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Re: *Dutiel v. Tween Brands, Inc., et al.*
Civil Action No. 4743-CC
Hirsh v. Rayden, et al.
Civil Action No. 4845-CC

Dear Counsel:

Plaintiff Cheryl Dutiel seeks reargument of the Court's Letter Opinion of October 2, 2009[1] (the "Letter Opinion") appointing Levi & Korsinsky, LLP ("L&K"), the counsel for Plaintiffs Edward Hirsh, Claire Rand, and Sarah Elliott ("Ohio Plaintiffs"), as lead counsel rather than Rigrodsky & Long, P.A. ("R&L"). For the reasons set forth briefly below, I deny Dutiel's motion for reargument.

[1] *Dutiel v. Tween Brands, Inc.*, 2009 WL 3208287 (Del. Ch. Oct. 2, 2009).

I. BACKGROUND

On June 25, 2009, Tween Brands Corporation and Dress Barn, Inc. announced an agreement under which a subsidiary of Dress Barn will merge with Tween Brands in a stock-for-stock transaction.

On June 29, 2009, Claire Rand filed in the Franklin County Common Pleas Court, Columbus, Ohio, a putative class action challenging the Proposed Merger. On July 8, 2009, Sarah Elliott likewise filed a putative class action against Tween Brands in the Franklin County Court. And on August 4, 2009, Edward Hirsh also filed a putative class action against Tween Brands in the Franklin County Court.

At some point in time after August 4, the plaintiffs and their legal counsel in these three actions (the "Ohio Actions") "agreed among themselves to cooperate, for the benefit of the Class and for the convenience of the Court and all parties concerned."[2] Before Ohio Plaintiffs filed an amended complaint, Defendants in the Ohio Actions filed Motions to Dismiss or Stay the Ohio Actions, and "argued in their motion papers that they wished to have any actions concerning the Proposed Merger proceed in Delaware, the state of Tween Brands' incorporation."[3] Ohio Plaintiffs agreed with Defendants, filed a combined putative class action complaint in Delaware on August 28, 2009, and voluntarily dismissed the Ohio Actions without prejudice during the week of August 31, 2009.

On July 17, 2009—several weeks before Ohio Plaintiffs filed their combined putative class action complaint in Delaware, but after two of the three Ohio actions had been filed—Dutiel brought a putative class action in Delaware against Tween Brands, Dress Barn, and Tween Directors.

Dutiel and Ohio Plaintiffs both sought consolidation of the two Delaware Actions and appointment of lead counsel. The Court consolidated the two Delaware Actions, appointed Ohio Plaintiffs as lead plaintiffs, and appointed L&K as lead counsel.[4] Dutiel now seeks reargument concerning the Court's decision to appoint L&K as lead counsel rather than R&L (Dutiel's chosen counsel).

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[2] Ohio Pls.' Mot. for Consolidation and Appointment of Lead Counsel, and Resp. to Mot. of Pl. Dutiel ("Ohio Pls.' Mot.") 5.
[3] *Id.* at 6.
[4] *See Dutiel*, 2009 WL 3208287.

II. ANALYSIS

As has been previously noted, "[t]he standard applicable to a motion for reargument is well settled."[5] To meet the standard and "obtain reargument, 'the moving party [must] demonstrate that the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law.'"[6] Further, the misunderstanding or misapplication "must be such that 'the outcome of the decision would be affected.'"[7] The motion is "not a mechanism for litigants to relitigate claims already considered by the court,"[8] nor is it intended "to offer a forum for disgruntled litigants to recast their losing arguments with new rhetoric."[9] Ultimately, the motion and the relief tied to it are "available to prevent injustice."[10]

No injustice has occurred here. Dutiel has failed to meet the standard applicable to a motion for reargument.

Dutiel contends the Court committed four errors in failing to appoint R&L as lead counsel. Two of these supposed errors relate to the misunderstanding of a material fact, and two relate to the misapplication of the law. All four contentions are themselves erroneous and appear to be based on Dutiel's misunderstandings and misapplications of settled Delaware law.

Dutiel first suggests the Court mistakenly based its Letter Opinion on the strong desire of Ohio Plaintiffs' counsel to act cooperatively, when as a matter of fact there was no such desire among Ohio Plaintiffs' counsel.[11] This assertion is simply false. The Court made no determination regarding the strength of the desire

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[5] *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007).
[6] *Deloitte & Touche USA LLP v. Lamela*, 2006 WL 345007, at *2 (Del. Ch. Feb. 7, 2006) (quoting Goldman v. Pogo.com Inc., 2002 WL 1824910, at *1 n.1 (Del. Ch. July 16, 2002)).
[7] *Deloitte & Touche USA LLP v. Lamela*, 2006 WL 345007, at *2 (Del. Ch. Feb. 7, 2006) (quoting Stein v. Orloff, 1985 WL 21136, at *2 (Del. Ch. Sept. 26, 1985).
[8] *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000).
[9] *Fisk Ventures, LLC v. Segal*, 2008 WL 2721743, at *1 (Del. Ch. July 3, 2008).
[10] *In re ML/EQ*, 2000 WL 364188, at *1.
[11] *See* Pl.'s Mot. for Reargument 3 ("A strong desire to act cooperatively, however, did not drive counsel for the Ohio Plaintiffs to work with one another, and reliance on any such claim of cooperation is unjustified.").

to cooperate among counsel for Ohio Plaintiffs.[12] Rather, the Court noted it is "important to recognize the representation that Ohio Plaintiffs' counsel has [sic] already forged among the many law firms involved in the Ohio Actions."[13] That is, counsel for Ohio Plaintiffs had already worked together to elect a representative from among their many members for the purposes of their Delaware litigation and their motion to appoint lead counsel. The Court did not reach *any* conclusion beyond that obvious fact. After reviewing the entirety of its Letter Opinion, the Court has failed to uncover the source of Dutiel's contention that the Court relied on any finding or belief—or even made any finding or formed any belief—relating to how strongly counsel for Ohio Plaintiffs desired to act cooperatively.[14]

Dutiel next suggests it is a matter of irrefutable fact that the quality of her counsel's pleadings is superior: "The Court also misapprehends the facts applicable to the decision in that it did not determine that Plaintiff Dutiel's operative complaint was superior."[15] Dutiel's confidence evidently arises from the similarity between counsels' complaints,[16] as well as the relatively fewer, and in Dutiel's mind therefore more meritorious, disclosure issues found in Dutiel's pleadings.[17] I will not address the former source of Dutiel's confidence, other than to wonder if there is precedent for isometry resulting in lower legal quality. As to the latter source of confidence, although it is entirely possible that future stages of this litigation will involve a paring down of the number of asserted disclosure issues, recognition of that possibility should not be tantamount to a finding that a higher number of disclosure claims necessarily is indicative of lower quality pleadings. Dutiel's argument is meritless.

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[12] Dutiel clearly conjures up this reliance, but in doing so she does not specify the range of time over which she presumes the Court to believe cooperation occurred. The Court declines to hypothesize here what specific time period Dutiel may have considered.

[13] *Dutiel v. Tween Brands, Inc.*, 2009 WL 3208287, at *2 (Del. Ch. Oct. 2, 2009).

[14] This Court appreciates holiday festiveness and cheer, but even at this time of year, it is best not to dress up or disguise a court's legal reasoning.

[15] Pl.'s Mot. for Reargument 8.

[16] *See* Pl.'s Mot. for Reargument 9 ("The Ohio Plaintiffs likely agreed as to the quality and materiality of [Plaintiff Dutiel's disclosure claims], because they asserted similar claims in their Amended Complaint….").

[17] *Id.* (noting "that a scattershot approach is rarely beneficial and thus, of the twenty-five allegations of material omissions [asserted by Ohio Plaintiffs], a great many likely are devoid of merit or are of marginal significance.").

Dutiel also contends the Court has misapplied a legal precedent, "[t]o the extent that the Court based its decision to appoint the Ohio Plaintiffs' selection as lead counsel for plaintiffs on the basis that the Ohio Plaintiffs had a greater economic interest."[18] Dutiel cites precedent that states "*relative* economic stakes are given great weight, not simply economic stakes."[19] This precedent effectively is comprised of three cases: *TCW Tech. Ltd. P'ship v. Intermedia Comm's, Inc.*,[20] *Hirt v. U.S. Timberlands Serv. Co. LLC*,[21] and the case Dutiel cites, *Wiehl v. Eon Labs*.[22] In *TCW Tech.*, this Court opined that courts "should give weight to the shareholder plaintiff that has the greatest economic stake in the outcome of the lawsuit."[23] The *Hirt* Court, citing the great weight spoken of in *TCW Tech.* and ultimately appointing as lead plaintiff the plaintiff before the court that had the larger economic stake, said that *one factor* to consider in ruling on a motion to designate a lead plaintiff or to appoint lead counsel is "the *relative* economic stakes of the competing litigants in the outcome of the lawsuit."[24] The *Wiehl* Court in turn cited to the criterion of relative economic interest as it conducted an analysis of three plaintiffs' shareholdings and found that "each of the plaintiffs' respective stakes in [the company] is minuscule."[25]

In contending that this Court has misapplied Delaware law, Dutiel relies on the *Wiehl* Court's interpretation of "relative economic interest." As titillating a source of support as that interpretation may have seemed, the reliance—and subsequent criticism of the Letter Opinion—is fraught with error. First, the *Wiehl* Court's own analysis was not one based on lengthy Delaware precedent, as Dutiel seems to believe. The *Wiehl* Court's analysis drew on a seemingly spontaneous reference in a single case to "relative economic interest" rather than "economic interest," and *Wiehl* itself appears to have been the first instance of a somewhat quantitative application of the terminology rather than a link in a long chain. Second, both the *Wiehl* Court's language and Plaintiff Dutiel's motion appear to confuse absolute differences with relative ones. The *Wiehl* Court sought to determine if one shareholder's stake in a company was meaningfully larger than

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[18] *Id.* at 6.
[19] *Wiehl v. Eon Labs*, 2005 WL 696764, at *3 (Del. Ch. Mar. 22, 2005) (emphasis in original).
[20] 2000 WL 1654504 (Del. Ch. Oct. 17, 2000).
[21] 2002 WL 1558342 (Del. Ch. July 3, 2002).
[22] *Wiehl*, 2005 WL 696764.
[23] *TCW Tech.*, 2000 WL 1654504, at *4.
[24] *Hirt*, 2002 WL 1558342, at *2 (emphasis added). The *Hirt* Court did not, however, provide guidance for how to consider the factor of relative economic stakes.
[25] *Wiehl*, 2005 WL 696764, at *3.

the stakes of other shareholders, *in terms of the overall size of the company*. This analysis is one involving *absolute* differences between the shareholders' stakes, not *relative* ones.[26] The *Wiehl* Court concluded each shareholder held a minuscule portion of the company, but the Court did not compare the sizes of the shareholdings *relative to one another*.[27] Third and most importantly, the motivating force behind the rulings in *TCW Tech.*, *Hirt*, and *Wiehl* is the very force this Court intended its Letter Opinion to reference, and which this Court believes to be an issue of fundamental import: the significance of an individual's stake in the litigation and the resulting incentive the individual has to participate in the litigation and monitor his or her counsel.[28]

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[26] A brief example may be illustrative. If Shareholder A holds five shares in a 100-share company and Shareholder B holds ten shares, it is correct to state that the absolute difference between their holdings is 5% (that is, Shareholder A holds a 5% stake and Shareholder B holds a 10% stake, and 10% - 5% = 5%). It is also correct to state the difference in relative terms (that is, Shareholder A's stake is 50% smaller than Shareholder B's, or, conversely, Shareholder B's stake is 100% larger than Shareholder A's). I should note, there are at least two ways of describing the relative difference between two numbers. One way is to say "10 is 100% larger than 5." Another way is to say "10 is 200% of 5." Both ways are correct. The discussion that follows relies on the first method.

[27] Simply because one examines shareholdings in terms of the overall size of the company (that is, perhaps, "relative" to the overall size of the company) does not mean one is actually examining relative differences between shareholdings, or certainly not the relevant relative differences. For example, a shareholder who holds 0.001% of a company certainly has a miniscule holding, as does a shareholder who holds 0.002% of the same company. The *Wiehl* Court stopped its analysis there. It did not compare the sizes of different shareholders' stakes relative to one another, but rather noted how similar the stakes were in the absolute sense (that is, as a percentage of the overall company). Such an analysis is not inherently flawed, but perhaps mislabeled as "relative." The Father of Relativity himself may provide Dutiel with additional guidance on the meaning of the word. As Albert Einstein is said to have explained, "Put your hand on a hot stove for a minute, and it seems like an hour. Sit with a pretty girl for an hour, and it seems like a minute. THAT'S relativity." It would be understandable if the Court's Letter Opinion were Dutiel's hot stove. What is not understandable—and what is absolutely baffling—is why Dutiel would vehemently demand an analysis of "relative" stakes, when in relative terms Ohio Plaintiffs' stake is 1100% larger than Dutiel's.

[28] *See, e.g.*, *Wiehl*, 2005 WL 696764, at *3 ("In addition, Prickett's client owns 1,000 shares having a market value in excess of $30,000. One supposes that this investment is of some significance to Huntsinger, an individual investor, and would cause him to monitor his counsels' conduct of the litigation."). Note that such a determination is made entirely in absolute terms, not relative ones, and actually did not favor the plaintiff with the higher economic interest; regardless of the fact that Prickett's client held fewer shares than the other plaintiffs seeking to be appointed lead plaintiff, Prickett's client's holdings were sufficiently large to convince former

To be clear, I am not advocating a bright-line rule with regard to any of the aforementioned factors. I am not proposing that this Court necessarily award lead-plaintiff status to the plaintiff with the highest absolute economic stake. I am not proposing that this Court necessarily conduct an analysis of relative stakes and award lead-plaintiff status to a plaintiff whose economic stake is much higher than another plaintiff's stake in relative terms, regardless of the absolute difference.[29] And I am not setting a specific dollar amount on the stake I believe a plaintiff must have in order for this Court to be confident the plaintiff will take an active interest in the outcome of the litigation. Despite Dutiel's assertion to the contrary,[30] what I am doing is examining, applying, and upholding Delaware law. Our precedent clearly holds that the Court should consider several factors when deciding which plaintiff the Court will appoint as lead plaintiff.[31] In the Letter Opinion, I listed these criteria and applied them to the facts of this case. For several of the factors, the race between potential lead plaintiffs was too close to call. But in no way do such close races mean the plaintiffs never even had the opportunity to lace up their shoes.

Vice Chancellor Lamb that Huntsinger would be actively, vigorously, and zealously involved in the litigation.

[29] Again, an example may be helpful. If the economic values of two shareholdings are small, a large relative difference may mask a near meaningless difference in absolute values. Such would be the case if Shareholder A held one share in a company, Shareholder B held ten shares in the same company, and each share was worth $1. In that case, even though Shareholder B's shareholdings are 900% larger than Shareholder A's in relative terms, the absolute difference is only $9. A court would likely be correct in feeling "well, $9 really is not that important a difference." Imagine, though, if Shareholder A held nine shares, Shareholder B held ten shares, and each share was worth one million dollars. Shareholder B's shareholdings are now only 11% larger than Shareholder A's in relative terms, but underlying that 11% is an absolute difference of one million dollars. A court may not be so quick, or correct, to deem the absolute difference unimportant.

[30] *See, e.g.*, Pl.'s Mot. for Reargument 7 (submitting "that the imposition of an analysis based heavily on absolute economic terms also represents a misapplication of the law," and citing to *TCW*'s holding that a court should consider multiple criteria when considering which counsel to appoint as lead counsel). Not only does Dutiel erroneously contend that the Court's Letter Opinion relied on absolute economic stakes, but she also errs in contending that the Court did not consider other criteria.

[31] *Dutiel v. Tween Brands, Inc.*, 2009 WL 3208287, at *1 (Del. Ch. Oct. 2, 2009) (citing *TCW Tech.*, 2000 WL 1654504, at *4).

III. ON INCENTIVES AND ETHICS

Finally, Dutiel believes "the decision set forth in the Letter Opinion will create unfavorable precedent that will invite abuse and waste of this Court's valuable judicial resources."[32] According to Dutiel, my October 2, 2009 decision is one "that will encourage certain plaintiffs who routinely file elsewhere to game the system and seek a second bite at the apple when they are shut out in a competing jurisdiction."[33] Further, Dutiel believes "it should not be the policy of this State or this Court to reward parties and lawyers who invoke this Court's name in a 'fishing' press release and then file elsewhere, only to return here after determining that their action is going to be stayed or dismissed."[34]

I do not see how the Letter Opinion provides incentives for the kind of behavior Dutiel has described. Nowhere in the Letter Opinion did I give any weight to where Ohio Plaintiffs filed or to what press releases L&K did or did not include on their website. Dutiel simply has created a straw man—accusing the Court of incentivizing bad behavior—and then purports to knock it down. Yet the Court has provided no incentive for abusive behavior. At most, the Court has declined—and continues to decline—to penalize a litigant because his or her counsel filed in another jurisdiction. The initial location of filing cannot be a principled basis for this Court to resolve lead counsel disputes. Yet this appears to be the gist of Dutiel's disagreement with the Court: that only Delaware firms who file class or derivative actions exclusively in Delaware may serve as lead counsel in Delaware, and any firm that has the gall to file in another jurisdiction is disabled from serving as lead counsel here. The answer to the question—who should serve as lead counsel?—is independent of filing proclivities, and focuses more on which counsel is most likely to defend the class vigorously and zealously. Likewise, the issue of online press releases did not bear upon the Court's decision. It is not the Court's role to serve as a "professionalism policeman" for the shareholder plaintiffs' bar. Nor does Dutiel point to any authority or basis for such a role. If Dutiel believes the issuance of online press releases poses an ethical problem, her counsel should report the conduct to appropriate disciplinary counsel.

[32] Pl.'s Mot. for Reargument 2.
[33] *Id.* at 5.
[34] *Id.* at 6 n.7.

IV. CONCLUSION

After reviewing Dutiel's motion for reargument, Ohio Plaintiffs' opposition to Dutiel's motion, and relevant Delaware law, I conclude that Ohio Plaintiffs should be lead plaintiffs, and, accordingly, Levi & Korsinsky, LLP should be lead counsel. I deny Dutiel's motion for reargument.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:bjt