IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ARTHUR E. BENNING, SR., BARBARA LEE BENNING, ARTHUR E. BENNING, JR. and JANESSA DABLER,	)	
Plaintiffs,	)	C.A. No. 99C-06-157 MMJ
v.	)	
WIT CAPITAL GROUP, INC., and WIT CAPITAL CORPORATION d/b/a WIT CAPITAL,	)	
Defendants.	)	

Submitted: August 18, 2005
Decided: August 22, 2005

SUPPLEMENTAL OPINION

Upon Remand of Appeal of Class Action Certification

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JOHNSTON, J.

PROCEDURAL CONTEXT

Wit Capital Corporation, a wholly owned subsidiary of Wit Capital Group, Inc. (collectively "Wit Capital"), is an internet brokerage firm. Plaintiffs Arthur E. Benning, Sr., Barbara-Lee Benning, Arthur E. Benning, Jr. and Janessa Dabler[1] were customers of Wit Capital. Plaintiffs filed their complaint on June 16, 1999, seeking declaratory relief and damages in connection with certain brokerage transactions.

On August 13, 1999, Wit Capital filed a Motion to Dismiss or Stay the Initial Complaint on the basis that the account agreements mandated a separate arbitration for each customer. At the November 9, 1999 hearing, the Court denied the motion and directed plaintiffs to move for class certification following receipt of Wit Capital's responses to class certification discovery.

Plaintiffs filed a Motion for Class Certification on December 16, 1999. The Court denied class certification.[2] The Delaware Supreme Court reversed the denial and remanded the action to this Court:

> Once the parties complete appropriate discovery, the Superior Court should then weigh the relevant factors to determine if plaintiffs have met the requirements of Rule 23(b)(3) for purposes of class

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[1]Plaintiff Dabler was not a party to the Initial Complaint. Rather, Dabler was permitted to intervene as a named plaintiff in April 2000.

[2]*Benning v. Wit Capital Group, Inc.,* Del. Super., C.A. No. 99C-06-157, Alford, J. (Jan. 10, 2001).

> certification. The trial judge should take care to consider not only whether questions of law or fact common to the class predominate over the questions affecting individual members, but to also give equal weight to the question of whether or not a class action remains the superior method for the fair and efficient adjudication of this litigation.[3]

The parties subsequently conducted additional discovery on the issues of numerosity[4], typicality[5] and predominance.[6] Upon consideration of Plaintiffs' Renewed Motion for Class Certification, by Memorandum Opinion dated November 30, 2004, this Court declined to certify Count III of the Amended Complaint ("holder" claims for damages sustained as a result of Wit Capital's purported failure to adhere to its anti-flipping policy) as part of a class action. The Court determined that any award of money damages would be too speculative and not based upon a cognizable injury. To the extent other allegations asserted reliance as an element of any cause of action (such as fraud), those claims were not appropriate in a class action. The Court also concluded that individual issues of

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[3] *Benning v. Wit Capital Group, Inc.,* Del. Supr., No. 116, 2001 (Order) (Nov. 1, 2001).

[4] Super. Ct. Civ. R. 23(a)(1) (whether the class is so numerous that joinder of all members is impracticable).

[5] Super. Ct. Civ. R. 23(a)(3) (whether the claims or defenses of the representative parties are typical of the claims or defenses of the class).

[6] Super. Ct. Civ. R. 23(b)(3) (whether questions of law or fact common to the members of the class predominate over any questions affecting only individual members).

justifiable reliance predominated over questions common to members of a potential class.

The Court certified a class comprised of Wit Capital customers who applied for IPO allocations and were denied allocations because of alleged violations of Wit Capital's policies. Four subclasses were certified: (1) qualified customers whose accounts may not have been adequately funded as of the effective date for each IPO, but who subsequently could have funded or did fund their accounts for the order in question, yet were denied IPO allocations because Wit Capital determined account balances on or before the effective date, rather than the settlement date; (2) qualified customers who had sufficient cash and stock in their accounts, but were denied IPO allocations because Wit Capital allegedly improperly calculated the minimum account balances as if the customer had to have an all cash balance; (3) qualified customers who received no IPO shares because Wit Capital allocated more than the proper number of shares to other customers; and (4) qualified customers who had not been identified as "flippers," but were denied IPO allocations because Wit Capital disregarded its preference policy and, as part of the same IPO, allocated stock to customers identified as "flippers."

Wit Capital appealed the November 30, 2004 decision, claiming that the Superior Court improperly certified the class as a matter of law. By Order dated

June 20, 2005, the Delaware Supreme Court considered the five issues asserted by Wit Capital on appeal. First, The Supreme Court found that it was not improper for the trial court to certify a class comprising four subclasses, based on the assumption that the four predicate theories of wrongdoing would withstand a motion to dismiss if such a motion were later prosecuted. To the extent that any or all of those theories did not survive dismissal, then the corresponding subclass could be excised from the class.

Second, Wit Capital contended that the "fact of harm" cannot be established on a class-wide basis unless all members of the putative class had timely received their IPO allocations and then sold their allocated IPO stock at a profit. It is equally likely (Wit Capital alleged) that some class members would have continued to hold their stock, that other class members would have sold their stock at a profit, and that the remaining class members would have sold at a loss. For that reason, Wit Capital urged, it is impossible to identify those persons who (assuming their IPO shares had been properly allocated) would have sold those shares at a profit, without first interrogating each putative class member. Thus, according to Wit Capital, the "fact of harm" element of plaintiffs' contract cause of action, like the element of "reliance" in a fraud action is inherently individual and, consequently, precludes class action treatment. The Supreme Court found that the plaintiffs did

not squarely respond to this argument in the Superior Court proceedings, and that the trial court's class certification did not address this contention and did not articulate the basis for its conclusion that dividing the class into four subclasses wold obviate individual issues predominating over class issues.

Third, the Supreme Court examined the Superior Court's finding that individual arbitrations would be economically impractical because the cost of arbitrating any single customer's claim would likely exceed the amount of the claim itself. The Supreme Court held that Wit Capital had conflated its "individual issue/fact of harm" position with its "superior method of adjudication" contention. Additionally, the trial court did not address this conflated "fact of harm" argument in analyzing whether class action treatment was a superior method of adjudication. On this basis, the trial court's ruling was found to be unclear.

Wit Capital's fourth claim of error challenged the trial court's determination that the members of the class are so numerous as to make the joinder of individual members impracticable. Wit Capital argued that this ruling was erroneous, because it assertedly rested upon assumptions and speculation rather than specific evidence. The Supreme Court disagreed. The Court concluded that at this stage of the proceedings, the record consists primarily of undisputed evidence that Wit Capital had a multitude of customers who collectively had engaged in thousands of IPO

trades. Even if divided into four subclasses, the number of class members would likely be too numerous to make their individual joinder practicable. If evidence later comes to light indicating that the membership of any subclass is numerically insufficient, the trial court may eliminate or redefine the subclass in light of such newly-developed evidence.

Wit Capital's final argument on appeal was that the trial court erroneously determined that the claims of the class representatives are typical of those of the class and that the named representatives would adequately represent the interests of the class.[7] The trial court's finding of "typicality" was based upon its understanding that the plaintiffs were claiming that they (or at least some of them) were members of each of the four subclasses. In their Answering Brief on appeal, however, plaintiffs did not defend the trial court's reasoning on that ground. The Supreme Court found that plaintiff's Answering Brief suggests that the representative plaintiffs are not members of each of the subclasses because the plaintiffs argued that it is not necessary for the class representatives to be a member of each subclass so long as the subclasses were "affected by very closely related conduct" arising out of a single or common scheme. Thus, the trial court's ruling

[7]Super. Ct. Civ. R. 23(b)(3)(A).

on these issues was held not to be supported by the party that is charged with defending the opinion on appeal.

The Supreme Court ordered the trial court's opinion and its rulings on the issues of predominance, superiority, typicality, and adequacy of representation remanded, instructing the trial court to clarify its rulings in a supplemental opinion.

The return date for the Supreme Court's decision upon the second remand was established as August 22, 2005. The parties completed briefing on the remand issues on August 5, 2005. The Superior Court held oral argument on August 18, 2005. This is the Superior Court's decision upon remand.

TYPICALITY AND ADEQUACY OF REPRESENTATION

Rule 23(a)(3) states that the claims of the representative parties must be typical of the claims of the class. The typicality requirement must be met for each subclass.[8] In its November 30, 2004 Memorandum Opinion, this Court stated:

> Plaintiffs have alleged that one or all of the Plaintiffs were wrongfully denied IPO allocations as a result of each of the four separate theories of recovery. Therefore, Plaintiffs' claims are typical of the sub-classes. As representative parties, Plaintiffs have the ability to fairly and adequately protect the interests of the class.[9]

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[8]Super. Ct. Civ. R. 23(c)(4).

[9]Rule 23(a)(4).

The Supreme Court found: "The apparent premise of the trial judge's finding of 'typicality' was her understanding that the plaintiffs were claiming that they (or some of them) were members of each of the four subclasses. If plaintiffs were alleging that, then the trial court's adequacy of representation ruling would be correct."

During oral argument on the first remand, the trial judge first suggested the possibility of creating subclasses. Plaintiffs asserted that at least one of the class representatives would be a member of each subclass. Plaintiffs' assertion was the basis of the trial court's finding of typicality.

During argument on the second remand, plaintiffs delineated the specific portions of the record containing allegations placing a named plaintiff in each of the four subclasses.

Subclass 1: Qualified customers whose accounts may not have been adequately funded as of the effective date for each IPO, but who subsequently could have or did fund their accounts for the order in question, and were denied IPO allocations because Wit Capital determined account balances on or before the effective date, rather than the settlement date.

In the Declaration dated December 17th, 2003 ("2003 Declaration"), Keith Altman reviewed the data for allocations in fourteen separate IPOs in which Plaintiffs either sought or received allocations of IPO stock through their brokerage accounts with Wit Capital. Altman concluded at paragraph 11 that, in all fourteen

IPOs, customers were denied IPO allocations if their account balances were less than the required minimum balance on the effective date. In none of the fourteen instances was the account balance verified on the settlement date. Paragraphs 35 and 36 of the Amended Complaint allege that Arthur E. Benning, Sr.'s account was not adequately funded on the effective date of the OneMain IPO, but was adequately funded on the settlement date. Nevertheless, he was denied an allocation.

Subclass 2: Qualified customers who had sufficient cash and stock in their accounts, but were denied IPO allocations because Wit Capital improperly calculated the minimum account balances as though the customer had to have an all cash balance.

In paragraphs 37 and 38 of the Amended Complaint, plaintiffs allege that Arthur E. Benning, Sr. did not receive any shares in the Mining Company IPO. Altman stated at paragraphs 8 and 9 of the 2003 Declaration that, although account agreements required that customers maintain a minimum account balance in cash and stock combined, IPO allocations were based upon cash balances only. According to the Amended Complaint, in the Mining Company IPO, Benning, Sr.'s account would have been sufficiently funded after the *pro forma* allocation if Wit Capital had calculated the balance combining cash and stock. However, the account did not have a sufficient cash only balance.

Subclass 3: Qualified customers who received no IPO shares because Wit Capital allocated more than the proper number of shares to other customers.

The Amended Complaint alleges at paragraphs 58 and 59 that although plaintiff Janessa Dabler did not receive any barnesandnoble.com IPO shares, other members were allocated 200 or more shares. The Affidavit of Keith Altman dated July 21, 2005 ("2005 Affidavit") states at paragraph 5 that at least 934 qualified customers did not receive any stock in this IPO. Of the 9,340 members who received allocations, 3,160 received 200 shares, which is 100 shares more per customer than should have been allocated unless all qualified customers had been allocated 100 shares.

Subclass 4: Qualified customers who had not been identified as "flippers," but were denied IPO allocations because Wit Capital disregarded its preference policy and, as part of the same IPO, allocated stock to customers identified as "flippers."

In paragraph 6 of the 2005 Affidavit, Altman states that in the barnesandnoble.com IPO, 679 investors who were listed as "flippers" received shares. Paragraph 77 of the Amended Complaint alleges that all plaintiffs were non-flippers as of July 1999. Paragraph 59 alleges that plaintiff Janessa Dabler was not allocated shares in the barnesandnoble.com IPO, which was in May 1999. During oral argument on the instant remand, plaintiffs' counsel represented that

Dabler was designated during the relevant time period as a "non-flipper." This representation was not disputed by defendants.

Defendants also have argued that there are inherent conflicts among each of the subclasses. Specifically, because only a limited number of IPO shares were available to its customers (a "zero sum game"), each subclass – which has an interest in maximizing its proportion of the total IPO shares – necessarily will seek to minimize the proportion held by other subclasses. This Court finds defendants' argument unpersuasive. Each of plaintiffs' claims is based upon the premise that Wit Capital did not follow its own allocation rules, as established by contract. The relief requested is for damages resulting from improper allocation. The named plaintiffs are members of more than one subclass and may have been affected by more than one type of erroneous allocation in a single IPO. Whether some class members may recover and others be found to have benefitted from improper allocation is something the trial court will need to sort out when and if it reaches the issue of the proper measure of damages. For purposes of class certification, distribution of damages does not create a disabling conflict among the subclasses. All subclasses are seeking determination of allocation in accordance with all of the relevant contracts and policies.

Therefore, considering the record at this stage of the proceedings as a whole, at least one of the named plaintiffs has made allegations of a claim typical to each of the four subclasses, and sufficient for adequate representation of each of the four subclasses.

PREDOMINANCE AND FACT OF HARM

Defendants have argued that if class members had received allocations, some members may have sold their stock at a profit, but others may have continued to hold their stock, or may have sold at a loss. Thus, defendants claim that the fact of harm is inherently individual and precludes class action treatment.

For the first time, during argument before the Supreme Court, plaintiffs countered with the "pop" theory. For 13 of the 14 IPOs examined by Altman, on the first day of public trading, the shares traded substantially above the IPO allocation price. This difference between the offering price and the first day's public trading price is referred to in the securities industry as the "pop." Plaintiffs argue that because plaintiffs were improperly denied allocations, they were injured at the time of the allocation because they lost the opportunity to purchase shares at the substantially lower IPO price.

For purposes of class certification in a breach of contract action, the fact of harm or injury should be determined as of the time of the breach. Whether or not

any individual class member would have sold at a profit, held, or sold at a loss, is a measure of damages issue. Defendants consistently have argued that fact of harm and measure of damages are wholly separate issues and should not be conflated. Legal precedent cited by defendants specifically states that injury must be proven on a class-wide basis. Under the circumstances presented in this action, it is not speculative that plaintiffs affirmatively requested to participate in IPOs. If these requests are found to have been improperly denied, the damages due to individual defendants will be established according to New York law. The potential for complexity in damages calculation is not a bar to class certification.

Therefore, this Court finds that common questions of law or fact predominate over any questions affecting only individual members. However, all four subclasses will be further limited to those IPOs in which stock prices rose at the time of the breach; in other words, in which stock prices rose on the first day the stock was available for public trading.

SUPERIORITY

In the November 30, 2004 opinion, this Court considered the question of whether individual members' actions could result in inconsistent or incompatible results. This Court found that litigation of this case will likely be protracted and complicated. Different factfinders inevitably will not reach identical results.

Should individual actions be brought in different jurisdictions, it is likely that legal issues will be resolved with some degree of inconsistency.

Wit Capital continues to argue that arbitration is available and required pursuant to the Account Agreement. Wit Capital has stated that it will honor the obligation to arbitrate, regardless of how many individual claims may be brought. Despite Wit Capital's good faith intent to abide by its obligation to arbitrate, the Court finds this argument misses the mark. Although Wit Capital now has been acquired by an entity with substantial financial resources, the specter of numerous arbitrations remains unrealistic. A class action is superior to either individual arbitrations or separate trials.

Further, if the Court were to deny class certification, the pursuit of individual claims is economically impractical for the individual plaintiffs. On second remand, plaintiffs submitted the Affidavit of James L. Rothenberg. Rothenberg projected the costs and fees that would be generated in connection with an individual arbitration. He concluded that, unless each claim amounted to at least $75,000, the expenses would far exceed the potential damages recovered by any individual claimant.

Additionally, individual class members lack sufficient information to determine whether they personally have claims against defendants. Upon making a

request for an IPO allocation, each customer received a sequential confirmation number. Although sequential, the confirmation numbers did not indicate the customer's position and priority among the multitude of allocation requests. A customer could tell if the number were lower – i.e., it was issued earlier in time and therefore had an earlier preference – only by comparing the number to another customer's number. Therefore, a customer who did not receive an allocation would know that Wit did not adhere to its first-come, first-served allocation policy only if, after comparing at least two confirmation numbers, the customers observed that the one with the higher, later-issued number received an allocation while the one with the lower, earlier-issued number did not.

It was by coincidence that the Bennings, a family of three Wit Capital customers, and Ms. Dabler, who belongs to an investment club with other customers, were in a position to compare their confirmation numbers and discover that their orders were not filed in the same order as the confirmation numbers. Customers were not informed why they were denied allocations. Any customer who did not receive allocations could reasonably conclude that Wit Capital simply ran out of IPO shares.

Therefore, this Court finds that a class action is the superior method for the fair and efficient adjudication of this litigation.

CONCLUSION

As directed by the Delaware Supreme Court on remand, this supplemental opinion is issued for the purpose of clarifying the November 30, 2004 Memorandum Opinion. This Court finds: (1) that at least one of the named plaintiffs has made allegations of a claim typical to each of the four subclasses, and sufficient for adequate representation of each of the four subclasses; (2) that common questions of law or fact predominate over any questions affecting only individual members; however, all four subclasses will be further limited to those IPOs in which stock prices rose on the first day the stock was available for public trading; and (3) that a class action is the superior method for the fair and efficient adjudication of this litigation.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston