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VICE CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: February 6, 2012
Decided: February 7, 2012

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Re: *In re Delphi Financial Group Shareholder Litigation*,
Consol. C.A. No. 7144-VCG

Dear Counsel:

The following is my decision on Plaintiff Oklahoma Firefighters Pension and Retirement System's ("Oklahoma Firefighters") "Motion to Vacate Stipulated Leadership Structure and Appoint Lead Plaintiff and Lead Counsel." Oklahoma Firefighters seeks appointment as lead plaintiff representing the Class A stockholders of Delphi Financial Group ("Delphi") and appointment of its counsel, Prickett, Jones & Elliott, P.A. ("Prickett Jones"), and Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz," and together with Prickett Jones, "Oklahoma Firefighters' Counsel"), as co-lead counsel, alongside current lead counsel Grant & Eisenhofer P.A ("G&E"),

Robbins Geller Rudman & Dowd LLP (“RGRD”), and Bernstein Litowitz Berger & Grossmann LLP (“BLBG,” and together with G&E and RGRD, “Consolidated Plaintiffs’ Counsel”).¹ At the conclusion of the February 2, 2012, teleconference regarding that Motion, I requested that the parties attempt in good faith to negotiate a leadership structure that would be acceptable to all involved, in recognition of the fact that the participating law firms should have a better idea than the Court of what structure they can employ to best serve the plaintiff class. The parties have notified me that their attempts to reach an amicable result have failed, leaving the determination of lead counsel to the Court. Based on my analysis below, I appoint Oklahoma Firefighters’ Counsel as co-lead counsel alongside Consolidated Plaintiffs’ Counsel. Counsel should file an amended consolidated complaint incorporating the strongest statement of the case of the plaintiff class.

In resolving a dispute over the lead counsel position, “the Court’s overriding goal is [to] establish a leadership structure that will provide

¹ In its initial briefing, Oklahoma Firefighters sought to have the Court name Prickett Jones, Kessler Topaz, and G&E as co-lead counsel, to the exclusion of BLBG and RGRD, who are currently in place as co-lead counsel alongside G&E per my January 4, 2012, Order for Consolidation and Appointment of Co-Lead Counsel. At the February 2, 2012, teleconference, however, Oklahoma Firefighters’ counsel acknowledged that BLBG and RGRD had already performed significant work for the class, and therefore informed me that they no longer seek to remove any of the firms currently in place as lead counsel, but rather seek appointment as co-lead counsel alongside the firms already in place.

effective representation” to the stockholder class.² The well-known *Hirt* factors provide the Court with guidance in reaching a decision that achieves that objective. Those factors include:

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

I note that these factors, rather than being a scorecard whereby the Court, after checking the boxes, can crown a “winner,” are really guideposts in the Court’s analysis of the primary issue, i.e., which leadership structure will ensure the most effective representation of the interests of the plaintiff class. A plaintiff’s firm does not “win” the lead counsel spot by accumulating the most “points,” as it might by demonstrating that its client owns the most shares or that it has litigated the most dual-stock cases. Instead, each factor

² *In re Del Monte Foods Co. S’holders Litig.*, 2010 WL 5550677, at *6 (Del. Ch. Dec. 31, 2010).

³ *Hirt v. U.S. Timberlands Service Co. LLC*, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002) (citations and quotation marks omitted) (citing *TWC Tech. Ltd. P’ship v. Intermedia Commc’ns, Inc.*, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000)).

is given weight only to the extent that it bears on the ultimate question of what is in the best interests of the plaintiff class. With those considerations in mind, I now address the issues raised by the competing law firms.

Quality of Pleadings

The quality of the pleadings is relevant for two reasons. The first is obvious, and it is that a demonstrably superior complaint is more likely to represent the interests of the plaintiff class and more likely to produce a successful outcome. The second reason the quality of the pleadings is relevant is because each complaint demonstrates the competence and investigative diligence of the counsel who filed it. As such, where one complaint is stronger than another, this Court will not discount that complaint's strength on the grounds that the "other plaintiffs' counsel could amend their complaints to incorporate its allegations."⁴ Allowing other lawyers to "free ride by copying a well-crafted complaint" diminishes the incentive for the lawyer filing the superior complaint to diligently investigate and plead good cases in the future.⁵

⁴ *Del Monte*, 2010 WL 5550677, at *9.

⁵ *Id.*

Oklahoma Firefighters asserts four differences that allegedly set its complaint apart from those filed by the Consolidated Plaintiffs.⁶ First, Oklahoma Firefighters' complaint seeks declaratory judgment as to whether disputed features of the overall deal attacked by all Plaintiffs—including the amendment to Delphi's Certificate of Incorporation, the additional consideration to be paid to Robert Rosenkranz for his Class B shares and options, and the payment of the pre-merger special dividend ("Special Dividend")—are elements of value arising from the accomplishment or expectation of the Delphi-Tokio Marine Holdings, Inc., merger ("Merger"), which in turn could affect the value of the exercise of appraisal rights. The Oklahoma Firefighters' complaint asserts that the Class A stockholders will face uncertainty, absent a ruling from this Court, in deciding whether to sell their shares in the market, approve the Merger, or seek appraisal. Second, the Oklahoma Firefighters' complaint alleges that the payment of disparate consideration on the Class B options and restricted stock is improper because the total voting power of Class B stock cannot exceed 49.9%. Third, the Oklahoma Firefighters' complaint raises several subsidiary issues with respect to the payment of the Special Dividend on all stock options and

⁶ I compare the complaint of Oklahoma Firefighters with the complaints originally filed by each of the Consolidated Plaintiffs and not the Consolidated Plaintiffs' amended complaint because the latter was filed after Oklahoma Firefighters' complaint.

restricted stock units, which Oklahoma Firefighters alleges violates Delphi's equity plans and the Delaware General Corporation Law, demonstrates that the Delphi directors are improperly interested in the transaction, and creates a new category of damages. Fourth, Oklahoma Firefighters claims that only its complaint recognizes that because the Merger converts the Class B stock into Class A stock, Rosenkranz's disparate consideration is contractually unavailable.

Except for the fourth item, which I find is comparably alleged in the Consolidated Plaintiffs' complaints, the above differences are marginal improvements over the complaints filed by the Consolidated Plaintiffs. Although in some respects these marginal differences simply add color and particularity to the pleadings of the Consolidated Plaintiffs, I find that they also demonstrate that Oklahoma Firefighters' Counsel have worked diligently in investigating and pleading the case of the Class A stockholders; therefore, I find that there is a role for them in this litigation that would provide some benefit to the plaintiff class.

Ability and Vigorousness

Both groups of counsel are well know to this Court as among the most able, experienced, and energetic practitioners of corporate law. I reject any notion that one group's experience in this type of case gives it an advantage

over the other group. I also do not find the vigor of counsel on either side to be lacking, nor do I find that either side has demonstrated a level of vigor that would warrant the exclusion of the other side. To avoid rushes to the courthouse, this Court accords no special weight or status to the first-filing plaintiff.⁷ Moreover, neither side here accuses the other of lacking the requisite vigor in prosecuting this lawsuit. Rather, Oklahoma Firefighters' counsel asserts that it has demonstrated the appropriate level of vigor, while Consolidated Plaintiffs' counsel argues that interfering with the leadership structure currently in place would prejudice the interests of the plaintiff class. I agree that Oklahoma Firefighters' Counsel has shown adequate "vigor." Additionally, although I acknowledge the effort and expense of Consolidated Plaintiffs' lead counsel thus far, I will not reward their first-filing status by accepting their argument that such preliminary efforts necessitate the exclusion of Oklahoma Firefighters' Counsel. Any prejudice to the plaintiff class may be avoided by appointing Oklahoma Firefighters' Counsel as co-lead counsel and not removing current lead counsel. I am confident that counsel are able to resolve amicably and in the best interests of their clients whatever differences they may have regarding litigation strategy and their respective roles.

⁷ See *Hirt*, 2002 WL 1558342, at *2 (citing *TWC*, 2000 WL 1654504, at *3).

Conflict, Resources, and Relative Economic Stakes

No conflict exists, so far as the record discloses, preventing any of the competing firms from litigating this matter fully, nor does either group appear unable to devote the necessary effort and resources to this litigation. Further, I do not find dispositive the differences in the Plaintiffs' respective ownership stakes. Although Oklahoma Firefighters owns a somewhat larger stake than that of the Consolidated Plaintiffs, this Court does not "simply add up the number of shares and select the law firm with the largest absolute representation."⁸ The "economic stake" factor recognizes that the plaintiff with the most at stake typically has the greatest incentive to monitor counsel and ensure effective prosecution of the lawsuit.⁹ Here, however, the Plaintiffs are all institutional investors, each owning a relatively small stake in Delphi. Thus, their relative economic positions are immaterial to my decision here, as I do not find that the interests of the plaintiff class are better served by Oklahoma Firefighters' leadership versus that of the Consolidated Plaintiffs.

Conclusion

After evaluating carefully the arguments and the record, it appears that adding Oklahoma Firefighters and its counsel to the lead in this matter

⁸ *Wiehl v. Eon Labs*, 2005 WL 696764, at *3 (Del. Ch. Mar. 22, 2005).

⁹ *See Del Monte*, 2010 WL 5550677, at *6.

adds small but cognizable value to the plaintiff class. Oklahoma Firefighters' Counsel seek to be added as co-lead counsel, believing they can work effectively with Consolidated Plaintiffs' Counsel to further the interests of the class. Consolidated Plaintiffs' Counsel opposes further addition of lead counsel, questioning the ability of all counsel to work productively together. When asking counsel to attempt to settle this matter, I had anticipated, should the matter require judicial intervention, retaining only one set of counsel as lead, under the conviction that an army without a general constitutes a mob. In a submission indicating that the two groups had not settled the matter, however, counsel for the Consolidated Plaintiffs informed me that the two sides *had* conversed and reached agreement that there was a role that Oklahoma Firefighters' Counsel could productively play in this litigation, and that the remaining differences were minor and could be worked out among counsel going forward, but that settlement of the issues had not been possible given the press of work remaining before trial. Having that assurance, I am sanguine that these parties can work productively together as co-lead counsel. Given that conviction, I find that the addition of the movant's counsel as co-lead counsel is likely to add value to the plaintiff class's case.

Accordingly, the motion of Oklahoma Firefighters is granted, and my order of January 4, 2012, is vacated to the extent incompatible with this Opinion. The parties should supply an appropriate form of order. To the extent the foregoing requires an order to take effect, IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III