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Re: *New Jersey Carpenters Pension Fund v. info*GROUP*, Inc.*
C.A. No. 5334-VCN
Date Submitted: January 17, 2013

Dear Counsel:

New Jersey Carpenters Pension Fund (the "Plaintiff" or the "Fund"), a former stockholder of *info*GROUP, Inc. ("*info*GROUP" or the "Company"), has moved for class certification in its action against *info*GROUP and its former directors (the "Defendants"). The Plaintiff asserts claims arising from the merger agreement between *info*GROUP and private equity firm CCMP Capital Advisors LLC ("CCMP") and the ultimate acquisition of all of the Company's stock by

CCMP for $8.00 per share (the "Merger").[1] The Complaint alleges that the Defendants breached their fiduciary duty of loyalty and good faith by selling the Company at an unfair price.

When the Court heard oral arguments on class certification, it reserved decision on whether the Plaintiff's proposed class representatives—the Fund and Ronald E. Kistner ("Kistner")[2]—satisfied the adequacy and typicality requirements of Court of Chancery Rule 23(a), but, as to all other requirements for class certification under Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2), the Court held that those requirements have been satisfied.[3]

The Court deferred addressing the typicality requirement because Defendants had identified certain defenses that were potentially applicable to the proposed class representatives that might not be asserted against other class members.[4] As to the adequacy requirement, the Court determined first, that the

[1] Verified Second Am. Class Action Compl. (the "Compl." or "Complaint").
[2] Kistner, a former stockholder of *info*GROUP, filed a complaint in Nebraska against the Company and its former directors shortly after the Fund filed its complaint. It appears that Kistner is not a party to this action and has yet to intervene. Defendants have not objected to his status.
[3] Oral Argument Tr. at 48-50, Jan. 17, 2013.
[4] *Id*.

Fund and Kistner had retained experienced and competent counsel and second, that there are no conflicts between them and other members of the proposed class.[5] Nonetheless, the Court deferred its ruling because, among other reasons, the Defendants had cast some doubt on whether Kistner, and the Fund's representative overseeing the litigation, George R. Laufenberg ("Laufenberg"), had sufficient knowledge of the claims and whether they had improperly abdicated control of the litigation to their counsel.[6]

The Court, thus, will now address the following unresolved issues: (1) whether the Fund and Kistner satisfy the typicality and adequacy requirements of Rule 23(a), and (2) the proper scope of the proposed class.

I. BACKGROUND

A. *The Merger*

The Plaintiff alleges that the Defendants sold *info*GROUP to CCMP at an inadequate price and after conducting a flawed process so that Defendant Vinod

[5] *Id.* at 49-50. The Court will not revisit these conclusions. The question is whether the class representatives have different claims and motivations or may be subject to different defenses. There are no adverse relationships between the two proposed class representatives and the balance of the potential class members.
[6] *Id*.

Gupta ("Gupta")—a director and substantial stockholder of *info*GROUP—could liquidate his interest in the Company. The Complaint contends that the director Defendants abdicated their fiduciary duty in the face of relentless harassment and pressure from Gupta to sell the Company. The Merger was announced on March 8, 2010, and despite strong opposition from some stockholders, it was approved by a majority of stockholders on June 29, 2010 and closed on July 1, 2010.[7]

B. *Procedural History*

The Fund filed its action on March 11, 2010 in this Court and Kistner filed his complaint in a Nebraska court six days later, on March 17. On June 24, 2010, the Court denied the Fund's motion for a preliminary injunction to enjoin the Merger. Defendants later filed a motion to dismiss the Complaint, which was substantially denied by the Court on September 30, 2011.[8]

[7] Compl. ¶ 2.
[8] *N.J. Carpenters Pension Fund v. info*GROUP*, Inc.*, 2011 WL 4825888 (Del. Ch. Sept. 30, 2011).

II. CONTENTIONS

Although the Plaintiff bears the burden of demonstrating that class certification is appropriate, the Defendants' various objections to certification frame the Court's analysis. The Defendants contend that the proposed class representatives (*i.e.*, the Fund and Kistner) have atypical claims and defenses and would be inadequate representatives. They also seek to limit the scope of the proposed class.

First, they contend that the Fund is not a typical class representative because it sold almost all of its shares before consummation of the Merger for $7.87 per share—$0.13 lower than the Merger price.[9] Because an unfair Merger price is central to the allegations made in the Complaint, the Defendants assert that the Fund's claims will be undermined at trial.[10] They further contend that the Fund may be subject to an acquiescence defense if the Fund voted in favor of the Merger.[11] As to Kistner, the Defendants assert that his claim, as he describes it in

[9] The *info*GROUP Defs.' Answering Br. in Opp'n to Pl.'s Mot. for Class Certification ("Defs.' Br.") 16-18.
[10] *Id*.
[11] *Id*. at 18-19.

his deposition, is not typical of the proposed class claim because it is based on a theory that he overpaid for *info*GROUP stock based on rumors of a bidding war.[12]

Second, the Defendants attack the Fund and Kistner as inadequate class representatives. Among other assertions, the Defendants contend that the Fund representative, Laufenberg, has not effectively participated in the litigation and lacks sufficient knowledge about the case to adequately represent the proposed class.[13] As to Kistner, they assert that he has completely surrendered control of the litigation to counsel and also lacks sufficient knowledge about the case.[14]

The Plaintiff seeks certification of a class consisting of:

> All holders of common stock of *info*GROUP, Inc. at any time from March 8, 2010 through and including July 1, 2010, whether beneficial or of record, including their legal representatives, heirs, successors in interest, transferees and assignees of all such foregoing holders, excluding the Defendants and CCMP . . . and their associates, affiliates, legal representatives, heirs, successors in interest, transferees and assignees [the "proposed class"].[15]

In addition, the Plaintiff seeks an order designating the Fund and Kistner as class representatives.

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[12] *Id*. at 23-25.
[13] *Id*. at 12-16.
[14] *Id*. at 20-23.
[15] Pl.'s Br. in Supp. of its Mot. for Class Certification 1. *See* Pl.'s Mot. for Class Certification.

The Defendants attempt to narrow the scope of the proposed class in two ways. First, they assert that the proposed class should exclude persons who voted in favor of the Merger because those stockholders are precluded under Delaware law from bringing fiduciary duty claims. Second, they contend that the proposed class should not include shareholders who purchased their shares after the Merger was announced.[16]

III. ANALYSIS

A. *Applicable Standards*

The remaining questions about whether a class should be certified depend upon two prongs of Court of Chancery Rule 23(a): "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."[17]

"The test of typicality is that the legal and factual position of the class representative must not be markedly different from that of the members of the

[16] *Id*. at 25-29.
[17] Ct. Ch. R. 23(a).

class."[18] In other words, "[i]f the proposed class representative's claims require more or less proof than would be required by the claims of other members of the class, class certification is unavailable."[19] Typicality is generally deemed satisfied if the representative's claim or defense "arises from the same event or course of conduct that gives rise to the claims [or defenses] of other class members and is based on the same legal theory."[20] However, a proposed class representative may not be typical if he is potentially subject to unique defenses not applicable to other class members.[21] Furthermore, typicality may be defeated if a conflict or a potential conflict exists between the legal and factual positions of the proposed class representative and class members.[22]

As mandated by the due process clause of the United States Constitution, the test of adequacy requires that the class representative "fairly and adequately"

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[18] *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1225-26 (Del. 1991) (internal quotation marks and citation omitted).
[19] *Paine Webber R&D P'rs, L.P. v. Centocor, Inc.*, 1997 WL 719096, at *5 (Del. Super. Ct. Oct. 9, 1997).
[20] *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1092 (Del. Ch. 2001) (alteration in original) (internal quotation marks omitted) (quoting *Krapf*, 584 A.2d at 1226).
[21] *See Dieter v. Prime Computer, Inc.*, 681 A.2d 1068, 1072-73 (Del. Ch. 1996) (noting that the "spectre of the defense [of standing] does disqualify the Dieters as appropriate class representatives").
[22] *See Bank v. Elec. Payment Servs., Inc*., 1997 WL 811552, at *16 (D. Del. Dec. 30, 1997).

protect the interests of the class.[23] Over time, the Court has identified a plethora of factors that inform whether a plaintiff would be an adequate class representative.[24] In addition to an inquiry into whether a plaintiff's attorney is qualified, experienced, and competent to prosecute the litigation, other factors include an "assurance of 'vigorous representation'" and "an absence of conflict" between the class representative and the class members.[25] Generally, a class representative must "possess a basic familiarity with the facts and issues involved in the lawsuit."[26] This list is far from exhaustive, but these factors are the most applicable to the Court's analysis on this motion.

B. *Are Kistner's Claims Typical and is He an Adequate Class Representative?*

The Defendants contend that Kistner's "claim" is atypical of the class claim because it is not based on the allegations made in the Complaint, namely, the

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[23] *See Prezant v. De Angelis*, 636 A.2d 915, 923 (Del. 1994).
[24] *See In re Fuqua Indus., Inc. S'holder Litig*., 752 A.2d 126, 130 (Del. Ch. 1999). Some of those factors include: "(1) economic antagonisms between the representative and the class; (2) the remedy sought by plaintiff in the derivative litigation; (3) indications that the named plaintiff was not the driving force behind the litigation; (4) plaintiff's unfamiliarity with the litigation; (5) other litigation pending between plaintiff and defendants; (6) the relative magnitude of plaintiff's personal interests as compared to her interest in the derivative action itself; (7) plaintiff's vindictiveness toward defendants; and (8) the degree of support plaintiff was receiving from the shareholders she purported to represent."
[25] *Paine Webber R&D P'rs*, 1997 WL 719096, at *6.
[26] *Fuqua Indus., Inc.*, 752 A.2d at 127.

failure of the Defendants to maximize the sale price of the Company. Kistner's deposition reveals that he purchased *info*GROUP shares in November 2009 (before the announcement of the Merger) based on rumors that a bidding war would likely increase the Company's share price. His testimony seems to suggest that he believed that the Merger price was unfair only because it was below his cost basis of $8.71. He also stated candidly that he would not have filed suit if he had recouped his investment. Still, other testimony shows that he did not expect the Company to "sell out in a fire sale" and that he believed that the Company was worth an amount well above his cost basis.[27] This latter testimony, of course, is consistent with the underlying claims in the Complaint.

The Defendants have attempted to equate Kistner's reasons for purchasing *info*GROUP stock and his views of the stock's value to his underlying legal theory, for purposes of showing that his claim diverges from other class members' claims. In this instance, that attempt fails because Kistner's reasons for purchasing *info*GROUP stock do not form the basis for his legal claim, nor do they necessarily

[27] Transmittal Aff. of Anthony A. Rickey, Esquire in Supp. of the *info*GROUP Defs.' Answering Br. in Opp'n to Pl.'s Mot. for Class Certification (the "Rickey Aff.") Ex. 2 (Kistner Dep.) at 53, 229-30.

preclude it.[28] "It is well settled that class representatives are not required to articulate the legal theories supporting their underlying claims. That is the role of plaintiff's counsel."[29] The Defendants have not asserted a substantive conflict between Kistner's actual legal claims and those of other class members. Even if Kistner had, at some point, conflicting views on the value of *info*GROUP stock, it is not clear how those views would subject him to a defense that would render his claims atypical when they are based on the same legal theories as other class members' claims.

Kistner's claims arise from the same events (the Merger) and conduct (the Board's allegedly engaging in a fire sale) as other class members. Not surprisingly, his claims are identical to the legal theories of other class members. Consequently, the Plaintiff has satisfied its burden to show that Kistner's claims are not markedly different from the legal and factual positions of other class members.

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[28] The Defendants have not cited any authority in support of their assertion that Kistner's reasons for purchasing *info*GROUP stock should disqualify him from serving as class representative.
[29] *Shapiro v. Nu-W. Indus., Inc.*, 2000 WL 1478536, at *4 (Del. Ch. Sept. 29, 2000).

As to the adequacy test, the Court notes that the Plaintiff has demonstrated that no actual conflict exists between Kistner and other class members. However, the Defendants assert that Kistner is not an adequate class representative because he has not vigorously litigated the case. From his deposition testimony, they quote a number of exchanges that tend to show that he lacks knowledge about the case or has limited involvement with it. The Court can draw the following inferences from those exchanges: (1) Kistner decided to pursue a lawsuit only because someone else had filed suit;[30] (2) he could not remember whether he had read the Complaint before it was filed or after it was filed;[31] (3) he did not know who the director Defendants were other than the fact that they were board members of *info*GROUP;[32] (4) he was unable to respond with specific events when counsel asked what had transpired in the litigation during the last two years;[33] and (5) he expected his attorneys to be the ultimate decision-makers on whether to accept a settlement offer.[34]

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[30] Rickey Aff. Ex. 2 (Kistner Dep.) at 94-95.
[31] *Id*. at 122-23.
[32] *Id*. at 125-26.
[33] *Id*. at 170-71.
[34] *Id*. at 218; *see* Defs.' Br. 20-23.

On the other hand, the Plaintiff quotes other parts of Kistner's deposition that tend to show that he was informed of the claims and facts in the Complaint.[35] For instance, Kistner was aware of the allegations that Gupta had a conflicting motive to sell the Company at a discount for liquidity purposes.[36] He also knew about other facts, including the twenty-one day go-shop period, the competing bidders, and that he had voted against the Merger.[37] As to his involvement in the case, Kistner stated that he had spent almost twenty hours reading the Complaint and talking with lawyers.[38] He also seemed to have a basic understanding of his role as a class representative, as well as an appreciation of the various motions filed by the parties and the actions taken by the Court in the litigation.[39]

Although Kistner perhaps may not be an ideal representative,[40] the Court is satisfied that he, as well as his counsel, will adequately represent the proposed class. The Defendants' objections are not persuasive enough to discredit Kistner's

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[35] Pl.'s Reply Br. in Supp. of Mot. for Class Certification ("Pl.'s Reply Br.") 4-9.
[36] Rickey Aff. Ex. 2 (Kistner Dep.) at 176-77.
[37] *Id*. at 163-64, 170.
[38] *Id*. at 171.
[39] *Id*. at 217, 241-43.
[40] *See Price v. Wilmington Trust Co.*, 730 A.2d 1236, 1238 (Del. Ch. 1997) (quoting *Ross v. A.H. Robins Co.*, 100 F.R.D. 5, 6 (S.D.N.Y. 1982) (Rule 23(a)(4) does not require that the class representative be the "best of all representatives.")

basic, but adequate, knowledge of the case and his continuing interest in, and commitment to, the litigation. With sophisticated, able, and competent counsel at his service, there is no reason to suspect that the proposed class would not receive adequate representation. Although Kistner was unable to offer specifics when asked about the last two years of the case, his reading of the Court's opinions on the motions to dismiss and to compel show some ongoing involvement on his part. Thus, the Court cannot conclude that he has completely abdicated control over the case to counsel. That Kistner expects that his lawyers will be the ultimate decision-makers on whether to settle the case is also of little help to Defendants. As a co-class representative in this action, Kistner does not have sole authority to approve or reject a settlement. He also does not have the "right to dictate the outcome of the action unilaterally."[41] It is not unreasonable to expect that he would be guided by the advice of counsel.

[41] *In re M&F Worldwide Corp. S'holders Litig.*, 799 A.2d 1164, 1174-75 (Del. Ch. 2002) ("Concomitant with this responsibility, the named plaintiffs gave up the right to dictate the outcome of the action unilaterally. Instead, any resolution of the action would also depend, to some extent, on whether their counsel agreed (and ultimately, on the court's approval).") (citation omitted).

Absent a conflict between the proposed class representative and members of the class, and absent incompetent or unable counsel, it would seem that an unusual set of facts is required in order for the Court to deny a plaintiff the role of class representative.[42] Such instances might occur when a proposed class representative knows practically nothing about the case or seemingly has no interest or involvement in the litigation. Those extreme facts are not present here.[43] The Plaintiff has demonstrated that Kistner has a basic knowledge of the claims and continues to participate in the litigation. That is enough to satisfy its burden.

C. *Are the Fund's Claim Typical and is It an Adequate Class Representative?*

Defendants attack the Fund, and more specifically, its representative overseeing the litigation, Laufenberg, as an inadequate class representative. They assert a laundry-list of objections, including: the Fund verified an inaccurate complaint; Laufenberg has spent only ten to fifteen hours on the matter; the Fund

[42] "The Courts generally accord the greatest weight to the presence or absence of conflicts of interest or economic antagonism when evaluating a lead plaintiff's adequacy." *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *14 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part*, 2012 WL 6707736 (Del. Dec. 27, 2012).
[43] *See Fuqua Indus., Inc.*, 752 A.2d at 133-34.

failed to check for accuracy any of the claims its counsel made in the Complaint;[44] Laufenberg never reviewed any of the documents cited in the Complaint; and the Fund sold shares of *info*GROUP stock after it filed this action.[45]

At the outset, the Court observes that the Fund's interests are not antagonistic to those of other class members. Nonetheless, the Defendants contend that the Fund lacks sufficient knowledge of the litigation and is not actively participating. However, those contentions are contradicted by portions of Laufenberg's deposition, which provides a sufficient basis to conclude that he has an understanding of the claims asserted against the Defendants.[46] In addition, it is apparent from Laufenberg's deposition that the Fund has also actively participated in the litigation by complying with Defendants' discovery demands and keeping abreast of its progress through communication with its counsel.[47] The Fund may not be a perfect representative in this regard, but it need not be to qualify as a class representative.

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[44] The Plaintiff appears to concede the truth of the assertion in part in its reply brief. "Plaintiffs in these cases typically (and properly) rely largely on investigations of counsel into the factual and legal bases for their claims. This case is no different . . . ." Pl.'s Reply Br. 11 n.7.
[45] Defs.' Br. 12-16.
[46] *See, e.g.*, Rickey Aff. Ex. 3 (Laufenberg Dep.) at 114-15, 123-26, 141-44.
[47] *See, e.g.*, *id*. at 112, 118, 168, 180.

Defendants' remaining contentions attack the Fund for having engaged in conduct unbecoming a potential class representative. While it is generally true that a lead plaintiff should not trade in a defendant's securities during pending litigation, that concern is intended primarily to address and to preclude trading on non-public information obtained through discovery.[48] Because the sale of a portion of the Fund's *info*GROUP's stock was orchestrated by an independent investment manager, and because there is no evidence to suggest (or even an allegation by the Defendants) that the Fund traded on the basis of non-public information, the Court cannot conclude that the Fund's conduct was inappropriate or would disqualify it from serving as a class representative. Finally, while the Fund acknowledges that it verified an inaccurate complaint, that mistake alone is not enough, in the Court's view, to deem it as an inadequate class representative.

[48] See Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 9.03[b][1], at 9-159 (2012) ("As fiduciaries to the class, representative plaintiffs are generally prohibited from trading in the defendant company's securities while litigation is pending. Representative plaintiffs often have access to confidential, nonpublic information during the course of discovery. Counsel for representative plaintiffs should specifically instruct their clients to refrain from buying or selling a defendant company's securities during litigation.").

As to typicality, the Defendants assert that the Fund is subject to an affirmative defense because it sold almost all of its shares for $7.87 per share before the Merger was consummated. That conduct, they contend, substantially undermines the Fund's claim that the Merger price of $8.00 per share was inadequate. The Defendants also assert that the Fund is susceptible to an acquiescence defense because it may not have voted against the Merger—a fact that appears to be unsubstantiated at this point.[49]

The recent decision in *In re Celera Corporation Shareholder Litigation* negates the Defendants' first objection to typicality.[50] In *Celera*, the Court stated that the proposed class representative may still have standing even though it sold all of its shares after the merger was approved by the board, but before the merger was consummated.[51] The Supreme Court concluded that the stockholder nonetheless had standing because it owned stock at the time the Merger agreement was approved, and because it challenged the terms of the Merger.[52]

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[49] Defs.' Br. 16-19.
[50] 2012 WL 6707736 (Del. Dec. 27, 2012).
[51] *Id*. at *8.
[52] *Id*.

Just as in *Celera*, the Fund owned shares at the time the Merger was approved by the Board. But unlike *Celera*, Laufenberg instructed the Fund in April 2010 to segregate 100 *info*GROUP shares into a separate account to preserve standing. Apparently, the Fund's remaining *info*GROUP shares (approximately 39,300) were sold in June 2010 for $7.87 per share. There is no indication why the Fund's independent manager sold the vast majority of its *info*GROUP shares before the Merger. Regardless of the motivation, however, under *Celera*, the Fund's sale of most (but not all) of *info*GROUP stock prior to the consummation of the Merger does not make its claims or defenses atypical or render it an inadequate class representative.

The Defendants' second objection to typicality also falls short. Under Delaware law, a "shareholder acquiesces in a merger" when he makes a "fully informed vote in favor of the merger, or accepts the benefits of the transaction."[53] In *Celera*, the Court determined that the proposed class representative did not acquiesce in the merger because it neither voted in favor of the merger nor

[53] *Id*. at *9.

accepted the benefits arising from the transaction.[54] In contrast to this case, the Fund may have voted in favor of the Merger.[55]

While votes in favor of the Merger may ultimately preclude some class members from obtaining relief, the Court is not persuaded that the spectre of an acquiescence defense should bar the Fund from serving as class representative. As discussed further below, the acquiescence defense will likely turn on whether the Fund voted in favor of the Merger and whether it was fully informed at the time it voted on the transaction. At this point, the Court has no basis to determine whether the Fund was fully informed, let alone whether it voted in favor of the transaction. The acquiescence defense may also lack merit if the Fund did not demonstrate unequivocal approval of the challenged transaction, which may have occurred given that it has continuously pursued this litigation since March 2010.[56]

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[54] *Id*.
[55] Whether the Fund voted for the Merger is not clear from the record.
[56] *See In re Best Lock Corp.*, 845 A.2d at 1080-81 (noting that "the fact that plaintiffs tendered their shares while simultaneously pursuing this action 'belies any thought to acquiescence.'") (quoting *Kahn v. Household Acq. Corp.*, 7 Del. J. Corp. L, 324, 328, 1982 WL 8778 (Del. Ch. Jan. 19, 1982)).

Even if the Fund is subject to such a defense, it would not necessarily be atypical for purposes of class certification. "A unique defense will render the proposed class representative's claims atypical only if it is likely to be a major focus of the litigation and not if it is insignificant or improbable."[57] The "major focus" analysis appears to turn on when the issues need to be resolved. If the "overriding question common to the class is 'logically prior' to special defenses against the named plaintiff," then the unique defense does not render the proposed lead plaintiff atypical.[58] In other words, "[w]here, as here, an alleged defense may affect the individual's ultimate right to recover, but it does not affect the presentation of the case on the liability issues for the plaintiff class, that defense should not make a plaintiff's claim atypical."[59]

The Court's decision in *Celera Corp* relied on this analysis to conclude that "allegations of acquiescence are not 'logically prior' to liability issues."[60] Thus,

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[57] *In re Celera Corp.*, 2012 WL 1020471, at *12 (internal quotations marks omitted).
[58] *O'Malley v. Boris*, 2001 WL 50204, at *4 (Del. Ch. Jan. 11, 2011) (quoting *Zeffiro v. First Pa. Banking & Trust Co*., 96 F.R.D. 567, 570 (E.D. Pa. 1983)); *see also In re Celera Corp.,* 2012 WL 1020471, at *12 (noting that *O'Malley* holds that a unique defense may not make a class representative atypical).
[59] *O'Malley,* 2001 WL 50204, at *4 (quoting *Zeffiro*, 96 F.R.D. at 570 (E.D. Pa. 1983)).
[60] *In re Celera Corp.*, 2012 WL 1020471, at *12-13.

the proposed class representative in *Celera Corp* was not disqualified because of its susceptibility to this defense. That same analysis would apply here. The Fund's susceptibility to an acquiescence defense does not "affect the presentation of the case on the liability issues for the plaintiff class."[61] Accordingly, the Fund is not disqualified on this basis from serving as class representative.

D. *The Proposed Class*

The Defendants seek to limit the proposed class by excluding *info*GROUP stockholders who (1) voted in favor of the Merger, and therefore, are potentially subject to an acquiescence defense, or (2) purchased their shares after March 8, 2010.

1. The Acquiescence Defense

A fully informed, uncoerced shareholder is precluded under Delaware law from challenging a merger if he has voted in favor of the transaction.[62] The Defendants contend that any shareholders that voted in favor of the Merger should be precluded for this reason, especially when the Court has previously dismissed the Plaintiff's disclosures claims as meritless. In response, the Plaintiff cites *In re*

[61] *Id*.
[62] *In re PNB Hldg. Co. S'holders Litig*., 2006 WL 2403999, at *21 (Del. Ch. Aug. 18, 2006).

JCC Holding Co., Inc.,[63] for the proposition that the acquiescence defense is not applicable at the class certification stage.

> [T]he different positions of class members on the issue of acquiescence (i.e., those who voted no and rejected the merger consideration, those who voted no and later accepted the consideration, and those who voted yes) could be addressed fairly in one class action, with at most the *possible* need for the creation of subclasses. The acquiescence issue creates no conflicts within the proposed class, it simply poses the possibility that certain groups of class members might have to fight through an affirmative defense.[64]

Ultimately, the question turns on whether the Court can determine—before trial—if the acquiescence defense is a conclusive bar to stockholders who voted in favor of the Merger. A plaintiff is subject to the acquiescence defense if he (1) has full knowledge of his rights and material facts; (2) has a meaningful choice in determining how to act; and (3) acts voluntarily in a way demonstrating unambiguous approval of the challenged transaction.[65] At this stage, the Court

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[63] 843 A.2d 713 (Del. Ch. 2003).
[64] *Id*. at 725 n.34; *see In re Celera Corp.*, 2012 WL 1020471, at *13 ("Where, as here, an alleged defense may affect the individual's ultimate right to recover, but it does not affect the presentation of the case on the liability issues for the plaintiff class, that defense should not make a plaintiff's claim atypical.") (internal quotation marks omitted) (quoting *O'Malley*, 2001 WL 50204, at *4).
[65] *In re Celera Corp.*, 2012 WL 1020471, at *9.

cannot determine whether *info*GROUP stockholders that voted in favor of the Merger were fully informed of all material facts at that time.

Indeed, the Court recently noted that the acquiescence defense might not apply where discovery might unearth additional information not known at the time the shareholders voted.[66] The Plaintiff contends that this is exactly what happened here when it later discovered that Gupta himself had emerged as a competing bidder during the sales process. In response, the Defendants argue that the *info*GROUP stockholders were deemed fully informed because the Court had previously held that the Complaint did not state a disclosure claim.[67]

Because the acquiescence defense may, if necessary, be addressed in a relatively easy fashion, through establishing an appropriate subclass, and because the Court is unable to determine whether *info*GROUP stockholders were fully informed, the Court declines at this point to narrow the proposed class to exclude stockholders who voted in favor of the Merger. The Court's holding as to the Plaintiff's disclosure claims only contemplated those facts that the Plaintiff, at that

[66] *Id*. at *10.
[67] At the hearing on class certification, the Defendants argued that the "new" information uncovered by the Fund was not material, especially given that Gupta never made a formal bid. At this point, the materiality of any newly discovered information will be best assessed at trial.

time, claimed should have been disclosed. That leaves open the possibility that some stockholders, though "partially or even mostly informed,"[68] were not fully informed and therefore, might not be subject to a successful acquiescence defense.

2. Purchasers of *info*GROUP Stock after the Merger was Approved by the Defendants

The Defendants contend that the proposed class should be narrowed to include only *info*GROUP stockholders of record as of March 8, the day the Merger agreement was signed. In their view, Delaware law does not afford standing to persons who were not stockholders at the time of the challenged board conduct because, as here, they knew (when they purchased their shares) what share price was due upon consummation of the Merger. Indeed, in many merger cases, "the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because it is the terms of the merger, rather than the technicality of its consummation, which are challenged."[69]

The Plaintiff, however, has alleged a continuing breach of fiduciary duty that extends beyond the execution of the Merger agreement and into the twenty-one

[68] *In re Celera Corp.*, 2012 WL 1020471, at *10.
[69] *In re Beatrice Companies, Inc. Litig*., 522 A.2d 865, 1987 WL 36708, at *3 (Del. Feb. 20, 1987) (TABLE).

day go-shop period. Specifically, the Complaint alleges that during the go-shop period the Defendants inexplicably failed to solicit a competing bidder who had previously made an $8.00 per share bid and had indicated a willingness to raise its offer.[70] Because that allegation challenges the Defendants' actions during the period after it approved the Merger, but before the transaction was consummated, the Defendants' attempt to narrow the class to the date the Merger agreement was executed must also fail.

In *Joseph v. Shell Oil Co*., the Court was confronted with a similar issue.[71] There defendants objected to a class representation including persons who purchased Shell stock after the date that the merger proposal was announced because they feared that the interests of arbitrageurs would conflict with those of lead plaintiffs. The Court declined to exclude them stating:

> Defendants . . . have not brought forth any evidence to support their theory that purchasers after [the merger was announced] would not be harmed in ways corresponding to the alleged harm accruing to the named plaintiffs if there were, in fact, breaches of fiduciary duty. Because of the timing of the various claimed breaches of fiduciary duty, some holders of stock may have been injured more or less

[70] Compl. ¶ 65.
[71] *Joseph v. Shell Oil Co.*, 1985 WL 21125 (Del. Ch. Feb. 8, 1985).

> severely than others, but all who held stock when each alleged breach occurred were injured similarly-if at all.
>
> Before trial, it is impossible to determine if there were breaches of fiduciary duty which affected purchasers differently depending on the date of purchase of stock. If, however, after trial it should appear that certain stockholders are not properly members of the class, Rule 23(c)(1) allows for the alteration or amendment of the Order certifying the class, and any problems can be rectified at that time.[72]

Accordingly, the Court will not limit the proposed class to only those stockholders as of March 8, 2010 because the Complaint alleges that the Defendants breached their fiduciary duty after the Merger agreement was signed.

IV. CONCLUSION

For the foregoing reasons, the Court will certify the proposed class under Rules 23(a), 23(b)(1), and 23(b)(2) and appoint the Fund and Kistner as class representatives. Of course, the Court has discretion to alter or amend the class definition if additional information comes to light or circumstances necessitate that action.[73]

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[72] *Id.*, 1985 WL 21125, at *2.
[73] Ct. Ch. R. 23(c)(1) ("An order under this paragraph may be conditioned, and may be altered or amended before the decision on the merits.").

An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K