EFiled: Dec 31 2010 2:04PM EST
Transaction ID 35134440
Case No. 6027-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE DEL MONTE FOODS COMPANY SHAREHOLDERS LITIGATION	)	CONSOLIDATED C.A. No. 6027-VCL

MEMORANDUM OPINION

Date Submitted: December 30, 2010
Date Decided: December 31, 2010

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LASTER, Vice Chancellor.

Seven different putative class actions have been filed on behalf of holders of common stock of Del Monte Foods Company ("Del Monte" or the "Company"). The competing plaintiffs and their law firms have not been able to agree on an organizational structure. Three different coalitions of plaintiffs and their counsel seek to lead the consolidated action. Each contender has strengths and weaknesses. Each law firm is qualified and would perform adequately. After balancing the "*Hirt* factors" – so named after *Hirt v. U.S. Timberlands Service Co., LLC*, 2002 WL 1558342 (Del. Ch. July 3, 2002) – I appoint the NECA-IBEW Pension Fund ("NECA") as lead plaintiff and the firms of Grant & Eisenhofer, P.A. ("G&E") and Robbins Geller Rudman & Dowd LLP ("Robbins Geller") as co-lead counsel.

I. FACTUAL BACKGROUND

On November 25, 2010, Del Monte announced that it had entered into an agreement to be acquired by a consortium of Kohlberg Kravis Roberts & Co. L.P. ("KKR"), Vestar Capital Partners ("Vestar") and Centerview Partners ("Centerview"; together, the "Sponsors"). In the transaction, Del Monte will merge with Blue Merger Sub Inc., an acquisition subsidiary, and each share of Del Monte stock will be converted into the right to receive $19 in cash. The transaction has an aggregate value of approximately $5.3 billion, including the assumption of $1.3 billion in net debt.

A. The Initial Complaints

On November 30, 2010, the law firm of Cooch & Taylor P.A. filed a complaint on behalf of Vivian Golombuski. Faruqi & Faruqi, LLP appeared as forwarding counsel. *See Golombuski v. Del Monte Foods Co., et. al.*, C.A. No. 6027-VCL (Del. Ch. Filed

Nov. 30, 2010). On December 3, 2010, Cooch & Taylor filed a complaint on behalf of Adrienne and Richard Kaufman. Gardy & Notis LLP appeared as forwarding counsel. *See Kaufman v. Richard G. Wolford, et. al*., C.A. No. 6047-VCL (Del. Ch. Filed Dec. 3, 2010). Both complaints alleged generally that that the Del Monte board of directors (the "Board" or the "Individual Defendants") breached their fiduciary duties by failing to act reasonably to obtain the best transaction reasonably available (the "*Revlon* claim"). The complaints also contended that the Sponsors aided and abetted the Individual Defendants' in their breach of duty. Because Del Monte had not yet filed a preliminary proxy statement in connection with the transaction, neither complaint asserted a claim for breach of the fiduciary duty of disclosure or made detailed allegations about the Board's process.

On December 6, 2010, Cooch & Taylor submitted a stipulated consolidation order appointing Golombuski and the Kaufmans as Co-Lead Plaintiffs, Faruqi & Faruqi and Gardy & Notis as Co-Lead Counsel, and Cooch & Taylor as Delaware Liaison Counsel. The order was granted on December 8 (the "Consolidation Order").

B. The Next Set Of Complaints

On December 14, 2010, two additional actions were commenced. G&E filed on behalf of NECA with Robbins Geller and Cavanaugh & O'Hara of Springfield, Illinois appearing as forwarding counsel. *See NECA-IBEW Pension Fund v. Del Monte Foods Company, et. al.*, C.A. No. 6068-VCL (Del. Ch. Filed Dec. 14, 2010). The NECA complaint was relatively more detailed and raised the different interests that Del Monte's management had in the Merger due to grossed-up change of control payments, the

accelerated vesting of equity awards, and the ability to cash in a large and otherwise illiquid block of 9.5 million shares. *See id.* ¶¶ 5, 38. The complaint also cited the Sponsors' intention to retain management, allegedly giving management the opportunity to continue in their positions and re-load their equity stakes. *See id.* ¶¶ 6, 40.

Also on December 14, 2010, Rosenthal, Monhait & Goddess, P.A. filed a complaint on behalf of Richard W. Nothnagel. Brodsky & Smith, LLC appeared as forwarding counsel. *See Nothnagel v. Richard G. Wolford, et. al.*, C.A. No. 6071-VCL (Del. Ch. Filed Dec. 14, 2010). The complaint largely paralleled the Kaufman complaint with minor editorial variations.

G&E filed a second complaint on December 15 on behalf of Joshua Teitelbaum. Wolf Haldenstein Adler Freeman & Herz LLP appeared as forwarding counsel. *See Teitelbaum v. Richard G. Wolford, et. al.*, C.A. No. 6076-VCL (Del. Ch. Filed Dec. 15, 2010). Coincidentally, this was the same day that Del Monte filed its preliminary proxy statement on Schedule 14A (the "Preliminary Proxy"). The Teitelbaum complaint largely paralleled the Kaufman complaint. Oddly, it demanded a trial by jury, something not available in this Court.

C. The Post-Preliminary Proxy Actions

The filing of the Preliminary Proxy provided the first opportunity for stockholder plaintiffs and their counsel to fashion claims for breach of the duty of disclosure and to assert more detailed *Revlon* claims. On December 17, 2010, Rosenthal Monhait filed a second action, this time on behalf of Union Asset Management AG ("Union"). Motley Rice LLC appeared as forwarding counsel. *See Union Asset Management Holdings v.*

Del Monte Foods Company, et. al., C.A. No. 6082-VCL (Del. Ch. Filed Dec. 17, 2010). The Union complaint challenged the process leading to the Merger as described in the Preliminary Proxy and asserted a claim for breach of the duty of disclosure.

The last complaint appeared on December 21, 2010. Rigrodsky & Long, P.A. filed it on behalf of Louisiana Municipal Police Employees' Retirement System ("LAMPERS"). Pomerantz Haudek Grossman & Gross LLP, Glancy Binkow & Goldberg LLP, and Harwood Feffer LLP appeared as forwarding counsel. *See Louisiana Municipal Police Employees' Retirement System v. Richard G. Wolford, et. al.*, C.A. No. 6089-VCL (Del. Ch. Filed Dec. 21, 2010). Despite post-dating the Preliminary Proxy by nearly a week, the LAMPERS complaint made no reference to that filing and did not assert a claim for breach of the duty of disclosure. In substance, it closely resembled the Kaufman complaint.

D. Efforts To Agree On A Leadership Structure Fail.

As each new complaint appeared, the Faruqi and Gardy firms notified the Court as contemplated by the Consolidation Order. Commendably, they did not stand on their nominal position as lead counsel, but rather sought to organize a coalition. They reached preliminary agreement with G&E and Robbins Geller on drafting an amended complaint and retaining a valuation expert. They negotiated a schedule with the defendants that would provide for the orderly presentation of a motion for preliminary injunction. They also negotiated a confidentiality stipulation that would enable discovery to proceed.

Then Motley Rice appeared on the scene. The Faruqi and Gardy firms sought to bring Motley Rice into the existing structure, but Motley Rice demurred. Presumably

emboldened by the relative size of their holder's equity stake, they elected not to cooperate. On December 23, 2010, Motley Rice moved to vacate the Consolidation Order, to have Union appointed lead plaintiff, and to be appointed sole lead counsel. As a fall-back, Motley Rice requested co-lead status. Motley Rice also moved for a preliminary injunction and sought expedited proceedings on its motion.

At this point, the nascent plaintiffs' coalition fell apart. Robbins Geller informed the Faruqi and Gardy firms that their preliminary agreement was off. Cooch & Taylor sought to re-claim the high ground for the Faruqi and Gardy firms by submitting the stipulated case management order. Later that day, G&E advised the Court that it would file papers on or before December 28 that would seek to have NECA appointed lead plaintiff and G&E and Robbins Geller appointed co-lead counsel.

E. The Organizational Procedures Order

In light of the leadership dispute, I declined to approve the stipulated case management order. On the evening of December 23, 2010, I issued an order consolidating the various actions and establishing the following procedures for resolving the leadership dispute:

> 2. Each plaintiff (or group of plaintiffs) and their counsel who wishes to serve in the leadership role, including the currently designated Lead Plaintiffs, shall hand deliver to Chambers by 5:00 p.m. on December 28, 2010, two copies of (i) a motion to be appointed as lead plaintiff and lead counsel (the "Motion") and (ii) a confidential submission in support of the Motion for *in camera* review by the Court (the "Confidential Submission"). The Motion and any supporting exhibits shall be e-filed. The Confidential Submission shall not be e-filed and will be provided only to the Court.

> 3. The Motion shall address the [*Hirt* factors]. To enable the Court to evaluate the strength of the movant's pleading, the amended complaint on which the applicant proposes to litigate should be attached as an exhibit to the Motion. The Motion shall also provide a form of order to implement the movant's proposed leadership structure.
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> 4. The Confidential Submission shall set forth the movant's plan for litigating the case, including (i) a listing of the names, hourly rates, and qualifications of the attorneys and other professionals who will staff the matter, (ii) a work plan estimating the tasks required for each phase of the case and the hours that each professional will devote to those tasks, together with an estimate of the expenses to be incurred, (iii) a description of the movant's goals for the litigation, strategies for achieving those goals, and the range of likely outcomes, and (v) the fee expectations of counsel under each likely outcome.
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> 5. A hearing on the applications will take place at 10:00 a.m. on December 30, 2010.

In re Del Monte Foods Co. S'holder Litig., No. 22, 2010 (Del. Ch. Dec. 23, 2010) (ORDER). I have considered the Confidential Submissions in reaching my decision, but I do not discuss them further.

On December 28, 2010, four coalitions moved for leadership status:

(i) the Faruqi/Gardy Group, in which Faruqi & Faruqi and Gardy & Notis would serve as Co-Lead Counsel and Cooch & Taylor function as Delaware Liaison Counsel;

(ii) the Motley Rice Group, in which Motley Rice would serve as sole Lead Counsel and Rosenthal Monhait function as Delaware Liaison Counsel;

(iii) the G&E Group, in which G&E and Robbins Geller would serve as Co-Lead Counsel; and

(iv) the Pomerantz Group, in which Pomerantz Haudek Grossman & Gross LLP would serve as Lead Counsel, Rigrodsky & Long would serve as Delaware Liaison Counsel, and Glancy, Binkow & Goldberg, LLP and Harwood Feffer LLP would assist.

On December 29, the Pomerantz Group withdrew its application and lent its support to the Motley Rice Group. The defendants advised me that they took no position on the leadership structure and would work constructively with whomever the Court appointed so that an injunction application could be presented on an expedited schedule. On December 30, I conducted a hearing on the dispute over organizational structure.

II. LEGAL ANALYSIS

"[I]n most complex corporate or securities litigation in this jurisdiction, class counsel agree upon appropriate roles and the court is not drawn into such disputes. This will not always be the case and it will on occasion be necessary for the court to manage class litigation to the extent of designating lead counsel." *Silverstein v. Warner Commc'ns Inc.*, 1991 WL 12835, at *2 (Del. Ch. Feb. 5, 1991) (Allen, C.). In *Hirt*, Vice Chancellor Lamb distilled six factors to be considered when resolving leadership disputes, drawing heavily on Chancellor Chandler's decision in *TCW Technology Limited Partnership v. Intermedia Communications, Inc.*, 2000 WL 1654504 (Del. Ch. Oct. 17, 2000). In somewhat paraphrased form, the six factors are:

(i) the quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs;

(ii) the relative economic stakes of the competing litigants in the outcome of the lawsuit (to be accorded great weight);

(iii) the willingness and ability of all the contestants to litigate vigorously on behalf of an entire class of shareholders;

(iv) the absence of any conflict between larger, often institutional, stockholders, and smaller stockholders;

(v) the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit; and

> (vi) the competence of counsel and their access to the resources necessary to prosecute the claims at issue.

See Hirt, 2002 WL 1558342, at *2.

Each of these factors touches on an aspect of the problem of agency costs.

> Plaintiffs' lawyers are the dominant players in representative shareholder litigation . . . . While in theory clients can and should control all litigation decisions, closely monitoring the actions of their attorneys, the reality in representative litigation is that no individual shareholder has a sufficiently large stake in the outcome of the case to spend much time monitoring the attorneys. The cost-benefit analysis for any single investor usually shows that the investor's potential gains from the litigation are miniscule compared to the expected costs from actively monitoring the pursuit of the case. Most investors respond to these incentives by remaining passive and may even be unaware that litigation is going on until after a settlement has been reached. The end result is under-investment by shareholders in monitoring class counsel's efforts.
>
> Poor monitoring creates the potential for agency costs, as the entrepreneurial attorney's interests can diverge from those of the clients. If class counsel have tremendous discretion to run the litigation, they may do so in a manner that maximizes their benefit, even at the expense of the interests of their putative clients. For example, class counsel may choose to settle a strong case quickly for a small award of damages if they can obtain a large attorney fee award with little effort.

Robert B. Thompson & Randall S. Thomas, *The New Look Of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 Vand. L. Rev. 133, 148 (2004) (footnotes omitted).

In federal securities actions, Congress has sought to limit agency costs by establishing "a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that . . . in the determination of the court, has the largest financial interest in the relief sought by the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). In doing so, Congress intended "'to increase the likelihood that

parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel.'" *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 544 (N.D. Tex. 1997) (quoting Conference Report on Securities Litigation Reform, H.R. Rep. No. 369, 104th Congress, 1st Sess. 31, *reprinted in* 1995 U.S.C.C.A.N. 679, 730). Congress further envisioned that larger holders would be able to act as vigorous monitors of plaintiff's counsel "because of their institutional savvy." William B. Rubenstein, *A Transactional Model of Adjudication*, 89 Geo. L.J. 371, 398 (2001).

After an initial adjustment period, plaintiffs' counsel responded by soliciting institutional holders to serve as lead plaintiffs, and public pension funds assumed a dominant role in securities litigation. *See* Stephen J. Choi & Robert B. Thompson, *Securities Litigation and its Lawyers: Changes During The First Decade After The PSLRA*, 106 Colum. L. Rev. 1489, 1519 (2006) (distinguishing 1995-1999, a period pre-dating substantial public pension fund involvement, from 2000 to the present, in which public pension funds predominate as lead plaintiffs). One apparent consequence of the presumption has been to shift the primary arena for competition among plaintiffs' firms away from well-lit courtrooms and into crepuscular commercial environs where client solicitations take place. Considerable debate has surrounded allegations that plaintiffs' firms induce pension funds to bring securities litigation, a practice known as "pay-to-play." *See* Drew T. Johnson-Skinner, Note, *Paying-To-Play in Securities Class Actions: A Look at Lawyers' Campaign Contributions*, 84 N.Y.U. L. Rev. 1725, 1737-40 (2009) (describing debate). A recent study of proxies for pay-to-play activity finds support for

the contrary concept of "pay-not-to-play." *See* David H. Webber, *Is "Pay-to-Play" Driving Public Pension Fund Activism In Securities Class Actions? An Empirical Study*, 90 B.U. L. Rev. 2031, 2036 (2010). Some empirical studies indicate that the public pension funds against whom pay-to-play charges have been leveled obtain superior results relative to other plaintiffs. *See* James D. Cox et al., *There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 Vand. L. Rev. 355, 368-75 (2008). The debate over the federal approach doubtless will continue, and its persistence and vibrancy suggest that Chancellor Chandler was wise to be cautious about adopting a bright-line rule turning solely on the proposed plaintiff's equity stake. *See TCW*, 2000 WL 1654504, at *4.

The *Hirt* factors contemplate a more nuanced and case-specific test in which the Court examines both the proposed lead counsel and the proposed named plaintiff. Factors (i), (v), and (vi) address aspects of the proposed lead law firm's ability to provide effective representation. Factor (vi) calls on the Court to consider specifically which law firm is best qualified to handle the matter. Factors (i) and (v) look at two objective indicia of counsel's ability: the pleading on which the law firm proposes to litigate and how counsel has acted in the case to date. Factor (iii) blends consideration of the law firm and the proposed lead plaintiff by requiring the Court to consider how the litigation is likely to unfold and whether the proposed leadership team will operate effectively. Factors (ii) and (iv) address attributes of the proposed lead plaintiff. Factor (ii) considers whether the economic stake of the particular proposed plaintiff, given that plaintiff's circumstances, is likely to lead to meaningful monitoring and reduced agency costs.

Factor (iv) asks whether there are any particular attributes of the proposed plaintiff, such as unique defenses or potentially divergent interests, that could diminish the plaintiff's effectiveness.

The Court's overriding goal is establish a leadership structure that will provide effective representation. *See In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 955 (Del. Ch. 2010). The factors are a means to that end.

A. The Lead Plaintiff Factors

The Faruqi/Gardy Group has proffered as its proposed lead plaintiff an individual who holds some 350 shares with a value at the current deal price of approximately $7,000. The Motley Rice Group and the G&E Group have advanced institutional investors with substantial holdings.

The Motley Rice Group's client, Union, holds 1,899,900 shares worth $36 million at the current deal price. Union is described as one of Europe's leading asset managers for private and institutional clients with over EUR 173 billion in assets under management. Its facially large position in Del Monte represents approximately 0.02% of its assets under management.

The G&E Group's client, NECA, holds 25,000 shares of Del Monte stock, valued at $475,000 at the current deal price. NECA is described as a pension trust fund located in Decatur, Illinois, that provides retirement benefits to more than 2,000 pensioners. NECA's stake in Del Monte represents approximately 0.07% of its $700 million in assets under management.

Both of the institutional holders are capable of providing sophisticated oversight for plaintiffs' counsel. This factor favors Union and NECA over the Faruqi/Gardy plaintiff. Union and NECA have not further distinguished themselves along this dimension.

In terms of ownership, Union's stake is far larger than NECA's, which in turn dwarfs the Faruqi/Gardy plaintiff's. The ownership factor, however, "is not used to generate a formalistic ranking, but rather comes into play when a plaintiff owns a sufficient stake to provide an economic incentive to monitor counsel and play a meaningful role in conducting the case." *Revlon*, 990 A.2d at 955; *see Wiehl v. Eon Labs*, 2005 WL 696764, at *3 (Del. Ch. Mar. 22, 2005) ("If every difference in economic stakes were given great weight, the court could simply add up the number of shares and select the law firm with the largest absolute representation. This is not Delaware law.").

The Faruqi/Gardy plaintiff does not have a sufficiently large stake to provide an incentive to monitor counsel and reduce agency costs. Union does. When viewed in isolation, Union's economic interest is sufficiently large that it could be economically rational for Union to fund litigation challenging the Merger on a non-contingent basis. At the same time, Union's investment in Del Monte comprises only a tiny fraction of its assets under management, and therefore Union decision-makers could be rationally apathetic and take a hands-off approach to the litigation. NECA's stake is not sufficiently large enough to support independent litigation on a non-contingent basis, but as a fraction of assets under management, its size is comparable to Union's investment.

On balance, the ownership factor favors Union over NECA, but to a lesser degree than the absolute dollar amounts might suggest.

In terms of potentially divergent interests, Union suffers in comparison to NECA. Union is an asset manager that does not itself have a beneficial interest in Del Monte shares. This fact gives rise to the potential charge that Union lacks standing *qua* stockholder under Delaware law for purposes of bringing a breach of fiduciary duty claim. *See Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1169-73 (Del. Ch. 2002) (dismissing direct claims where plaintiff was not a stockholder at the time of the alleged wrongdoing). Union also could face difficulties meeting the standards for a class representative under Court of Chancery Rule 23. *See Tanzer v. Cavenham Ltd.*, 1982 WL 8791, at *1-2 (Del. Ch. Mar. 2, 1982) (denying intervention to proposed class representative whose claim to stockholder status was fairly litigable).

Union responds that, under German law, it has full authority to litigate on behalf of the funds it manages and that regardless, it has been assigned the right to litigate by the funds it represents. *Cf. In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *29-31 (Del. Ch. May 3, 2004) (approving purchase and enforcement of litigation rights by stockholder that already had standing to sue). Union also cites *In re Vivendi Universal, S.A. Securities Litigation*, 605 F. Supp. 2d. 570 (S.D.N.Y. 2009). The *Vivendi* defendants contended that various European asset managers, including some German investment advisors, lacked Article III standing to sue under the federal securities laws. As to the German investment advisors, the district court rejected this argument and held that a certain type of German investment advisor has standing to sue

on behalf of the funds it manages. *Id.* at 578. The district court found there were disputes of fact about whether the plaintiffs in the case qualified as that type of German investment advisor. *Id.* at 579.

In balancing the *Hirt* factors, I need not determine whether Union has standing as a German investment advisor to sue under Delaware law, whether Union ultimately can satisfy the requirements of Rule 23, or the degree of overlap between Article III standing and Delaware stockholder standing. I am confident that if Union is appointed lead plaintiff in this expedited action, the defendants will take discovery into these matters and raise any issues that might give them a defense. *Cf. Tanzer*, 1982 WL 8791, at *1 (observing that if intervention were permitted, defendants immediately would attack purported stockholder's status as a proper representative).

In a non-expedited case, the great weight afforded to Union's larger equity interest would override these concerns and cause me to favor Union as lead plaintiff. A non-expedited schedule would permit the parties to explore and present the interesting legal issues posed by Union's status as a German investment advisor. I could give meaningful consideration to those difficult questions and the interplay among Delaware, federal, and foreign law. If the defendants were able to knock out Union, Motley Rice could locate and substitute a different plaintiff.

In an expedited case where the schedule will unfold over a matter of weeks, the calculus is different. This Court and the parties have finite resources. Those resources should be focused on the merits of the claims that could yield benefits to the class, not on side issues. NECA is an institutional investor whose appointment as lead plaintiff will

not create unnecessary vulnerabilities. Under the circumstances, NECA emerges as the superior lead plaintiff.

B. Counsel's Performance In The Litigation To Date

In evaluating lead counsel, this Court considers how the competing lawyers have proceeded in the case to date. One relevant *Hirt* factor is the enthusiasm and vigor with which the various contestants have prosecuted the litigation. This factor should not be read to encourage the premature filing of motions to expedite or the immediate serving of discovery requests. Here, all counsel responsibly recognized that the filing of the Preliminary Proxy would kick off the real litigation activity. The Faruqi/Gardy Group appropriately sought to organize plaintiffs' counsel during the pre-filing period so that the plaintiffs would be ready to move forward once the Preliminary Proxy arrived. The G&E Group and the Faruqi/Gardy Group commendably reached a preliminary understanding on a leadership structure. On the facts of this case, the decision not to file a precipitous motion to expedite does not suggest any lack of enthusiasm or vigor. It rather shows a mature understanding of how an injunction proceeding would unfold. Once it became clear that an agreement on leadership could not be reached, each coalition demonstrated its ability to move with alacrity by grasping for the leadership role. This factor does not particularly favor any plaintiff coalition.

A second relevant *Hirt* factor is the quality of the pleading that counsel has prepared. This factor decidedly favors the G&E Group. Their pleading identified and attacked a number of potentially significant process flaws which, if true, could lead to relief. These include:

(i) management allegedly being permitted to continue to engage in discussions with KKR after the Board decided in March 2010 not to actively pursue a sale of the Company;

(ii) management allegedly being permitted to engage directly in acquisition discussions with KKR without an independent Board member present;

(iii) the Board allegedly permitting KKR and Centerview to bring Vestar into their bidding group, thereby effectively eliminating their strongest competition;

(iv) the Board allegedly permitting the Sponsors to use Barclays for buy-side financing, giving Barclays a conflict of interest;

(v) despite Barclay's buy-side conflict, the Board allegedly delegating the negotiation of material terms to Barclays, and

(vi) despite Barclay's buy-side conflict, the Board allegedly permitting Barclays to manage the go-shop process.

Only one other complaint – the Faruqi/Gardy effort – raised any of these points, and it cited the Barclays' buy-side conflict briefly in a single paragraph. Similarly, although each of the complaints mentioned the equity holdings of Del Monte management and the Board, only the G&E Group's complaint contained allegations as to why their equity ownership did not align their interests with those of the stockholders. The G&E Group's complaint also included disclosure claims comparable to those asserted in the other complaints.

In weighing the *Hirt* factors, I decline to discount the strength of G&E Group's pleading because of the prospect that other plaintiffs' counsel could amend their complaints to incorporate its allegations. To prepare a good complaint requires the investment of time and resources. Lawyers must develop factual allegations and legal theories, then weave them together in a persuasive pleading. If other lawyers can free

ride by copying a well-crafted complaint, counsel will have diminished incentives to investigate potential claims and file good cases.

At present, I cannot know whether any of the claims asserted in any of the complaints will pan out. What I can determine is that at this stage of the proceeding, the G&E Group has prepared the strongest complaint. This factor favors the G&E Group.

C. Counsel's Track Record And Ability To Litigate Going Forward

Ultimately, the most important factor when appointing lead counsel is the degree to which the attorneys will provide effective representation for the class going forward. The *Hirt* factors therefore call on this Court to consider the willingness and ability of counsel to litigate vigorously on behalf of the entire class of shareholders, the competence of counsel, and their access to the resources necessary to prosecute the claims at issue.

The law firms who seek lead plaintiff status are typically repeat players who appear frequently in the Court of Chancery.[1] Law firms establish a track record over

[1] *See* Thompson & Thomas, *The New Look of Shareholder Litigation*, *supra*, 57 Vand. L. Rev. at 185-87 (noting based on empirical study that the same plaintiffs' law firms appear with high frequency in class actions challenging transactions, with the top 16 firms in database collectively involved in "about 75 percent of [all] class action cases" filed in Court of Chancery during the study period); Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 Vand. L. Rev. 1797, 1841 (2004) (finding only five cases challenging transactions in Court of Chancery during three-year study period that were actively prosecuted "on behalf of clients with substantial financial interests by law firms not generally identified as part of the 'traditional' plaintiffs' bar").

time, and they "build (and sometimes burn) reputational capital." *Revlon*, 990 A.2d at 956. All of the law firms in this case have a track record in this Court.

G&E's track record stands out. Recently, in *Louisiana Municipal Police Employees' Retirement System v. Fertitta*, C.A. No. 4339-VCL (Del. Ch. filed Feb. 5, 2009), G&E and Bernstein Litowitz Berger & Gross challenged two attempts by Landry's CEO, Chairman and controlling shareholder to take Landry's private. The case raised novel questions as to whether a controlling stockholder and a board of directors could be held liable for breaching their fiduciary duties by terminating a merger agreement. The plaintiffs litigated the case for over a year and, with trial approaching, secured an increase in the merger consideration for Landry's then-current stockholders from $14.75 per share to $24 per share, representing over $65 million of additional value. Transcript of Settlement Hearing at 22, *Fertitta*, C.A. No. 4339-VCL (Del. Ch. Oct. 6, 2010). The plaintiffs also obtained a fund of $14.5 million dollars for Landry's former stockholders, despite strong arguments that the former stockholders had no claim. *Id.* In addition, the Landry's board agreed to significant corporate governance reforms. *Id.* This was not a shared-credit case in which a special committee was the principal negotiator. All of the benefits were solely attributable to the work of plaintiffs' counsel.

G&E also achieved a notable settlement in the Court of Chancery in litigation brought derivatively on behalf of American International Group, Inc. *See Teachers Retirement System of Louisiana v. Greenberg*, C.A. No. 20106-VCS (Del. Ch. filed Oct. 20, 2003). After several years of litigation and on the eve of trial, G&E secured $115

million, constituting what to date is the largest derivative recovery in this Court. G&E has had numerous other successes, but I will not belabor the point.[2]

Robbins Geller likewise has achieved significant success in Delaware. In *In re Chaparral Resources, Inc. Stockholders Litigation*, C.A. Nos. 2001-VCL & 2633-VCL (Del. Ch. filed Mar. 14, 2006 and Dec. 21, 2006), Robbins Geller teamed with Bouchard Margules & Friedlander, a Delaware firm that has established an excellent track record of its own, to intervene to take control of a case that predecessor counsel had tried to settle based on "low-hanging fruit." Transcript of Settlement Hearing at 5, *Chaparral*, C.A. No. 2633-VCL (Del. Ch. Mar. 13, 2008). The defendants eventually settled after trial for $41 million, 45% more than the merger price negotiated by a special committee two years earlier. *Id.* In *In re Prime Hospitality, Inc. Shareholders Litigation*, C.A. No. 652-CC (Del. Ch. filed Aug. 19, 2004), members of the traditional plaintiffs' bar agreed to a disclosure-only settlement. Robbins Geller and Bouchard Margules successfully objected to the settlement. *In re Prime Hospitality, Inc. S'holders Litig.*, 2005 WL 1138738 (Del. Ch. May 4, 2005). They litigated the case and obtained an additional $25 million for the

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[2] *See, e.g.*, *La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1190-92 (Del. Ch. 2007) (obtaining injunction against $23 billion stock-for-stock merger for breach of duty of disclosure and on grounds that special dividend triggered appraisal rights); *UniSuper Ltd. v. News Corp.*, 2005 WL 3529317, at *10 (Del. Ch. Dec. 20, 2005) (prevailing on motion to dismiss claims for breach of contract and promissory estoppel against adoption of rights plan, ultimately leading to settlement calling for rights plan to be put to a stockholder vote and requiring stockholder approval of any future rights plan until 2026, *see* Transcript of Settlement Hearing, *UniSuper*, C.A. No. 1699-CC (Del. Ch. May 23, 2006)); *In re Digex Inc. S'holders Litig.*, 789 A.2d 1176, 1214 (Del. Ch. 2000) (establishing likelihood of success on merits on claim that waiver of Section 203 was not entirely fair); *Carmody v. Toll Bros.*, 723 A.2d 1180, 1195 (Del. Ch. 1998) (stating claim against dead-hand pill, effectively invalidating measure).

class. Transcript of Settlement Hearing at 4, *Prime Hospitality*, C.A. No. 652-CC (Del. Ch. Sept. 19, 2007). Likewise in *In re TD Banknorth Shareholders Litigation*, C.A. No. 2557-VCL (Del. Ch. filed Nov. 20, 2006), members of the traditional plaintiffs' bar settled a case for less than $3 million. Robbins Geller and Prickett, Jones & Elliott, P.A., another Delaware plaintiffs' firm with a history of generating tangible results, objected to the settlement, took control of the case, and litigated for over two years. They eventually secured a settlement that provided minority shareholders with an additional $50 million, nearly 17 times more than the original settlement. Transcript of Settlement Hearing at 5, *TD Banknorth*, C.A. No. 2557-VCL (Del. Ch. June 25, 2009). Each outcome resulted solely from counsel's litigation efforts.

Finally, in *In re ACS Shareholder Litigation*, C.A. No. 4940-VCP (Del. Ch. filed Oct. 1, 2009), G&E and Robbins Geller worked together to obtain structural changes to a merger agreement, including modifications to the no-shop provision, suspension of the force-the-vote provision, and the addition of a majority-of-the-minority voting requirement. They subsequently obtained an additional $69 million for ACS' public shareholders in post-closing litigation. Transcript of Settlement Hearing at 17, *ACS*, C.A. No. 4940-VCP (Del. Ch. Aug. 24, 2010). The case settled within two business days of trial, after seven months of vigorous litigation, including briefing and argument on a motion for partial summary judgment and full pre-trial briefing.

None of the other firms who seek the leadership position have comparable track records in this Court. Their submissions cite impressive outcomes in other jurisdictions, but I do not have the same degree of familiarity with what has happened in those cases

and, given finite resources, cannot investigate each claim. Ordinarily I would assume that counsel's representations were accurate, but when reviewing their descriptions of results achieved in Delaware cases, I recognized a number of situations that were being portrayed as sole-credit recoveries, but which in fact involved a special committee negotiating an increase in the transaction price, albeit with the support of plaintiffs' counsel. One law firm went so far as to claim credit for the impressive outcome in *Emerging Communications*, yet the firm in fact represented one of the original plaintiffs who

> pressed forward with a settlement after confirmatory discovery that would have resulted in a final price of $10.25 binding those stockholders who did not seek appraisal to the same price negotiated by the special committee. Only after objection by a large holder represented by a very large firm that more usually represents corporate defendants than stockholders was the settlement abandoned. The ultimate result was an award of damages based on a $38.05 per share value, in a detailed opinion by Vice Chancellor (Justice) Jacobs that found glaringly obvious procedural and substantive problems with the special committee process.

In re Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 632 (Del. Ch. 2005) (internal footnotes omitted). The loose descriptions of the results achieved in Delaware cases casts doubt on the reliability of the firms' descriptions of the results in other jurisdictions. I have therefore relied on my familiarity with the Delaware cases and my knowledge of the competing applicants' historical performance in this Court.

The results achieved by G&E and Robbins Geller demonstrate that they have the ability and resources to litigate the case competently and vigorously. There is no guarantee that they will succeed, but at this stage of the proceeding, I am convinced that they are the firms best qualified to represent the class.

III. CONCLUSION

After balancing the *Hirt* factors, I conclude that in the context of this expedited challenge to a pending transaction, NECA is the superior lead plaintiff. G&E and Robbins Geller are the firms best qualified to serve as co-lead counsel. An order establishing this leadership structure has been entered.