IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

VIRGINIA A. NOERR, Plaintiff, v. DANIEL GREENWOOD, THOMAS ANDERSON, RICHARD HUBER, CHARLES HUTCHINSON, RICHARD RENT, BARRY MACLEAN, and GERTA KNOLL, EXECUTOR OF THE ESTATE OF JAMES KNOLL, Defendants.	)	C.A. No. 14320-NC

OPINION

Date Submitted: September 11, 2002
Date Decided: November 22, 2002

Norman M. Monhait, Esquire of ROSENTHAL MONHAIT GROSS & GODDESS, P.A., Wilmington, Delaware; and Terrance Buehler, Janet L. Reed, and Robert E. Williams, Esquires of BUEHLER REED & WILLIAMS, Chicago, Illinois; Attorneys for the Plaintiff.

Martin P. Tully and S. Mark Hurd, Esquires of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; and Christopher Q. King, Esquire of SONNENSCHEIN NATH & ROSENTHAL, Chicago, Illinois; Attorneys for the Defendants.

JACOBS, VICE CHANCELLOR

Pending is a motion for class action certification in this action brought by Virginia A. Noerr ("the plaintiff' or "Noerr") against the former members of the board of directors of Specialty Equipment Companies ("Specialty" or "the company"). For the reasons discussed below, the plaintiffs class certification motion will be granted, although the class that is certified will be narrower than the proposed class as defined by the plaintiff.

I. FACTS

Noerr, who is a Specialty common stockholder, sues on behalf of a proposed class of Specialty common stockholders.' In her pending motion she asks this Court to certify a class consisting of all persons who owned Specialty common stock on April 2, 1993, and their successors in interest, transferees, and assigns.[2]

In her Third and Supplemental complaint, Noerr alleges that in April 1993 the defendant directors misled the stockholders by disseminating a false and misleading proxy statement in connection with the vote on two

[1] Specialty was a Delaware corporation, headquartered in Belvidere, Illinois, that manufactured commercial ice cream machines and restaurant equipment. In November 2000, Specialty was acquired by United Technologies Corporation in a reverse triangular merger.

[2] The defendants and their affiliates are excluded from the class. 3d Am. Compl. ¶ 22.

proposed incentive compensation plans – one for non-employee directors and the other for employee directors and senior management. Under both plans the directors and executives were to receive stock options. Under the "Employee Plan," half of the options would vest when Specialty's stock price reached certain targets, and the other half would vest within two years of the confirmation of the plans. Under the "Director Plan," non-employees would be granted options at the company's annual meeting. Half of the directors' options would vest within two years, and the balance would vest if and when the stock price increased to specified levels.

According to the complaint, upon the options becoming vested the holders would be entitled to purchase millions of Specialty common shares at an exercise price significantly below the fair market value of those shares. The exercise price disclosed in the proxy statement was $1 per share. The fair market value of Specialty's stock, the proxy statement disclosed, was less than the exercise price.

In December 1993, Specialty's stock opened for trading on the Nasdaq system at $5 per share, and ended its first day of trading at $7 per share. There were no material improvements to Specialty between the date the proxy statement was issued and the date that the stock was publicly listed. Over the next three years, the stock price continued to rise, and all

options that were issued under both incentive plans completely vested. Eventually, the stock price rose to a peak level of $30 per share.

Noerr claims that the defendant directors knew or should have known that, contrary to what the proxy statement had disclosed, the fair market value of the Specialty stock was higher than the $1 per share exercise price. She claims that the proxy statement should have disclosed (i) the reasons for the defendant directors' belief that the fair market value of the stock was less than the exercise price, and (ii) that the directors had already set the $1 exercise price before the company's independent auditor had determined the fair market value of the stock. The foregoing conduct, the plaintiff alleges, constituted a breach of the directors' fiduciary duty to the Specialty stockholders.

II. THE CONTENTIONS AND GOVERNING LAW

At this stage of the proceedings, Noerr seeks the certification of a proposed class, the appointment of herself as the class representative, and the designation of her attorneys as class counsel.

To be certified, a class must satisfy both prongs of Court of Chancery Rule 23.[3] The plaintiff must satisfy all four requirements of Rule 23(a) and

[3] *Nottingham Partners v. Dana, 564* A.2d 1089, 1094 (Del. 1989).

must also satisfy at least one of the three criteria enumerated in Rule 23(b). The defendants contend that no class should be certified, for several reasons.

First, they contend that the plaintiff cannot satisfy the requirements of Rule 23(a)(4), because due to conflicting economic interests, she cannot fairly and adequately represent the interests of other class members. The defendants also contend the class definition is too vague to permit certification. The plaintiff vigorously disputes both positions.

Second, the defendants urge that the class cannot be certified under Rules 23(b)(1) or (b)(2). Certification under Rule 23(b)(1) would be improper (they argue) because there is no risk of inconsistent adjudications that could result in incompatible standards of conduct, as it is highly improbable that other stockholders will file lawsuits raising the same issue. The defendants also contend that Rule 23(b)(I) certification would be improper because the relief sought is primarily monetary, and not equitable, in character. Finally, the defendants oppose class certification under Rule 23(b)(2), because the plaintiff does not seek an injunction or corresponding

declaratory relief.[4]

These challenges raise two broad issues. The first is whether the plaintiff and her counsel can fairly and adequately represent the interests of the class. The second is whether the plaintiff has satisfied the requirements of any or all of the three subsections of Rule 23(b). I conclude that the plaintiff has satisfied both sets of requirements, and that a stockholder class will be certified.

III. ANALYSIS

A class action is a procedural device used to avoid multiple lawsuits involving the same or similar issues that affect numerous parties.' Class actions enable parties that have small individual stakes to overcome the often-prohibitive transactional costs of bringing a lawsuit, by suing on behalf of other parties who are similarly situated.[6] A class action is used to enforce individual, as distinguished from derivative, rights.[7] For example, class

[4] The defendants have offered no substantive response to the plaintiffs request for class certification under Rule 23(b)(3). In their correspondence of August 15, 2002, the defendants argue that the Court should not consider the Rule 23(b)(3) argument because the plaintiff did not raise it until her reply brief. The September 11, 2002 reply states that the plaintiff is content "to regard the motion as submitted to the Court." Thus, it is unclear whether the plaintiff is still pressing her Rule 23(b)(3) argument. In any event, this Opinion does not rely on Rule 23(b)(3) as the basis for certification, although for analytical purposes it does discuss Rule 23(b)(3).

[5] 1 Donald J. Wolfe, Jr. & Michael A. Pittenger, Corporate *& Commercial Practice in the Delaware Court of Chancery* § 9-3, at 9-108 (3d ed. 2001).

[6] *Id.*

[7] *Id.* § 9-3, at 9-111.

action treatment is typically available in cases where (as here) it is claimed that stockholders' voting rights were abridged as a result of the nondisclosure or misdisclosure of material information in connection with a corporate transaction.*

A. Is Rule 23(a) Satisfied?

To merit certification as a class action, a lawsuit must first satisfy all four requirements of Court of Chancery Rule 23(a).[9] The defendants do not dispute that the plaintiff has satisfied the first three of those requirements. Only the fourth is said to be in dispute.

Rule 23(a)(1) requires that the prospective group of class members be so numerous that the joinder of individual plaintiffs would be impracticable. That requirement is satisfied, because over 100 individuals and entities throughout the country own over fourteen million shares of Specialty common stock." Rule 23(a)(2) requires that there be questions of law and fact that are common to all class members. This requirement is satisfied, because at issue is the accuracy of the disclosures relating to the incentive

---

[8] *Id.*

[9] *Nottingham Partners, 564* A.2d at 1094-95.

[10] *See Leon N. Weiner & Assoc., Inc. v. Krapf, 584* A.2d 1220, 1225 (Del. 1991)(noting that the numerosity requirement is satisfied where there are over 100 class members); ***See also Tietz*** v. ***Bower,*** 695 F. Supp. 441,445 (N.D. Cal. 1987)(noting that the numerosity requirement was satisfied where there were 27 geographically dispersed class members).

compensation plans that the stockholders were asked to approve. All putative class members were affected identically by those disclosures.* [11] Rule 23(a)(3) mandates that the claims of the class representative be typical of the claims of the class that she seeks to represent. To the extent that Noerr's legal and factual claims are identical to those of the putative class members, that requirement is met. As more specifically discussed, however, the definition of the proposed class raises concerns under Rule 23(a)(3) that require that that class definition be narrowed.[12]

Thus, as the parties view it, the sole issue under Rule 23(a) arises under subsection (4). As briefed by the parties, the question is whether the plaintiff and her counsel can fairly and adequately represent the class that she seeks to have certified. The defendants argue that she cannot, because the plaintiffs interests conflict with those of the other members of the class. The argument runs as follows: as defined, the class includes "all Specialty Common stockholders who owned Specialty common stock on April 2, 1993 [the record date for the annual meeting] . . . *and their successors in interest and transferees and assigns*."[13] That definition includes not only also those persons who were Specialty stockholders of record on the date of

[11] *Nottingham Partners, 564* A.2d at 1095.
[12] Id. (emphasis added).
[13] 3d Am. Compl. ¶ 22.

the vote, but also persons who later acquired their shares from that (former) stockholder group. The inevitable result, the defendants urge, is an economic conflict between the original and the transferee stockholder groups, both of which would be competing to share the same recovery. Because the class as defined would embrace two distinct groups whose economic interests conflict, and because the plaintiff belongs to only one of those groups, defendants conclude that Noerr cannot adequately protect the interests of the defined class.

This argument hopelessly conflates-and confuses-two distinct class action concepts: the ability of the class representative to protect fairly and adequately the interests of the class, as required by Rule 23(a)(4); and the legal sufficiency of the class definition, as implicated (at least implicitly) by Rule 23(a)(3), which requires that the claims or defenses of the class representative be typical of the claims or defenses of all class members. Although the defendants couch their argument in adequacy-of-representation terms, more fundamentally their argument challenges whether any class defined in the manner the plaintiff has chosen can be legally sufficient to merit certification. The defendants contend that the definition is legally flawed, and I agree.

To clear away the Rule 23(a)(4) underbrush, no reason has been shown to doubt the ability of the plaintiff or her counsel to represent the interests of those class members with whom the plaintiff shares an identical interest. Noerr's Illinois and Delaware counsel are highly experienced in the stockholders class action arena, and both counsel are highly competent. Thus, no real issue is presented under Rule 23(a)(4), properly understood.

The real issue posed is whether, in the circumstances alleged here, this Court can certify a "disclosure" class that consists not only of the persons to whom the alleged improper disclosures were made, but also their "successors in interest and transferees and assigns." The defendants argue that no class thusly defined can be certified, because only the former group of stockholders – persons who were stockholders on the record date of the meeting held to vote on the incentive compensation plans-have standing to assert the disclosure claim. The latter group (the successors in interest, transferees and assigns of those "record date" stockholders) have no standing to assert the disclosure claim, because by its very nature, that claim is personal to the stockholders to whom the offending disclosure is made. Therefore, the defendants conclude, it would be improper – indeed legally impossible – to certify the class as defined in the current complaint.

That argument, in my view, has merit. A claim for breach of the fiduciary duty of disclosure can only be maintained by stockholders to whom the duty was owed, in this case, the stockholders on the record date who were entitled, and were being asked, to vote. The only other persons who could assert that disclosure claim would be the "record date" stockholders' successors in interest, who by operation of law would be entitled to assert disclosure claims on behalf of those record date stockholders. Examples of such "successors in interest" would be a person having a power of attorney to act on behalf of a record date stockholder, a personal guardian for a record date stockholder, and an executor of a record date stockholder's estate.

The remaining categories of persons described in the class definition, i.e., the "transferees and assigns" of the former stockholder group, would not be entitled to assert any disclosure claim on behalf of a deceived stockholder transferor, because such transferees and assigns would have no personal disclosure claim to assert. They therefore cannot be included as members of the proposed class.[14] Accordingly, the only class that could be certified is a

[14] The issue arises because of the apparent practice of plaintiffs' counsel of defining the primary group of stockholders that comprise the proposed class and thereafter reflexively, adding as a "boiler plate" tag-along, language such as "their successors in interest and transferees and assigns." Counsel is urged to pay careful attention when drafting the definition of any class that they are asking this Court to certify.

class consisting of persons who were Specialty stockholders on the record date of the stockholders meeting to vote on the compensation plans, as well as persons who were entitled to assert the disclosure claims of those stockholders by operation of law.[15]

In a related argument, the defendants also urge that the class definition is impermissibly vague because it excludes the "Defendants and any person, firm, trust, corporation or other entity related to or affiliated with any of the Defendants," without precisely defining what "related to or affiliated with" means.[16] The defendants propose different language to replace that which they claim is vague. Their argument, however, ignores relevant precedent.

---

[15] Although the defendants' "class definition" argument does not defeat the motion for class certification, it does raise a fundamental question, which is whether the certified class would be entitled to recover anything other than nominal damages. That question arises, because although the stockholder class would have been harmed if it were found deprived of the right to cast an informed vote, any economic harm resulting from their uninformed approval of the incentive plans and the issuance of options thereunder, would arguably have affected only the corporation. The arguments supporting that proposition would be that (i) the options constituted a waste of corporate assets, and (ii) the dilution of shares resulting from the issuance of the options affected all stockholders equally. Thus, any harm resulting from the option-created dilution would be remediable only in a derivative action; because it would not involve the kind of share dilution that was held to give rise to individual claims in ***In re Tri-Star Pictures, Inc. Litig., 634*** A.2d 319 (Del. 1993). ***See In re Triarc Cos., Inc. Class and Derivative Litig.,*** 791 A.2d 872 (Del. Ch. 2001).

That conclusion would be problematic in this case, because although the original complaint asserted both derivative and class claims, the current Third Amended and Supplemental Complaint alleges only class claims. As explained by the plaintiffs counsel in a May 9, 2001 letter to the Court, the derivative claims were dropped as a result of a merger of Specialty into United Technologies Corp. in November 2000.

[16] The class definition as actually phrased in ¶ 22 of the Third Amended Complaint and Supplemental Complaint excludes only the "defendants named [in the complaint] and their affiliates." The language is not vague.

In the past, this Court has approved essentially identical language[17] and the defendants are unable to differentiate this case from those where the definitional language was approved.

In summary, with the one exception discussed above, that requires a narrowing of the class definition, I conclude that the plaintiff has satisfied all of the requirements of Rule 23(a).

B. Is Rule 23(b) Satisfied?

The second broad issue is whether the proposed class can be certified under any or all of the subsections of Rule 23(b). For the following reasons, I conclude that the action should be certified under Rules 23(b)(l)(A) and (B).

By way of overview, it should be pointed out that there are important differences between a class that is certified under Rule 23(b)(1) or (b)(2) and one that is certified under Rule 23(b)(3). Where a class is certified under Rule 23(b)(l) or (b)(2), there are no mandatory "opt out" rights, and any final judgment rendered in that case operates as *res judicata* with respect to the entire class." Where a class is certified under Rule 23(b)(3), creating what is sometimes referred to as a "damages class action," the class

---

[17] *See In re Cencom Cable Income Partners, L.P. Litig., 2000* Del. Ch. LEXIS 10, at *20 (Del. Ch. Jan. 27, 2000).

[18] *Joseph v. Shell Oil Co.,* 1985 Del. Ch. LEXIS 458, at *9 (Feb. 8, 1985); see Wolfe & Pittenger, *supra* note 5, § 9-3[b], at 9-130.

members have the right to opt out and bring their own individual action, rather than remaining as class members and being bound by the result.[19]

Under Rule 23(b)(l), a class may be certified in two situations.[20] The first is where the prosecution of separate actions by or against individual class members would result in inconsistent or varying adjudications and create incompatible standards of conduct for the opposing party.[21] The second is where an adjudication of the claims of individual class members would be dispositive of, or substantially impair, the interests of non-parties and potential class members.[22]

The defendants advance multiple arguments opposing certification under Rule 23(b)(l)(A). They first argue that a certification under this provision normally involves claims for equitable relief, whereas here the thrust of the requested relief is monetary.[23] But, the nature of the relief requested is not the exclusive factor the Court must consider in determining under which subsection of Rule 23(b) to certify a class.[24] The Court must

---

[19] See Wolfe & Pittenger, *supra* note 5, § 9-3[b], at 9-130.

[20] The language of Rule 23(b)(l) allows the Court to certify a case under either subsection (A), (B), or both (A) and (B).

[21] Ch. Ct. R. 23(b)(l)(A).

[22] Ch. Ct. R. 23(b)(l)(B).

[23] *Dieter v. Prime Computer, Inc.,* 681 A.2d 1068, 1074 (Del. Ch. 1996).

[24] *In re Mobile Communications Corp. of Am., Inc. Consol. Litig.,* 1991 Del. Ch. LEXIS 4 at *47 (Del. Ch. Jan. 7, 1991); *Turner v. Bernstein, 768* A.2d 24, 30-31 (Del. Ch. 2000).

also consider whether (i) all members of the class are similarly situated with respect to each issue of liability and damages and whether (ii) the litigation of separate and individual actions would subject the defendants to the risk of inconsistent standards of conduct with respect to the same transaction.[25]

The thrust of the relief sought in this case is, to be sure, monetary in character: the plaintiff purports to seek compensatory damages and the imposition of a constructive trust to capture any profits resulting from the defendants' alleged breach of fiduciary duty.[26] But, the monetary character of the requested relief does not, by itself, defeat certification under Rule 23(b)(1), because here the class members are similarly situated and separate litigations would subject the defendants to the risk of inconsistent standards of conduct.

---

[25] *Id.*

[26] As earlier noted, these damage claims arguably belong to Specialty and may be derivative in character. If that were shown to be the case, then the damages recoverable by the class would likely be nominal.

Noerr also seeks declaratory relief. That relief would not require an injunction for its enforcement. The plaintiffs alternatively argue that the class action can be maintained under Rule 23(b)(2). Certification under this section is appropriate where the relief sought is primarily a class-wide final injunction or corresponding declaratory relief. Ch. Ct R. 23(b)(2); ***Nottingham Partners,*** 564 A.2d at 1095. "Corresponding declaratory relief' either affords injunctive relief or serves as a basis for later injunctive relief. C.A. Wright, A.R. Miller & M.K. Kane, 7A ***Federal Practice and Procedure $1775*** (1986)(hereinafter "Wright, Miller & Kane"). The declaratory relief that the plaintiff seeks will not serve as the basis for a later injunction. While the constructive trust is an equitable remedy, the true purpose of that remedy in this case is to recover money. For these reasons, Rule 23(b)(2) does not apply here.

In this case, the primary substantive issue is whether the directors breached their fiduciary duty of disclosure in the proxy statement. The proxy statement was either materially false or misleading or it was not. In either event, the proxy disclosures would have impacted all members of the proposed class the same way. No justification has been shown for allowing the same substantive issues, arising out of the same transaction, to be repeatedly relitigated by identically-situated multiple plaintiffs. That scenario would create a palpable risk of inconsistent adjudications of the propriety of the same proxy disclosures.

The Commentary and the Advisory Committee Notes created in connection with the adoption of Rule 23(b)(1) of the Federal Rules of Civil Procedure ("F.R.C.P.") also support class certification under Court of Chancery Rule 23(b)(1).[27] Here the money damages (if any) would be identical for each share, and the damages awarded to each class member would depend solely on the number of shares that each class member owns. Where, as here, the damages recoverable by to each member of the class

[27] F.R.C.P. 23 is substantively similar to Ch. Ct. R. 23, Therefore, interpretations of the federal rule are persuasive authority in the interpretation of this Court's Rules. *Nottingham Partners, 564* A.2d at 1094.

would be determined on that basis, the Rule drafters intended Rule 23(b)(1) as the appropriate vehicle for class certification.[28]

The defendants argue that certification of the class would not further the intended purpose of Rule 23(b)(l)(A), because if the class were not certified there would be little risk of separate lawsuits that could result in inconsistent rulings and incompatible standards of conduct for the defendants. The short answer is that the defendants offer no evidence to support that *ipse dixit* assertion.

Alternatively, the plaintiff argues that the Court should certify the class under Rule 23(b)(3). This Court has previously noted the debate over whether class certification should occur under Rules 23(b)(l)(A) or Rule 23(b)(3) in cases involving claims for monetary relief.[29] Rule 23(b)(3) certification has been found appropriate where the class members are loosely bound by common questions of law or fact and considerations of convenience, but where the damages would likely be specific to each individual class member.[30] This is not such a case. Here, any damages to which class members would be entitled would be based solely upon the

---

[28] ***Turner, 768*** A.2d at 32 (discussing Wright, Miller & Kane §§ 1772-74, 1789 and ***Advisory Committee Notes for the Federal Rules of Civil Procedure for the United States District Courts, Rule 23, 1966 Amendment); Hynson v. Drummond Coal Co., Inc.,*** 601 A.2d 570,575 (Del Ch. 1991).

[29] ***Turner, 768*** A.2d at 32-34.

[30] ***Id.*** at 33; See ***also*** Wright, Miller & Kane § 1784.

number of shares that they own. For that reason, this action is more appropriately certified under Rule 23(b)(l)(A) than under Rule 23(b)(3).

Certification is also appropriate under Rule 23(b)(l)(B). That subsection applies in cases where there is a risk that an individual adjudication "would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." [31] This is such a case, and the defendants make no persuasive showing to the contrary. Accordingly, the Court finds that the class (as redefined) should be certified under Rules 23(b)(1)(A) and 23(b)(1)(B).

IV. CONCLUSION

For these reasons, the motion to certify the class action is granted in conformity with this Opinion. Noerr will be appointed as the class representative, and her attorneys shall be designated as class counsel. Counsel shall confer and submit an agreed forrn of implementing order.

[31] Ch. Ct. R. 23(b)(l)(B).