

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

STEPHEN P. LAMB
VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: December 28, 2007
Decided: January 4, 2008

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***RE: In re BEA Systems, Inc. Shareholders Litigation
C.A. No. 3298-VCL***

Dear Counsel:

I have reviewed and considered the arguments advanced in connection with the pending motion to reconsider the court's December 5, 2007 Order Amending the Consolidation Order. I conclude that the best course is to consider anew the question of the appointment of lead counsel. Thus, both the December 5 order and the lead counsel provisions of the initial consolidation order will be vacated. If, after conferring, counsel for the various plaintiffs are unable to reach agreement on

a new organizational structure, I will resolve the matter based on the factors identified in relevant Delaware precedent, on a schedule to be established. My reasons for reaching this conclusion are briefly stated as follows.

Procedural Posture

There are now three purported class action complaints pending in this court, all related to the same transaction. Mr. Long's office filed the first two complaints within hours of each other on October 12, 2007, the very day the markets reported an unsolicited takeover bid for BEA. Not surprisingly, the second complaint bears substantial similarity to the first, although it omits some of the detail found in the first. The third complaint was filed on October 31, 2007 by Mr. Fioravanti. That complaint also relates to the unsolicited bid, but includes allegations relating to the interim developments.

The current dispute arises out of lead counsel provisions found in the consolidation order Mr. Long's office submitted for the court's consideration on October 26, 2007, without a formal motion and without a brief. The court entered that order routinely on the next business day, acting on the representation that the matter was unopposed and the belief that good grounds existed to do so. The lead counsel provisions of that order are found in paragraph 4 and name Faruqi & Faruqi LLP of New York City and Brower Piven of Baltimore (the out-of-state law

firms involved in filing the first two complaints) as co-lead counsel, and name Rigrodsky & Long P.A. of Wilmington as liaison counsel. The consolidation order further provides that each new case filed in this court arising out of the same transaction shall be made a part of the consolidated action and shall be governed by the terms of the consolidation order (including its lead counsel provision), unless an objection thereto is made within 10 days of service of a copy of that order.

Acting within the terms of the consolidation order, Mr. Fiorvanti filed a motion to reconsider on November 13, 2007, principally seeking to change the lead counsel designation to include his firm, Prickett, Jones & Elliot P.A., and to exclude the Brower Piven firm. No response having been filed, on November 27, 2007, Mr. Fiorvanti submitted a proposed form of order to implement the relief sought in his motion. When no response was made to that additional submission, the court entered Mr. Fioravanti's proposed order on December 5, 2007, modifying the lead counsel provision of the consolidation order.

The original plaintiffs promptly moved for reconsideration of the December 5 order. In both their December 6 letter and a subsequent filing, the original plaintiffs explain their initial failure to respond to the motion to modify the consolidation order as the result of an understanding they say was obtained from the court's staff that the court would circulate a letter asking counsel for a briefing

schedule. They offer no explanation for their failure to respond to Mr. Fiorvanti's November 27 letter and proposed form of order.

Discussion

While the appointment of lead counsel is useful and necessary when multiple lawsuits arising out of the same transaction are filed in this court, the court is aware that the practice can be subject to abuse by those who file prematurely and seek to use the lead counsel designation as a means to exclude others from playing a lead role in litigation. Where, as is often the case, a proposed consolidation order is uncontested, the lead counsel designation provisions will only reflect whatever arrangement the existing group of plaintiffs' lawyers have agreed to among themselves. In addition, in such a case, the court will often enter the order as a matter of routine and without the benefit of any exposition of the advantages or disadvantages of the provisions designating either lead plaintiffs or lead counsel. Thus, when another complaint is thereafter filed, even if it is a stronger complaint and even if that plaintiff or its counsel has some advantage as a representative over those already appointed, the burden is cast on the latecomers to overturn the existing order.

In this case, the initial complaints were filed the very day news of an unsolicited takeover bid was made public. In the intervening three months, no

motion for expedited proceedings has been made and, judging from the docket, no substantial litigation activity has been undertaken apart from the entry of an order providing for the confidential treatment of discovery materials. Notably, initially-appointed lead counsel have not filed a consolidated complaint, although directed to do so “[a]s soon as practicable” in paragraph 4 of the consolidation order. From all of this, it may be inferred that the almost immediate filing of the proposed order of consolidation in this case was done to solidify or give primacy to the position of the prompt filers and to exclude or make secondary those who filed later, even as more information emerged suggestive of a cause of action. Certainly, there was no litigation-driven reason to impose a form of organization at so an early time.

It is also the case that I entered the initial consolidation order as a matter of routine practice, unaware of its prematurity and without the occasion to consider whether some other lead counsel arrangement should be preferred.

In the circumstances, I conclude that the best course of action is to vacate both the December 5 order and paragraph 4 of the original consolidation order. While I could now rule on the question of appointing lead counsel on the basis of the submissions made to date, I direct that all plaintiffs’ counsel meet in an effort to agree upon new lead counsel provisions. In that effort, counsel should, of course, focus on the criteria the court will apply if agreement is not reached.

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Counsel are further directed to advised the court of the outcome of the meeting

within 7 days of the date hereof. IT IS SO ORDERED.

/s/ Stephen P. Lamb

Vice Chancellor