendants, as well as current and former employees, directors, and outside advisors), reviewed transcripts of Securities and Exchange Commission deposition testimony, and thoroughly analyzed Plaintiffs' claims.

After deliberation, the SLC directed Abercrombie to move to dismiss the derivative lawsuit for the reasons set forth in its 144-page SLC report. Abercrombie did so. Under *Zapata*, the district court was required to consider whether the SLC was independent, acted in good faith, and had reasonable bases for its conclusion. The district court found that each of these criteria had been met, granted Abercrombie's motion, and dismissed the lawsuit. On appeal, the Panel

Majority reversed the district court, finding that one SLC member's decision to partially recuse himself destroyed the SLC's independence as to all issues.

### **III. POINTS OF LAW AND FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL MAJORITY**

The Panel Majority concluded that the laudable decision by one of the two members of the SLC, attorney Alan A. Tuttle, to recuse himself from deliberations only as to his former colleague Robert S. Singer "demonstrates that Tuttle, and therefore the SLC, was not independent," *Booth*, 2011 U.S. App. LEXIS 6814, at \*20, and that "because Tuttle, for whatever reason or no reason at all, recused himself from considering the claims against Singer he effectively admitted that he was not independent." *Id.* at \*22.

The Panel's conclusion that recusal by one member of the SLC vitiates SLC independence finds no support in any precedential authority: no statute, no opinion, no scholarly literature supports that conclusion. Nor did the Panel Majority cite any precedent in support of its holding that the act of recusal *creates* actual bias or prejudice. Indeed, Judge Griffin noted that his research uncovered only one case addressing the topic, and the holding in that case is directly contrary to the Panel Majority's conclusion. *See id.* at \*35 (Griffin, J., dissenting) (discussing *Buchwald v. Univ. of Minnesota*, 573 N.W. 723 (Minn. Ct. App. 1998)).

The Panel Majority's Opinion not only fails to follow well-settled, controlling law in determining SLC independence but also creates an unsupportable impediment to the analysis of that question.

#### **IV. ARGUMENT FOR REHEARING EN BANC**

##### **A. The Majority's Decision turns the philosophy underlying recusal on its head.**

As the Panel noted, there is no case law, in the context of a SLC, to guide Alan Tuttle's decision to partially recuse himself. *Booth*, 2011 U.S. App. LEXIS 6814, at \*22 n.4. Tuttle – in what should be considered commendable behavior – decided out of an abundance of caution, and before the SLC began to do its work, that he would not participate with Brisky and their counsel in the SLC's deliberations as to Singer. The Panel Majority turned Tuttle's good faith recusal upside down and created perhaps one of the most perplexing proclamations in the history of corporate law:

Had Tuttle not recused himself from considering the claims of Singer, we might agree with the district court's conclusion that he was independent. However, because Tuttle, for whatever reason or no reason at all, recused himself from considering the claims against Singer[,] he effectively admitted that he was not independent.

*Id.* at \*22. The Panel Majority further determined that Tuttle's supposed lack of independence as to Singer tainted the entire SLC process. *Id.* at \*25. Thus, instead of commending Tuttle for his exercise of discretion, the Panel Majority determined that "his recusal create[d] a perception that [he] was not independent." *Id.* at \*22.

The Panel’s conclusion dramatically departs from the standards of settled law regarding recusal in other contexts. *See, e.g., United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986) (Judge Vela’s prior recusal did not provide any evidence on which a reasonable person could harbor doubts as to Judge Vela’s impartiality in the present case); *United States v. Balistrieri*, 779 F.2d 1191, 1216 (7th Cir. 1985) (“Judge Warren recused himself because he thought there might be an appearance of impropriety if he presided. His recusal cannot reasonably be taken to be founded on actual bias or prejudice.”).

In dissenting from the Panel decision, Judge Griffin wrote that he only was able to locate one other court that had previously considered the effect of recusal on a determination of bias. *Id.* at \*35. Judge Griffin then pointed out that the Majority’s approach directly contradicts the Minnesota Court of Appeals’ decision in *Buchwald v. University of Minnesota*, 573 N.W.2d 723, 728 (Minn. Ct. App. 1998), which held that recusal by a college president did not, in and of itself, admit bias.

Further, as Judge Griffin’s dissent correctly observed, the result reached by the Panel Majority—that recusal by Tuttle was an admission of lack of independence—is not supported by any authority. *Booth*, 2011 U.S. App. LEXIS 6814, at \*34. The Panel Majority admitted as much: “there is very little case law to guide us on [the determinative] issue and nothing from the Delaware courts in

the unique context of special litigation committees . . . .” *Id.* at \*22 n.4.<sup>3</sup> Because the Panel Majority issued its decision without the benefit of any precedent, Abercrombie requests that the en banc court take up this nationally important corporate law question.

**B. The Majority’s Decision regarding Tuttle’s independence is at odds with settled Delaware law.**

Plaintiffs’ briefing and oral argument regarding Tuttle centered on the ground that Tuttle lacked independence as to Singer, based on his friendship and prior working relationship with Singer, which developed when the two men worked together at Gucci. Tuttle, however, in an abundance of caution, recused himself from considering claims against Singer. The record is clear that SLC-member Brisky, assisted by independent legal counsel, decided all issues relating to Singer.

As Judge Griffin correctly found, however, Tuttle’s decision to abstain on the basis of his friendship with Singer was not required. *Booth*, 2011 U.S. App. LEXIS 6814, at \*36 (“Delaware courts have consistently held that “[n]either mere personal friendship alone, nor mere outside business relationships alone, are sufficient to raise a reasonable doubt regarding a director’s independence.”) (citations omitted). Multiple cases recognize that neither friendship nor prior

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<sup>3</sup> Despite this admission, the Majority did not certify the issue to the Delaware Supreme Court.

working relationships prevent an SLC member from being independent. *See St. Clair Shores Gen. Employees Ret. Sys. v. Eibeler*, 2008 WL 2941174, at \*8 (S.D.N.Y. July 30, 2008) (special litigation committee member's friendship with director-defendant did not affect special litigation committee member's independence); *Madvig v. Gaither*, 461 F. Supp. 2d 398, 405 (W.D.N.C. 2006) (statement by special litigation committee member that director-defendant was his "friend" did not call into question that special litigation committee member's independence); *Litt v. Wycoff*, 2003 WL 1794724, at \*3-6 (Del. Ch. Mar. 28, 2003) (long standing personal friendships). As one federal court has observed: "Business dealings seldom take place between complete strangers and it would be a strained and artificial rule which required a director to be unacquainted or uninvolved with fellow directors in order to be regarded as independent." *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1441 (N.D. Cal. 1994). In this case, too, the district court below concluded: "The associations and contacts of the type which Mr. Tuttle has had with Defendant Singer are not intricate, inappropriate, or such as to suggest that Mr. Tuttle would not faithfully discharge his obligations to Abercrombie's shareholders." (R. 311, Opinion & Order of 03/12/2009, at 8.)

Here, the Majority Panel essentially held that a friendship between Tuttle and Singer, that normally would not be improper, became improper through Tuttle's additional, cautionary step of recusal. The Panel has created a new

exception to settled Delaware law that does not stand to reason. If the Majority had applied well-settled Delaware law, followed throughout the United States, it would have found that Tuttle's friendship with Singer did not mar his independence.

**C. The Panel Majority's failure to consider Brisky's independence conflicts with Delaware law.**

The conclusion that the entire SLC lacked independence because of the recusal by Tuttle also ignored established Delaware law permitting one-member SLCs. *Booth*, 2011 U.S. App. LEXIS 6814, at \*22 ("Delaware expressly authorizes committees containing one member.") (citations omitted). As the dissent highlighted, *id.* at \*39, Delaware law clearly permits one member SLCs, *see Sutherland v. Sutherland*, 958 A.2d 235 (Del. Ch. 2008), and also permits a division of labor within a multiple-member SLC. *See St. Clair Shores*, 2008 WL 2941174, at \*8. Yet, the Panel Majority did not consider this issue. Because of this, the Majority erred in failing to determine whether Brisky—as a one-member SLC—was independent, concluding that analysis of her conduct was "unnecessary in light of Tuttle's taint." *Id.* at \*29.

The entire Abercrombie Board knew that Brisky analyzed and decided matters affecting Mr. Singer—and the SLC Report said exactly so. (Appx. 76-229, Report of Special Litigation Committee, at 11 n.5.) Delaware law dictates that

Brisky's independence should have been examined. Thus, by failing to do so, the Panel Majority's opinion falls further into error.

**V. CONCLUSION**

For all these reasons, Abercrombie respectfully requests rehearing en banc.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 19, 2011, I filed the foregoing with the Court's electronic filing system, which will serve electronic notice to all parties of record.

s/ Philip A. Brown

An attorney for Nominal Defendant-  
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