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Hirt v. U.S. Timberlands Service Company, LLC, et al., C.A. No. 19575
Bowers v. Rudey, et al., C. A. No. 19577
Cutler v. Rudey, et al., C.A. No. 19578
Eberlin, -et al. v. Rudey, et al., C.A. No. 19584
Susser v. Rudey, et al., C.A. No. 19592
Tisch v. Rudey, et al., C. A. No. 19608
Kosseff v. Rudey, et al., C.A. No. 19613
Obstfeld v. Rudey, et al., C.A. No. 19632

Submitted: June 18, 2002
Decided: July 3, 2002
Revised: July 9, 2002

Dear Counsel:

On June 18, 2002, the court heard argument in these eight consolidated actions on cross-motions to appoint lead counsel, one made by Harry R. Eberlin (a named plaintiff in C.A. No. 19584) and the other by Harold Hirt (the named plaintiff in C.A. No. 19575). Having considered the matter further, the court has decided to grant Eberlin's motion and deny Hirt's.

Eberlin seeks the joint appointment of the law firms of Stull, Stull & Brody and Abbey Gardy LLP as plaintiffs' lead counsel. Eberlin's affidavit discloses that he is the owner of 134,000 common limited partnership units of defendant U.S. Timberlands Company, L.P. According to his brief, this represents approximately 1.1 percent of the public interest in Timberlands and has a value of approximately $387,500. Eberlin's motion is supported by six of the eight groups of lawyers representing the plaintiffs in these actions. Hirt, of course, opposes Eberlin's motion and seeks the appointment of his counsel, Bull & Lipshitz, LLP, as sole lead counsel. It appears from the record that Hirt has only a relatively modest holding in the issuer. None of the other plaintiffs or their counsel support Hirt's application.[1]

[1] Apparently, one group of plaintiffs take no position on the cross-motions.

These cases all concern a proposed buy-out transaction of the public interest in Timberlands. These are the second series of such actions that have been filed in this court. The first were filed in 2000 and related to an earlier proposal to accomplish a similar transaction. Because that proposal stalled, those earlier cases were never pursued and were eventually dismissed at the urging of the court. Shortly thereafter, the buy-out proposal was revived and the second round of cases filed.

Much of Hirt's argument relating to the organization of the new cases consists of attack on the organization of the earlier cases, in which his lawyers competed unsuccessfully to be appointed co-lead counsel with Abbey Gardy. Hirt complains that the vote taken on that proposal was unfairly influenced by a proliferation of cases brought by plaintiffs and lawyers allied with Abbey Gardy. Hirt also complains that those earlier cases were not vigorously pursued.

In my view, issues relating to the organization of the earlier litigation are of only limited relevance to the pending motions. In particular, I note that a number of the law firms involved in the earlier cases are not, as least as of this date, involved in the cases now pending. Included among these missing firms are the two who originally supported Bull & Lipshitz as co-lead counsel with Abbey Gardy. Similarly, there are several firms involved in the pending cases that had no role in the earlier cases and who

either support the decision to appoint Abbey Gardy and Stull, Stull & Brody as co-lead counsel in the new cases or (in one case) take no position on the issue.

I am also not persuaded by Hirt's arguments that the earlier cases were not vigorously prosecuted. The fact is that those cases related principally and directly to a management buy-out proposal that stalled. There was no ripe claim to litigate and any effort to move those cases forward would properly have been met by motions to dismiss and stay discovery. In fact, in response to an inquiry from the court, the parties properly agreed to a voluntary dismissal without prejudice. It was mere coincidence that the latest buy-out proposal was announced only one month later, prompting the filing of the new complaints.

It is the usual experience when multiple related class and derivative actions are filed in this jurisdiction that the plaintiffs and their counsel are able to negotiate acceptable governance structures for the management of the litigation without involving the court in that process. Nevertheless, as has been observed, it is "occasion[ally] . . . necessary for the court to manage class litigation to the extent of designating lead counsel."[2]

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[2] *Silverstein v. Warner Communications, Inc.*, 1991 WL 12835 (Del. Ch. 1991) (citing 5C WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1206 (1990)).

The court has had the opportunity on those occasions to address the factors that should be considered in ruling on a motion to designate a lead plaintiff or to appoint lead counsel. These may be summarized as follows:

- the "quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs;"[3]
- the relative economic stakes of the competing litigants in the outcome of the lawsuit (to be accorded "great weight");[4]
- the willingness and ability of all the contestants to litigate vigorously on behalf of an entire class of shareholders;[5]
- the absence of any conflict between larger, often institutional, stockholders and smaller stockholders;[6]
- the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit;'
- competence of counsel and their access to the resources necessary to prosecute the claims at issue.*

The court has also recognized that no special weight or status will be accorded to a lawsuit "simply by virtue of having been filed earlier than any other pending action."'

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[3] *TWC Technology Limited Partnership v. Intermadia Communications, Inc.*, 2000 WL 1654504 (Del. Ch. *2000); In re SFX Entertainment, Inc. Shareholders Litig.*, Consol. C.A. No. 17818, Steele, V.C. (Apr. 25, 2000) (ORDER).

[4] *TWC Technology* at *4.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Court of Chancery Rule 23(a) (ability of representative parties to "fairly and adequately protect the interests of the class" a prerequisite to class action certification); *Youngman* v. *Tahmoush*, *457* A.2d 376 (Del.Ch. 1983) (derivative plaintiff must be qualified to act in fiducairy capacity on behalf of corporation and its stockholders .) .

[9] *TCW* at *3.

In addition, the court recognizes that it is customary and desirable, where multiple lawsuits are filed relating to the same transaction or set of facts, for the plaintiffs' lawyers involved to meet and vote on an organizational structure for the prosecution of the litigation. While such a decision is not binding on the court, it will be accorded weight when the outcome is challenged by one or more of the litigants or their counsel, unless it appears to have been improperly obtained. In his motion, .for instance, Hirt claims that the vote to organize the original suits was wrongly influenced by the vote of a lawyer who was retained separately to represent a regular client of Abbey Gardy and, thus, is said to have lacked independence of that firm. Although this charge is controverted, the court sees no reason to form any conclusions about it, both because the conduct at issue relates to the earlier suits and because the consensus of the plaintiffs' counsel in the pending suits is obviously not the product of the improper conduct alleged. As a general matter, however, the court assumes that plaintiffs' counsel are, as a rule, fully aware of the problems associated with the conduct that is alleged and are capable of neutralizing its effect on the process of selecting lead counsel. Where that is not the case, the court will give no weight to the improperly procured or influenced vote of plaintiffs* counsel.

Weighing all of these factors leads the court to grant Eberlin's motion and deny Hirt's cross-motion. The pleadings are all similar in quality and, in cases of this sort, discrepancies are often eliminated by the filing of a consolidated complaint incorporating the strongest elements of the various complaints on file. Eberlin has a very substantial economic stake in the outcome of the litigation, one that is far greater than Hirt's. There is also no suggestion that the size of Eberlin's stake gives rise to any conflict of interest between him and the other members of the putative class. Finally, the other factors, including the lopsided preference of the group of plaintiffs' counsel as a whole, all either favor Eberlin's choice of lead counsel or favor neither moving party.

For these reasons, plaintiff Eberlin is directed to submit an appropriate form of order within 10 days of the date of this opinion consolidating these actions and appointing counsel in accordance with this decision.

Very truly yours,

Stephen P. Lamb

OC: Register in Chancery