IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: TD BANKNORTH SHAREHOLDERS LITIGATION	))	C.A. No. 2557-VCL

MEMORANDUM OPINION

Submitted: July 17, 2008
Decided: July 29, 2008

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LAMB, Vice Chancellor.

The plaintiffs in this case seek certification as class representatives.[1] The defendants oppose the motion, arguing that the plaintiffs have failed to demonstrate the "adequacy" requirement under Court of Chancery Rule 23(a)(4).[2] Specifically, they argue that both plaintiffs have insufficient knowledge of the litigation, have failed to properly monitor their counsel, and should be disqualified due to the conduct of counsel. Given the plaintiffs' sufficient knowledge of, and participation in, the litigation and the lack of evidence supporting any improper relationship with counsel, the court has granted the plaintiffs' motion.

I.

The background of this case was set forth in an earlier decision.[3] For ease of reference, however, the following is a brief summery of the pertinent facts.

This is a class action litigation brought by former investors in the nominal defendant, TD Banknorth, Inc. ("Banknorth"). Banknorth is a Delaware corporation headquartered in Portland, Maine, that provides banking and financial advisory services throughout New England.[4] In March 2005, defendant Toronto-Dominion Bank, a Canadian company headquartered in Toronto, Ontario, Canada

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[1] The lead plaintiffs seeking appointment as class representatives are City of Dearborn Heights Act 345 Police & Fire Retirement System and H. Louis Farmer, Jr.

[2] Court of Chancery Rule 23(a)(4) requires that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . the representative parties will fairly and adequately protect the interests of the class."

[3] *See In re TD Banknorth S'holders Litig.*, 938 A.2d 654 (Del. Ch. 2007).

[4] Banknorth serves as a holding company for TD Banknorth, N.A., which is the entity that operates the banking and financial advisory services.

("Toronto-Dominion"), bought a 51% interest in Banknorth.[5] In connection with that transaction, Toronto-Dominion and Banknorth executed a stockholders' agreement that, among other things, placed certain restrictions on Toronoto-Dominion's ability to propose or effectuate a going private transaction with Banknorth before March 1, 2007. Notwithstanding this agreement, Toronto-Dominion and Banknorth began negotiating a going private transaction in January 2006. On November 18, 2006, following protracted discussions, a Banknorth special committee and the full board approved an all cash transaction whereby Toronto-Dominion would acquire the remaining Banknorth common stock for $32.33 per share. On November 20, 2006, Banknorth publicly announced the transaction and multi-jurisdictional litigation ensued. Not surprisingly, a key claim alleged in these lawsuits was that Toronto-Dominion improperly initiated the transaction in violation of the stockholders' agreement.

[5] Toronto-Dominion is the other corporate defendant in this case. There are also several former officers and directors of Banknorth named as individual defendants. Defendants W. Edmund Clark (Clark is also the president, chief executive officer, and a director of Toronto-Dominion), Wilber J. Prezzano, William E. Bennett, and William J. Ryan served on Banknorth's board during all relevant times and also served on Toronoto-Dominion's board. Defendant Bharat B. Masrani became the president of Banknorth in September 2006 and became the chief executive officer in March 2007. Defendants P. Kevin Condron, Robert G. Clarke, Dana S. Levenson, and Curtis M. Scribner were Banknorth directors and members of the special committee that considered the going private transaction discussed herein. The remaining Banknorth directors named as defendants are Gary S. Weidema, Peter G. Vigue, David A. Rosow, John M. Naughton, Irving E. Rogers, John O. Drew, Brian M. Flynn, Joanna T. Lau, and Steven T. Martin.

Six class action lawsuits were filed in the Court of Chancery and, on November 29, 2006, this court entered a consolidation order appointing co-lead counsel (the "Original Plaintiffs"). On December 8, 2006, one of the plaintiffs currently seeking certification as a class representative, H. Louis Farmer Jr., filed a class action complaint in a state court in Maine. While Farmer took extensive discovery in the Maine litigation, including nine depositions,[6] the Original Plaintiffs did little to advance the litigation in Delaware, seemingly satisfied with negotiating a very modest settlement. Aware of these negotiations and concerned by what he saw as the Original Plaintiffs' lack of diligence, Farmer stipulated to stay the Maine litigation and, with the other plaintiff currently seeking certification, the City of Dearborn Heights Act 345 Police & Fire Retirement System ("Retirement System"), filed a motion to intervene in the Delaware litigation. On March 23, 2007, two days after the filing of the motion to intervene, the Original Plaintiffs filed a stipulation of settlement, agreeing to the certification of the class and the appointment of the Original Plaintiffs as class representatives. The terms of the settlement also included certain corrective disclosures, and an increase of $.03 per share in the merger price.

[6] "Counsel for the [Original Plaintiffs] was present for these depositions, and the substance of the depositions formed a sizable portion of the plaintiffs' confirmatory discovery in Delaware." *Banknorth*, 938 A.2d at 662.

On March 28, this court heard argument on the motion to intervene and denied the motion, but suggested that Farmer and Retirement System could choose to file an objection to the stipulated settlement. Farmer and Retirement System filed their objection, amply supported by the extensive discovery taken in the Maine action, and, on July 19, this court rejected the settlement, stating:

> the [Original] plaintiffs' failure to address or leverage potentially meritorious claims involving . . . the stockholders' agreement, particularly when viewed in light of inadequacies in the settlement notice and the insubstantial nature of the plaintiff-generated disclosures in this case, requires the court to disapprove the proposed settlement.[7]

Following the ruling, the defendants and the Original Plaintiffs stipulated to the intervention of Farmer and Retirement System as sole lead plaintiffs and the appointment of Coughlin Stoia Geller Rudman & Robbins LLP as sole lead counsel and Prickett, Jones & Elliott, P.A., as sole Delaware lead counsel.[8] The lead plaintiffs now seek certification as class representatives.

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[7] *See Banknorth*, 938 A.2d at 654. This court found the plaintiffs' work in securing disclosures lacked "a strong causal link," in part, because "most of the disclosures for which the plaintiffs claim partial credit were made primarily in response to SEC comment letters." *Id*. at 669. In addition, the court found the notice submitted to the class inadequate in several respects. "[T]he initial notice completely omitted the entire exhibit showing the disclosures" and "the notice did not explain to the class members that the individual defendants and their affiliates would participate in the settlement fund." *Id*. at 670 (emphasis omitted).

[8] That stipulation was so ordered on August 1, 2007.

II.

Farmer and Retirement System contend that they "have taken an active role in prosecuting this litigation, have sufficient knowledge of the claims and easily meet the applicable legal standards."[9] According to them, the deposition testimony of Farmer and Retirement System reveals two sufficiently informed and active plaintiffs, warranting certification. In addition, the plaintiffs' counsel deny soliciting Farmer or any impropriety in the relationship between Retirement System and its outside counsel, VanOverbeke, Michaud & Timmony, P.C.

The defendants' opposition is based principally on their contention that Farmer and Retirement System are inadequate class representatives under Rule 23(a)(4).[10] According to the defendants, Farmer and Retirement System have failed to demonstrate that either of them has sufficient knowledge of the litigation to serve as a class representative. The defendants also argue that both plaintiffs have improperly abdicated control of the litigation to counsel. The defendants contend that certification is not appropriate under Rule 23(a)(4) because the Coughlin Stoia firm solicited Farmer by phone in violation of the Florida Rules of Professional Conduct. Finally, the defendants argue that Retirement System

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[9] Pls.' Reply 2.

[10] The defendants do not challenge the commonality, numerosity, and typicality requirements under Rule 23(a) or the requirements under Rule 23(b).

should be disqualified from serving as a class representative because it maintains an improper relationship with the VanOverbeke firm.

III.

Rule 23(a)(4) requires that a class representative "fairly and adequately protect the interests of the class." Delaware case law makes clear that in order to meet this requirement "a representative plaintiff must not hold interests antagonistic to the class, retain competent and experienced counsel to act on behalf of the class and, finally, possess a basic familiarity with the facts and issues involved in the lawsuit."[11]

IV.

As an initial matter, it is important to note that it is the movants' burden "to persuade the court that the named representatives will protect the interests of the class."[12] As indicated, the defendants focus on the "familiarity" component of Rule 23(a)(4), arguing that Farmer and Retirement System "lack basic knowledge of and interest in this litigation."[13] In order for a class representative to satisfy this requirement, "a rudimentary understanding of the claims, facts, and issues is

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[11] *O'Malley v. Boris*, 2001 WL 50204, at *5 (Del. Ch. Jan. 11, 2001).
[12] *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1224 (Del. 1991); *see also Smith v. Hercules, Inc.*, 2003 WL 1580603, at *4 (Del. Super. Jan. 31, 2003) ("The burden of demonstrating that each requisite element has been satisfied is on the party seeking certification.").
[13] Defs.' Br. in Opp'n 1. As previously noted, the defendants also challenge the relationship between Farmer, Retirement System, and their counsel.

adequate."[14] This is not an "onerous" standard and "[i]n certain instances, a named plaintiff's understanding and control of the litigation has been held to be largely insignificant."[15]

A. Farmer

The movants contend that even though Farmer did not use "precise legal or factual terms, his testimony . . . establishe[d] an adequate understanding of the claims, facts and issues in this action" and that he "has closely followed his investment in [Banknorth] and dr[awn] his own conclusion" about the going private transaction.[16] In addition, as further proof of his adequacy as a class representative, the plaintiffs cite the fact that Farmer became a Banknorth stockholder many years ago when it first went public. In response, the defendants contend that Farmer is "entirely unfamiliar with the [c]omplaint's allegations" and he "does not know the class he seeks to represent."[17] The defendants characterize Farmer's testimony as "distorted," arguing that his objection to the transaction is based primarily on his belief "that Toronto-Dominion's original purchase of shares from [Banknorth] in March of 2005 was somehow improper and that after that purchase, Toronto-Dominion kept [TD Banknorth] from increasing its dividends."[18]

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[14] *O'Malley*, 2001 WL 50204, at *5.
[15] *Id*. (citing *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 129-34 (Del. Ch. 1999)).
[16] Pls.' Reply 15.
[17] Defs.' Br. in Opp'n 15.
[18] *Id*.

Even though Farmer's recollection of the facts and legal arguments in the complaint were not extensive, he exhibited sufficient knowledge to meet the minimal requirements of Rule 23(a)(4). He demonstrated a familiarity with Banknorth and an understanding of its relationship with Toronto-Dominion. For example, he knew the name of the chief executive officer and testified that he consistently read Banknorth public filings.[19] Farmer also recalled Toronto-Dominion's purchase of its controlling interest in Banknorth in March 2005 and he drew reasoned inferences from this transaction.[20] More specifically, he recognized that after the 2005 transaction, Banknorth ceased increasing its dividend, as it had done for many years. Farmer believed Toronto-Dominion did this to suppress the Banknorth stock in order to acquire the minority interest in the future at more attractive price.[21] In fact, Farmer testified that he believed that leading up to the going private transaction Toronoto-Dominion and the Banknorth CEO were "arranging the price."[22] Farmer convincingly testified that he considered the price offered in the going private transaction to be inadequate by at least $10 per share based on his familiarity with the stock as a longtime stockholder.[23] While general,

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[19] Farmer Dep. 5.
[20] *Id.* at 10.
[21] *Id*. at 48.
[22] *Id*. at 51. Contrary to the defendants assertions, Farmer's objection to the transaction does not focus entirely on this allegation. Moreover, as discussed, this reveals Farmer is informed about Banknorth stock and the events that gave rise to the litigation.
[23] *Id.* at 78.

these facts constitute bases for the claims in the complaint and his analysis demonstrates that he is engaged in the litigation.[24] In addition, while Farmer's language is not precise, it is clear he understands that he represents the Banknorth stockholders that were cashed out in the going private transaction.[25]

Lastly, the defendants argue that Farmer "has completely ignored his obligation to supervise his counsel" and that Farmer's attorneys "have been solely responsible for making strategic decisions in this litigation."[26] While the defendants correctly note that Farmer testified that he did nothing to supervise or direct the actions of his counsel, he was in regular communications with them and he kept himself apprised of the filings in the case.[27]

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[24] Farmer also regularly discussed his holding in Banknorth and this litigation with a friend and fellow stockholder. Through this relationship, Farmer learned of the possible breach of the stockholders' agreement.

[25] Farmer Dep. 4 ("Q. Mr. Farmer, what's your understanding of your duties as lead Plaintiff in a class action? A. My understanding of it is just that I happen to accept representing the other stockholders in trying to . . . get a fair price for the transaction that took place when they took over our stock. Of course, I don't have a legal background, so I depend on attorneys."); *id.* at 38-39 ("Q. I'm trying to get to your understanding of what group of people you are representing as lead Plaintiff . . . ? A. From the time they bought out our 49 percent of the stock, the people that were stockholders at that time.").

[26] Defs.' Br. in Opp'n 14.

[27] Farmer Dep. 43-44; 37, 77. *See In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 291 (Del. 2002) ("Our case law requires little more than that a representative be generally familiar with the litigation. Indeed, our legal system has long recognized the appropriateness of an attorney taking the dominant role in derivative proceedings. Therefore, the mere fact that class counsel undertook the dominant role in this litigation in no way suggests that the class representatives must be found to have inadequately represented the class.") (footnotes omitted).

B. Retirement System

While Farmer's testimony presented this court with a fairly close question, the Retirement Systems' representative, John J. Riley II, demonstrated a clear understanding of the major factual and legal arguments in the complaint. Specifically, Riley recalled the alleged breach of the stockholder agreement, the allegations challenging the process leading up to the transaction, and the disclosure claim.[28] In addition, Riley recalled the merger price and the basic restrictions in the stockholders' agreement.[29] Riley also testified that Retirement System has taken steps to stay informed about the litigation and that their counsel secures consent before taking any steps in the litigation, including before making any filings.[30]

C. The Relationship Between The Plaintiffs' Counsel And The Plaintiffs

Finally, this court must address the defendants' arguments that the Coughlin Stoia firm improperly solicited Farmer and that Retirement System and the

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[28] Riley Dep. 49 ("Q. What does the Retirement System assert that each Defendant in this action did wrong? A. Well, we felt that the process that was adhered to during the acquisition of the remaining 49 shares after Toronto-Dominion Bank purchased the majority interest in TD Banknorth, that they . . . broke the shareholders agreement on . . . acquiring . . . the additional 49 shares – 49 percent of the shares. Also we felt that the proxy that was given to the minority . . . shareholders was not fully informative of the deal and also how Toronto-Dominion Bank was on both sides of the issue for Toronto-Dominion Bank and . . . TD Banknorth.").

[29] *Id.* at 19, 130-32. *See O'Malley*, 2001 WL 50204, at *5 (holding that plaintiffs met Rule 23(a)(4) because they understood "the nature of the claims, the alleged wrongdoing of the defendants, and the basic facts and issues raised by this lawsuit").

[30] Riley Dep. 22-23, 25. While there is no question the plaintiffs' counsel is the driving force behind this litigation, "that is not reason enough to convince this court" that Farmer and Retirement System are inadequate plaintiffs. *O'Malley*, 2001 WL 50204, at *5.

VanOverbeke firm maintain an improper relationship. According to the defendants, "a court may not certify a class where a potential class representative was solicited in a questionable manner."[31] The defendants rely on federal case law, noting Delaware courts' reliance on federal law "in interpreting the dictates of . . . Rule 23."[32] The defendants' reliance on federal jurisprudence is not misplaced; however, the record in this case does not support denying the motion as to Farmer or Retirement System.

Farmer testified that he received a phone call asking whether he owned stock in Banknorth and whether he would be interested in serving as a class representative.[33] Farmer testified he had no idea who placed the call and could not conclude it was someone from the Coughlin Stoia firm or someone acting on behalf of the firm.[34] While the Coughlin Stoia firm did not file an affidavit denying any involvement, it represented in court that it found nothing in its records to suggest it initiated the call. Without more information, this court cannot deny the motion on this basis.

The defendants also argue that "VanOverbeke uses the Retirement System as a litigation vehicle, repeatedly urging the Retirement System to commence or

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[31] Defs.' Br. in Opp'n 10 (citing *Bodner v. Oreck Direct, LLC*, 2007 WL 1223777, at *2-3 (N.D. Cal. Apr. 25, 2007)).
[32] *Id*.
[33] Farmer Dep. 8-9, 46-47.
[34] *Id*. at 47.

participate in securities and/or shareholder litigation that . . . it otherwise would not have commenced."[35] More specifically, the defendants contend that "VanOverbeke's attorneys continuously review the Retirement System's holdings for possible securities claims" and that Retirement System "has never refused to pursue a litigation opportunity presented by VanOverbeke . . . ."[36] In addition, the defendants note that Retirement System has always acted as lead plaintiff when advised by VanOverbeke and always agreed to VanOverbeke's recommendations concerning what law firm should serve as lead counsel.[37]

At oral argument, this court inquired as to whether the defendants were aware of any decision finding this sort of relationship improper. In response, the defendants raised a recent decision of the United States District Court for the Southern District of New York, *In re Monster Worldwide, Inc. Securities Litigation*.[38] According to the defendants, the court in that decision declined to certify the Steamship Trade Association-International Longshoremen's Association Pension Fund ("STA-ILA") as a class representative because of an improper relationship with their outside counsel, that is purportedly analogous to Retirement System's relationship with the VanOverbeke firm. In the *Monster*

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[35] Defs.' Br. in Opp'n 23.
[36] *Id*. at 24 (emphasis omitted).
[37] Riley Dep. 72-73, 79.
[38] 2008 WL 2721806 (S.D.N.Y. July 14, 2008).

case, the court found that STA-ILA had "an inadequate familiarity with, and concern for, the litigation."[39] The court reached this decision, in part, based on the "appalling" deposition testimony of the co-chairman of STA-ILA, Horace Alston, stating:

> Mr. Alston . . . did not know the name of the stock at issue . . . did not know the name of either individual defendant, did not know whether STA-ILA ever owned Monster stock, did not know if an amended complaint had been filed, did not know whether he had ever seen any complaint in the action, did not know that defendant McKelvey had moved to dismiss the complaint, and did not know that STA-ILA had moved for pre-discovery summary judgment. He also testified that STA-ILA had hired the Angelos Law Firm to represent it in this litigation, that he would "guess" that Angelos then hired Labaton Sucharow LLP as Lead Counsel, that STA-ILA had granted counsel at Angelos permission to file "any complaint for any reason they deemed necessary," and that STA-ILA did not review the complaint in this case before it was filed.[40]

In response to this testimony, STA-ILA designated a second trustee of the fund to be deposed, but the court dismissed this more informed testimony since the witness conceded "he had mostly learned about the substance of the litigation only in the week before his deposition, and had devoted almost no time to the case before then."[41] Properly offended by this conduct, the court concluded that "STA-ILA has no interest in, genuine knowledge of, and/or meaningful involvement in this case

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[39] *Id*. at *3.
[40] *Id*. at *4 (citations omitted).
[41] *Id*.

and is simply the willing pawn of counsel."[42] The court held "STA-ILA cannot qualify as a class representative."[43] Contrary to the defendants' characterization, this decision relies primarily on the uninformed deposition testimony of the STA-ILA trustee and the ensuing conduct, and does not support a conclusion that the relationship between client and counsel in this case is improper.

Indeed, the record in this case does not reveal a similarly troubling relationship between Retirement System and the VanOverbeke firm. Here, even though Riley's deposition testimony evinces a great deal of deference to the advice of the VanOverbeke firm, there is no complete abdication of control of the litigation. Moreover, Riley's testimony revealed that he is aware of the major facts and legal arguments in the litigation. Therefore, this court will not, as the defendants ask, conclude that Retirement System is an inadequate plaintiff.

V.

For all of the foregoing reasons, the order certifying the class has been entered.

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[42] *Id*.
[43] *Id*.