

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Pamela S. Tikellis, Esquire
Chimicles & Tikellis LLP
222 Delaware Avenue, Suite 1100
Wilmington, DE 19801

Christine S. Azar, Esquire
Labaton Sucharow LLP
1201 N. Orange Street, Suite 801
Wilmington, DE 19801

Stuart M. Grant, Esquire
Grant & Eisenhofer, P.A.
1201 North Market Street, Suite 2100
Wilmington, DE 19801

Paul A. Fioravanti, Esquire
Prickett, Jones & Elliott, P.A.
1310 N. King Street
Wilmington, DE 19801

Michael D. Goldman, Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
Wilmington, DE 19801

Kenneth J. Nachbar, Esquire
Morris, Nichols, Arshat & Tunnell LLP
1201 North Market Street
Wilmington, DE 19801

Gregory V. Varallo, Esquire
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, DE 19801

C. Barr Flinn, Esquire
Young Conaway Stargatt & Taylor, LLP
1000 West Street, 17th Floor
Wilmington, DE 19801

Re: *Southeastern Pennsylvania Transportation Authority v. Rubin, et al.*
C.A. No. 6323-VCN
New Orleans Employers – International Longshoremen’s Association,
AFL-CIO Pension Fund v. Rubin, et al.
C.A. No. 6335-VCN

New Orleans Employees' Retirement System v. Rubin, et al.

C.A. No. 6339-VCN

Erie County Employees Retirement System v. Rubin, et al.

C.A. No. 6346-VCN

Delaware County Employees' Retirement Fund v. Rubin, et al.

C.A. No. 6361-VCN

Date Submitted: April 27, 2011

Dear Counsel:

Five actions have been filed to challenge the sale, pursuant to a March 28, 2011, merger agreement, of GSI Commerce, Inc. ("GSI") to Defendant eBay Inc. Before the Court are competing efforts to gain control of the course of that challenge. Four shareholder-plaintiffs have stepped forward as possible representatives of the shareholder class. Plaintiff New Orleans Employees' Retirement System ("NOERS") proposes that it be designated the lead plaintiff and that its counsel, Grant & Eisenhofer, P.A. ("Grant & Eisenhofer"), be named lead counsel.¹ Plaintiff Erie County Employees Retirement System ("Erie County") asks the Court to designate it and NOERS as co-lead plaintiffs and its attorneys, Prickett, Jones & Elliot, P.A. ("Prickett Jones"), as co-lead counsel with Grant & Eisenhofer. Plaintiffs Southeastern Pennsylvania Transportation Authority ("SEPTA") and

¹ NOERS's motion is also supported by Plaintiff New Orleans Employers – International Longshoremen's Association, which is represented by Labaton Sucharow LLP.

Delaware County Employees' Retirement Fund ("Delaware County"), both represented by Chimicles & Tikellis LLP ("Chimicles & Tikellis"), propose that NOERS, Erie County, SEPTA, and Delaware County each be appointed a co-lead plaintiff allowed to select one member of a team of four co-lead counsel.²

Ideally, when several related shareholder class actions are filed in this Court, plaintiffs' counsel will confer and reach consensus regarding a leadership structure for pursuing the shareholders' interests without the Court's involvement. Where agreement cannot be achieved, the Court is called upon to designate lead plaintiff(s) and lead counsel; this is one such instance.

In making its decision, the Court is guided by *Hirt v. U.S. Timberlands Service Company, LLC*,³ which identified the following factors to consider:

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

² The identified firms have all associated with out-of-state firms.

³ 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002).

- the competence of counsel and their access to the resources necessary to prosecute the claims at issue.⁴

Applying these factors to the current litigation does not lead the Court inexorably to a single answer. The Court notes at the outset that this is not a case in which the competency of the lawyers involved, or their access to the resources necessary to prosecute the shareholders' claims, may be questioned. The contestants have successfully served as lead counsel or co-lead counsel in varying numbers of complex cases; each is capable of ably serving in that role here. Thus, the Court cannot reach a decision based on *Hirt's* competency factor here.

Similarly, an examination of *Hirt's* economic factors is not helpful either. Each of the plaintiffs is an institutional shareholder that holds a small amount of GSI's common stock.⁵ Accordingly, the litigation presents neither the prospect of

⁴ *Id.* ("The court has also recognized 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.") (citations and quotations omitted).

⁵ Despite some debate about the number of outstanding shares, the plaintiffs each own roughly between 0.003% and 0.02% of GSI's common stock. SEPTA's Mem. of Law in Supp. of its and Delaware County's Mot. for Consolidation and Appointment as Co-Lead Pls. at 8; Erie County's Mem. of Law in Supp. of its Cross-Mot. to Appoint Leadership Structure and Resp. to Pending Mot. for Appointment of Lead Pl. and Lead Counsel at 9-10. Thus, each plaintiff's respective stake is "not large enough to demonstrate a substantial relative difference that would require the Court to give this factor great weight." *Wiehl v. Eon Labs*, 2005 WL 696764, at *3 (Del. Ch. Mar. 22, 2005).

conflict between larger and smaller shareholders nor a material difference among the plaintiffs' relative economic interests in the litigation.

With regard to the other factors, a comparison of the pleadings reveals that, although the Erie County Amended Complaint and the NOERS Complaint may be slightly stronger than the SEPTA/Delaware County Amended Complaint, they are not dispositively so. Indeed, the differences among the three sets of pleadings can, to some extent, be attributed to the strategic choices.

Finally, it is difficult to find, based on whether or when attorneys decided to file motions to expedite, material differences in the contestants' willingness to prosecute the action vigorously on behalf of all the plaintiffs, or even to find, again perhaps because they were motivated by varying litigation strategies, differences among how vigorously each contestant has prosecuted the action to date. If any distinction can be drawn with regard to this factor, it is perhaps in favor of Prickett Jones, which like Grant & Eisenhofer, filed a strong complaint, but has since filed an amended complaint, which accounts for information that was included in GSI's preliminary proxy statement.

Although the factors described above do not mandate, or even persuasively suggest, any one outcome, a decision must be made in order to allow the litigation to proceed and to protect the shareholders' interests.

Without either a significantly better set of pleadings or a materially superior economic interest—measured by the holdings of a sponsoring plaintiff—counsel should demonstrate a willingness to work with others. Conversely, for the Court to appoint everyone (or most everyone) to a lead role would run the risk of imposing the inefficiencies and lack of focus that frequently plague committees. Ultimately, the objective must be to find the case management structure that optimizes the interests and potential of the shareholder class.

In this instance, plenty of talent has come forth in the shareholders' cause. The challenge is to find a way to harness that talent while establishing a leadership authority to resolve the inevitable debates about strategy and allocation of resources. To that end, the Court designates Erie County as lead plaintiff and Prickett Jones as lead counsel.⁶ Although the Court will not—and should not—engage in detailed real-time supervision of the Plaintiffs' case, the Court's expectation here may diverge

⁶ To the extent it is necessary, the *Hirt* factors, if they provide a basis for separating out any candidate for lead counsel, support, albeit only marginally, Pricket Jones.

from the more traditional perspective. Lead counsel, as suggested during oral argument, should act as the captain of the proverbial ship. It is lead counsel's responsibility—after consulting openly and in detail with its client and other counsel—to allocate work fairly among the willing. This is not an appointment that empowers lead counsel to take most of the work or the “good” work for itself. In short, the role of lead counsel, not to be profound, is to lead.

The motion to consolidate these actions is unopposed and therefore is granted. Counsel are requested to pursue scheduling discussions in accordance with the colloquy during oral argument and to submit a form of order to implement this letter opinion.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K