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STATE OF DELAWARE

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Re: ***Wiehl v. Eon Labs, et. al., C.A. No. 1116-N***
Paulena Partners LLC v. Eon Labs, et. al., C.A. No. 1117-N
Robert Kemp, IRRA v. Eon Labs, et. al., C.A. No. 1119-N
Calcagno v. Eon Labs, et. al., C.A. No. 1125-N
Erste Sparinvest Kapitalanlagegesellshaft MBH v. Eon Labs, et. al., C.A. No. 1134-N
Huntsinger v. Eon Labs, et. al., C.A. No. 1136-N
Hung v. Eon Labs, et. al., C.A. No. 1139-N

Dear Counsel:

In this disputed motion to consolidate, three law firms seek lead counsel positions to pursue the claims against Eon Labs, Inc. and the other defendants. Milberg Weiss Bershad & Shulman LLP and Faruqi & Faruqi, LLP argue that they have been elected co-lead counsel by the plaintiff shareholder groups.[1] Prickett Jones & Elliot, P.A. responds that it was shut out of the shareholder voting process because the Milberg/Faruqi result was predetermined by the number of shares owned by their clients instead of the factors specified under Delaware case law. In addition, Prickett challenges the process by which the plaintiffs' counsels' organizational meeting occurred.

These class action lawsuits[2] against Eon and the other defendants began on February 22, 2005 with the filing of a complaint by Faruqi. There were two other complaints filed the same day, one by the Brualdi Law Firm and one by Bull & Lifshitz, LLP. Milberg filed a complaint the next day, and a second one the following week.[3] Prickett filed its complaint on March 1, the same day that

[1] Milberg has taken the lead in arguing for the co-lead counsel position. For the sake of simplicity, the court will refer to Milberg and Faruqi as "Milberg," unless otherwise noted.
[2] The general allegation in all of the complaints is that the defendants breached their fiduciary duties in connection with a tender offer from Novartis AG. The tender offer was announced on February 21, 2005.
[3] In the first complaint, Milberg represents an individual shareholder. In the second complaint, Milberg represents an institutional shareholder.

Milberg filed its second complaint. Faruqi & Faruqi also filed a second complaint on March 3.

Although it was not the first firm to file, Prickett was the first firm to move for expedited proceedings. The court responded by scheduling a hearing within two days, on March 4, based on Prickett's representation that the tender offer challenged in the litigation was set to commence on March 7 and to close 20 business days thereafter. During the hearing, which was attended either in person or by telephone by at least 10 law firms, the defendants immediately made clear to the court that the tender offer would not commence on March 7 and would not close before May 12 due to regulatory issues. They further asserted that the tender offer was not expected to close until the second half of this year, as stated in their press release announcing the offer.

Based on the representations of the defendants, which were communicated to all the plaintiffs' firms and the court immediately before the hearing, the court denied the motion to expedite. The entire hearing took less than 10 minutes, most of which involved introducing counsel.

The three firms seeking leadership, Milberg, Faruqi, and Prickett, now return to this court in a disputed motion to consolidate. All agree that this court set out

the relevant factors for selecting lead counsel in *TWC Technology Limited Partnership v. Intermedia Communications, Inc*.[4] Those factors were summarized more recently in *Hirt* as follows:

- 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; and
- the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit.[5]

Looking to Court of Chancery Rule 23(a), the *Hirt* court also listed "competence of counsel and their access to the resources necessary to prosecute the claims at issue" as another factor to consider. Finally, in regard to the timing of the complaints, the *Hirt* court noted 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.'"[6]

[4] 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000).
[5] *Hirt v. U.S. Timberlands Serv. Co. LLC*, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002) (citing *TWC Technology*, 2000 WL 1654504, at *4).
[6] *Id* (quoting *TWC Technology*, 2000 WL 1654504, at *4).

The firms here focus on three issues: the quality of the pleading, the relative economic stakes of the plaintiffs, and the process of the plaintiffs' counsels' organizational vote.[7]

A. Quality Of The Pleading

Both sides claim the other's complaint is deficient. Milberg claims that Prickett grossly, and perhaps intentionally, misread the merger agreement and, based on the misreading, filed an ill-founded and wasteful motion to expedite. Milberg also claims that Prickett's complaint contains factual errors, such as whether the defendants' stock options vest immediately. In response, Prickett lists several alleged deficiencies in the Milberg/Faruqi complaints. For example, Prickett alleges that the complaints do not list all of the correct parties, do not properly lay out the relationship of the defendants, and do not contain important allegations concerning the defendants' fiduciary duty and the allegedly coercive nature of the challenged tender offer.

The court finds that Milberg's attack on the motion to expedite somewhat overstates the case. Milberg relies on both the language from the merger

[7] The court does not ignore the other factors or consider them less important. The firms, through their documents and arguments, impliedly concede that any of the three could meet the standard for lead counsel based on the other factors, such as competence, willingness, and vigor. Therefore the court narrows its discussion to the pertinent arguments.

agreement, which allows for the tender offer to commence at a later date if the buyer and seller agree, as well as the language from the press release that declares the transaction would not close until the second half of 2005. Armed with those two facts, Milberg now claims that Prickett's motion to expedite was unwarranted. What Milberg omits from its analysis is that it did not know when the tender offer was due to commence and had no assurance that it would not occur on the schedule set forth in the merger agreement and repeated in the motion to expedite. Furthermore, Milberg asks the court to look to information from a press release that does not correspond with the defendants' position. The press release states that the offer will not close until the second half of 2005, but the defendants' position is that it would not close until after May 12. Therefore, given the information available when it filed the motion to expedite, Prickett's actions were not unreasonable.

Turning to the other purported deficiencies of the complaints, the court finds that each side's arguments have some merit. There are improvements that could be made with regard to all of the complaints, a fact that is not unexpected given the rapid filing. This does not, however, provide support for Milberg's assertion that Prickett grossly or intentionally misread the agreement in presenting its summary of the facts.

Finally, in terms of overall quality, Prickett's complaint is more detailed and organized than the others, although all address the same issues. That being said, Milberg did not alter or expand its complaint from the time it filed for an individual stockholder on February 23 until it filed for an institutional investor on March 1. Prickett's complaint appears to be more targeted, better researched, and more challenging for the defendants. On the whole, Prickett's complaint, at the outset, appears superior to the others.

B. Economic Stakes Of The Plaintiffs

Milberg emphasizes the economic stakes factor from *Hirt*, especially the "great weight" to be accorded it. While not arguing that the size of the economic stake should be dispositive, Milberg refers to it as the driving force of the analysis. Milberg's position should come as no surprise, given that it represents the plaintiff with the largest number of shares, an institutional investor with 57,000 shares, while Faruqi represents the largest individual stockholder, who owns 38,000 shares. Prickett, on the other hand, represents an individual with 1,000 shares.

The court agrees with Milberg that economic stakes should be given great weight. However, the court finds that Milberg has overlooked a critical word in the factor stated in *Hirt*: relative. *Hirt* stands for the proposition that *relative* economic stakes are given great weight, not simply economic stakes. 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.

Here, Prickett's client has fewer shares than the clients of Milberg or Faruqi. But the analysis should not stop there. In this case, Eon has 88 million shares outstanding. Thus, each of the plaintiffs' respective stakes in Eon is minuscule. Indeed, even the largest plaintiff owns only 0.065% of Eon's shares. Its stake is simply not large enough to demonstrate a substantial relative difference that would require the court to give this factor great weight under *Hirt*. 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.

C. Plaintiffs' Counsels' Organizational Vote

Milberg also stresses the outcome of the plaintiffs' counsels' organizational vote. Again, Milberg's position should be no surprise given that Milberg and Faruqi "won" the vote.

This court has frequently stated its position that the plaintiffs' lawyers should work out the lead counsel or other leadership structure among themselves. "[T]he 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."[8] But the process for choosing lead counsel must be fair and include all firms.[9] If the vote is improperly obtained, the court will disregard the resulting leadership structure.[10]

In this case, the process was not fair. Although five law firms filed complaints, only three voted at the meeting.[11] As a result, two of the three voting firms elected themselves co-lead counsel, although the need for more than one lead counsel is not obvious. At least on the face of things, it appears that the process was structured to exclude one firm, Prickett. Of the three firms seeking a leadership position, Milberg and Faruqi voted for themselves and each other as

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[8] *Hirt*, 2002 WL 1558342, at *2.
[9] *Black v. Cox Communications, Inc.*, C.A. No. 630, transcript at 82 (Del. Ch. Aug. 24, 2004) ("[The shareholder vote] process . . . does need to be fair and people need to talk to each other and include everybody.").
[10] *Hirt*, 2002 WL 1558342, at *2.
[11] The Brualdi Law Firm did not attend the meeting. The Bull & Lifshitz firm attended the meeting but could not provide confirmation of its client's share ownership. Therefore, while Milberg contends that all participants except Prickett voted for the Milberg/Faruqi co-leadership, Prickett argues that the vote was two to one, with Milberg and Faruqi voting for themselves.

co-lead counsel, presumably by prior agreement. This process is not easily described as either fair or democratic. The court does not find that the process went so far as to allow Milberg and Faruqi to improperly obtain their leadership positions, but the conduct of the meeting clearly disfavored Prickett and is therefore not accorded the weight described in *Hirt*.

D. Conclusion

After analyzing the *Hirt* factors, the court is unable to distinguish between the firms in any meaningful way. In addition, the court cannot fully accept the shareholder vote because it does not appear to have offered a fair, democratic process based on the number of firms filing complaints. Therefore, the court will require that the plaintiffs' counsel convene another organizational meeting at which they will again vote to adopt an organizational structure consistent with this opinion. At that meeting, the court expects that participants will discuss and consider the factors addressed herein. In particular, the participants should, before voting, agree on the appropriate structure best suited to manage this litigation in the interests of the class they seek to represent. This includes a determination whether a co-lead counsel (or co-Delaware coordinating counsel) structure is necessary or desirable for the efficient management of this case. Only after those matters are settled should a vote be taken. If one lead counsel is chosen, the court

expects that firm to assign work in a manner consistent with the interests of the class and the talents and availability of participating counsel.

IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor