**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| **DOUGLAS C. SMITH, Individually and on Behalf of All Others Similarly Situated,** | ) | |
| Plaintiff, | ) | C.A. No. 01C-08-291 WCC |
| v. | ) | |
| **HERCULES, INC., a Delaware corporation, and THOMAS GOSSAGE,** | ) | |
| Defendants. | ) | |

Submitted: February 21, 2003
Decided: March 3, 2003

**ORDER**

*Upon Defendants' Application for Certification of Interlocutory Appeal.*
***DENIED.***

Richard G. Elliott, Jr., Esquire, and Jennifer C. Bebko Jauffret, Esquire, Richards, Layton & Finger, Wilmington, Delaware 19899. Attorneys for Plaintiff, Douglas C. Smith.

Jeffrey S. Goddess, Esquire, Rosenthal, Monhait, Gross & Goddess, Wilmington, Delaware 19899. Attorney for Plaintiff, Douglas C. Smith.

Arthur Makadon, Esquire, and Geoffrey A. Kahn, Esquire, and Sally M. Williams, Esquire, Ballard Spahr Andrews & Ingersoll, LLP, Philadelphia, Pennsylvania 19103-7599. Attorneys for Defendants, Hercules, Inc., and Thomas Gossage.

Kathleen Furey McDonough, Esquire, and Jennifer Gimler Brady, Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware 19899-0951. Attorneys for Defendants, Hercules, Inc. and Thomas Gossage.

**CARPENTER, J.**

This 3rd day of March, 2003, upon consideration of the defendants Hercules, Inc., and Thomas Gossage (collectively "Defendants"), Application for Certification of Interlocutory Appeal, it appears that:

1. Defendants have applied for certification of interlocutory appeal of this Court's Memorandum Opinion, dated January 31, 2003,[1] granting plaintiff Douglass C. Smith's ("Plaintiff") motion for class certification. Plaintiff opposes certification on the grounds that the granting of class certification does not determine a substantial issue, and does not establish a legal right as required by Rule 42. Additionally, Plaintiff argues that this Court's decision did not involve an original question of law and that interlocutory review would not serve considerations of justice, but would instead serve only to delay and/or interrupt the progress of the action. For the reasons that follow, the Application for Certification is DENIED.

2. The facts of the matter *sub justice* are discussed fully in the Memorandum Opinion dated January 31, 2003. Briefly, the Plaintiff sought certification for a class action for a group consisting of former or current employees of Hercules that participated in an Integration Synergies Incentive Compensation Plan which was developed when Hercules acquired BetzDearborn, Inc. Defendants subsequently field a motion and brief in opposition to the Plaintiff's motion for class

[1] *See Smith v. Hercules, Inc.*, C.A. No. 01C-08-291, Carpenter, J. (January 31, 2003).

certification. After a long, and thorough opinion by this Court, Plaintiff's motion for class certification was granted. Defendants now bring this Application for Certification of Interlocutory Appeal.

3. Supreme Court Rule 42 governs certification of interlocutory appeals. In pertinent part, Rule 42(b) provides:

> (b) *Criteria to be applied in determining certification and acceptance of interlocutory appeals.* No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria:
> (i) Same as certified question. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or
> ***
> (v) Case dispositive issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.[2]

Supreme Court Rule 41(b) provides the following reasons for accepting certification of questions of law:

> Without limiting the Court's discretion to hear proceedings on certification, the following illustrate reasons for accepting certification:
> (i) Original question of law. The question of law is of first instance in this State;
> (ii) Conflicting decisions. The decisions of the trial courts are conflicting upon the question of law;
> (iii) Unsettled question. The question of law relates to the constitutionality, construction or application of a statute of this State

[2] SUPR. CT. R. 42(b)(i-v).

which has not been, but should be, settled by the Court.[3]

4. The Defendants argue that the January 31, 2003 Memorandum Opinion of this Court determines a substantial issue, establishes a legal right and presents an original question of law[4] and/or that appellate review would otherwise serve considerations of justice.[5] Assuming without deciding that the Order determined a substantial issue and established a legal right, Defendants fail to establish at least one of the criteria of Rule 42(b)(i-v) necessary to certify an interlocutory appeal.

5. First, the defendants assert that the order presents an original question of law, under Rule 42(b)(i). In support of this, Defendants look to the Third Circuit who have held that courts should exercise their discretion in allowing interlocutory review when there is a novel or unsettled question of law.[6] Defendants then proceed to make the exact same arguments as were asserted in their opposition to Plaintiff's motion for class certification, *i.e.*, that it is a novel and important issue whether class certification is appropriate when the putative class members consist of senior executives and managers "who have sufficient financial resources and alleged

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[3] SUPR. CT. R. 41(b).

[4] SUPR. CT. R. 42(b)(i).

[5] SUPR. CT. R. 42(b)(v).

[6] *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001).

damages to pursue their own claims". Defendants exaggeration of the putative class's claims by focusing on the average does not create an original question of law, nor does their manipulation of the word "novel" in this Court's previous opinion warrant an interlocutory review. The reference to "novel" in the opinion was not related to questions of law, but to the unique factual scenario which the Court was left to apply the Rule 23 requirements to. The decision was grounded on clear precedent and did not involve a novel issue of Delaware law. The legal principles in this action are well settled. The only issue remaining was the application of the law to the unique facts of this case. Thus, there is not an *original* question of law justifying an interlocutory appeal. To reiterate, given that the alleged damage arose from the same set of operative facts, at the same time, and to the same group of individuals, and given the geographic dispersion and the discrepancy in the size of the potential recovery compared to the overall cost of the litigation this Court fails to see how a class action is not the superior means of proceeding with the litigation. Further, as the Court noted in its opinion, focusing on the average is misleading as the potential damage recovery varies considerably among members of the putative class, and the Court would be remiss to fail to factor in the significant cost of litigation even if the smaller claims were to be joined or consolidated. Thus, simply because some of the putative members may possess the financial wherewithal to proceed on their own does not

impair the Court's ability to find certification appropriate, and it does not create an original question of law necessitating interlocutory appeal, which is expressly reserved only for exceptional circumstances.[7]

6. Second, the defendants argue that appellate review would otherwise serve considerations of justice, under Rule 42(b)(v) as judicial efficiency can be achieved without class certification. Defendants argue that joinder or consolidation is the more appropriate means to proceed with the litigation and further assert that a difference of opinion exists as to whether a class should be certified on efficiency grounds where individual claims are substantial, thereby warranting interlocutory review.[8]

7. The Court fails to see how interlocutory review could terminate the litigation or otherwise serve considerations of justice. First, granting interlocutory review would not terminate the litigation as the claims of the plan participants would still survive and could be prosecuted by those who are capable of doing do, both financially and geographically. Second, the Court must agree with the Plaintiff that granting interlocutory appeal would effectively disrupt the action by delaying the

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[7] SUPR. CT. R. 42(b).

[8] *See Muttart v. American Mortg. & Guar. Co.*, 1998 WL 109820 (Del. Super. Ct.); *Sugai Prods., Inc. v. Kona Kai Farms, Inc.*, 1997 WL 824022 (D. Haw.); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 98 (W.D. Mo. 1997); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996).

proceedings. This action has proceeded through a long and much-contended path to simply get to its current stage. Furthermore, extensive discovery has proceeded in this action since December 2001. Moreover, the same volume of evidence would need to be presented whether the action proceeded as a class action or an individual action. Thus, contrary to Defendants' arguments, the litigation costs are as high or higher if tried as an individual case. As this Court noted in its previous decision, class certification serves to provide efficiency and economy of litigation and is the superior means to proceed with the litigation given the geographical dispersion of the putative class and the size of their respective claims.

8. The Defendants finally argue that this Court has "created new law" when it indicated that class certification would afford "cover" to current employees who are potential class members. The language had no such effect. Rather, it is a common-sense observation made by the Court merely acknowledging as a practical matter, the naturally difficult employment situation that would be created if individual suits were filed. The Defendants realize that the only practical way to have this dispute litigated is through the class action process and if they defeat the certification it will be extremely difficult and costly for individuals to pursue this matter. It is this motivation that is at the core of the appeal. However, this is not a sufficient basis to meet the criteria of Rule 42. As indicated in my previous opinion, without class

certification the Defendants will in all likelihood be allowed to avoid being held responsible for any improper conduct that may have occurred in this situation. This would be unjust, and not, as asserted by the Defendants, serve justice.

9. Accordingly, Defendants' Application for Certification of Interlocutory Appeal is **DENIED**.

**IT IS SO ORDERED.**

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Judge William C. Carpenter, Jr.

Original to Prothonotary