



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE PATTERN ENERGY GROUP INC.) C.A. No. 2020-0357-MTZ
STOCKHOLDERS LITIGATION)

ORDER ESTABLISHING LEADERSHIP STRUCTURE

WHEREAS:

A. Two competing teams of stockholder plaintiffs and counsel seek to be appointed to leadership roles in this consolidated action.

B. Under one proposal, Gary Brosz and Michael Richardson would serve as co-lead plaintiffs. Bernstein Litowitz Berger & Grossman LLP, Andrews & Springer LLC, and Friedman Oster & Tejtel PLLC would serve as co-lead counsel. This decision refers to this team of litigants and counsel as the “Brosz Group.”

C. Under the other proposal, Jody Britt would serve as lead plaintiff. Labaton Sucharow LLP and Robbins Geller Rudman & Dowd LLP would serve as co-lead counsel, and The Schall Law Firm would serve as additional counsel. This decision refers to this team of litigants and counsel as the “Britt Group.”

D. When faced with a leadership dispute, the court’s task is to “establish a leadership structure that will provide effective representation.”¹ To that end, the

¹ *In re Del Monte Foods Co. S’holders Litig.*, 2010 WL 5550677, at *6 (Del. Ch. Dec. 31, 2010).

court weighs the “*Hirt* factors,” so named after *Hirt v. U.S. Timberlands Service Company, LLC*.² In somewhat paraphrased form, the six factors are:

- (i) the quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs;
- (ii) the relative economic stakes of the competing litigants in the outcome of the lawsuit;
- (iii) the willingness and ability of all the contestants to litigate vigorously on behalf of an entire class of shareholders;
- (iv) the absence of any conflict between larger, often institutional, stockholders, and smaller stockholders;
- (v) the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit; and
- (vi) the competence of counsel and their access to the resources necessary to prosecute the claims at issue.³

E. The *Hirt* factors provide guidance; they are not a “scorecard.”⁴ “A plaintiff’s firm does not ‘win’ the lead counsel spot by accumulating the most ‘points,’ as it might by demonstrating that its client owns the most shares or that it has litigated the most dual-stock cases. Instead, each factor is given weight only to the extent that it bears on the ultimate question of what is in the best interests of the plaintiff class.”⁵

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

³ *See id.* at *2.

⁴ *In re Delphi Fin. Grp. S’holder Litig.*, 2012 WL 424886, at *1 (Del. Ch. Feb. 7, 2012).

⁵ *Id.*

F. For purposes of analysis, it is helpful to group the *Hirt* factors into categories based on whether they focus more closely on the proposed lead plaintiff or the proposed lead counsel. Certain factors turn on more general characteristics while others examine action taken in the particular case.

1. Factors (ii) and (iv) address attributes of the proposed lead plaintiff. Factor (ii) considers whether the economic stake of the particular proposed plaintiff, given that plaintiff's circumstances, is likely to lead to meaningful monitoring and reduced agency costs. Factor (iv) asks whether there are any particular attributes of the proposed plaintiff, such as unique defenses or potentially divergent interests, that could diminish the plaintiff's effectiveness.

2. Factors (i), (v), and (vi) address aspects of the proposed lead counsel's ability to provide effective representation. Factors (i) and (v) look at two objective indicia of counsel's ability based on their actions in the specific case: the pleading on which the law firm proposes to litigate and how counsel has acted in the case to date. Factor (vi) calls on the Court to consider more generally which law firm is best qualified to handle the matter.

3. Factor (iii) blends consideration of the law firm and the proposed lead plaintiff by requiring the Court to consider how the litigation is likely to unfold and whether the proposed leadership team will operate effectively.

IT IS ORDERED, this 2nd day of July 2020:

1. The factors in this case are closely balanced. Both groups are highly qualified and capable of litigating the case.

2. The lead plaintiff factors do not materially favor either group.

a. No one has suggested that either group has any interest that would diverge from the class. No one has argued that either has any greater or lesser expertise acting in a fiduciary role, and proposed lead plaintiffs in both groups have submitted unsworn declarations attesting to their commitment to prosecuting this action.

b. Neither side has a comparatively significant equity stake. This Court only accords “great weight” to “substantial relative difference[s]” in movants’ stakes; it does not “simply add up the number of shares and select the law firm with the largest absolute representation.”⁶ Here, Britt held 500 shares of PEGI stock. No member of the Brosz Group held more than a few thousand shares, and when considered either individually or in the aggregate, the stakes and relative difference between them are de minimis. “[N]one of the stock holdings among the plaintiffs are large or small enough ‘to demonstrate a substantial

⁶ See *Wiehl v. Eon Labs*, 2005 WL 696764, at *3 (Del. Ch. Mar. 22, 2005).

relative difference’ that would require the Court to give this factor great weight under *Hirt*.⁷

3. The lead counsel factors marginally favor the Britt Group.

a. In evaluating lead counsel, this court considers how the competing lawyers have proceeded to date in the case. One relevant *Hirt* factor is the enthusiasm and vigor with which the various contestants have prosecuted the litigation, but this factor should not be read to encourage the premature filing of motions to expedite or the immediate serving of discovery requests. “To avoid rushes to the courthouse, this Court accords no special weight or status to the first-filing plaintiff.”⁸

b. “[U]sing Section 220 . . . is the expected and prudent course of action[.]”⁹ Where one movant “obtained more documents through Section 220 than any other group,” and that “extra effort yield[s] meaningful additional documents,” the Court has found that movant demonstrated superior vigor of prosecution to date and a greater willingness and ability to litigate.¹⁰

⁷ *In re Inv’rs Bancorp, Inc. S’holder Litig.*, 2016 WL 4257503, at *2 (quoting *Wiehl*, 2005 WL 696764, at *3).

⁸ *Delphi*, 2012 WL 424886, at *3.

⁹ *In re Kraft Heinz Co. Deriv. Litig.*, 2020 WL 1248471, at *2 (Del. Ch. Mar. 13, 2020) (ORDER).

¹⁰ *Id.* at *1–2; see also *In re Dell Techs. Inc. Class V S’holders Litig.*, 2019 WL 1259867, at *2 (Del. Ch. Mar. 18, 2019) (ORDER) (appointing movant that “exhibited greater persistence in using Section 220” by obtaining “additional documents, which enabled

c. In this case, both groups obtained documents pursuant to Section 220 and used those documents to draft detailed, lengthy complaints. The Brosz Group initially demanded a broader scope of production than the Britt Group, and that advocacy benefitted both parties. Between March 5 and April 10, 2020, each group received five separate document productions; each group received the same documents. The Brosz Group stopped there. The Britt Group persisted and successfully obtained sixth and seventh document productions. Those productions yielded additional, essential documents, including September 29, 2019, board minutes, and October 31, 2019, board materials. The Britt Group made better use of Section 220.

d. Both groups filed competent complaints that would support meaningful litigation. But the Court favors the movant whose “complaint provide[d] more factual fodder for counsel to work with should they be called to defend their pleading against alleged failures . . . or to overcome the presumptions associated with application of the business judgment rule.”¹¹ Here, the additional documents the Britt Group secured provided additional factual fodder that makes theirs the superior complaint. While at bottom the two complaints present the

them to identify additional aspects of the transaction” in their superior complaint); *Inv’rs Bancorp*, 2016 WL 4257503, at *3–4 (appointing movant that obtained meeting minutes through Section 220 that were not secured by other group and noting that the complaint’s “additional content” flowing therefrom “is not fluff”).

¹¹ *Inv’rs Bancorp*, 2016 WL 4257503, at *5.

same narrative arc and legal theories, the documents Britt secured add subplots and more detail, which the Court may consider on any future dispositive motion. At present, I cannot know whether any of the claims asserted in any of the complaints will pan out, but it appears to me that the Britt Group made better use of Section 220 and other materials to file a relatively superior complaint. Accordingly, the Britt Group's Complaint is best able to represent the interests of the shareholder class.¹²

4. Ultimately the most important factor when appointing lead counsel is the degree to which the attorneys will provide effective representation for the class going forward. The Brosz Group is comprised of successful Chancery practitioners from well-regarded firms and with substantial trial experience. The Britt Group is also comprised of well-regarded firms with impressive records before this Court, even though the individual attorneys in the group have less

¹² See *Dell Techs. Inc.*, 2019 WL 1259867, at *2 (appointing movant that “exhibited greater persistence in using Section 220, which enabled them to craft a relatively superior complaint” and finding that movant, who obtained additional materials and pled additional claims, was more “focused on achieving the best outcome in this litigation”); *In re CytRx Corp. S’holder Deriv. Litig. II*, 2017 WL 697656, at *4 (Del. Ch. Feb. 22, 2017) (explaining how successful applicant used Section 220 to obtain documents, including board minutes, and craft a superior complaint); *Inv’rs Bancorp*, 2016 WL 4257503, at *5 (stating that the prevailing movant “us[ed] the fruits of their Section 220 demand, particularly meeting minutes” to draft a superior complaint). The Brosz Group argues that the Britt Group persisted under Section 220 to secure a leadership role, rather than to benefit the class. The facts underpinning this argument are disputed. At bottom, because the Britt Group’s persistence benefitted the class, I do not reach whether that persistence was somehow invalidated by being aligned with counsel’s pursuit of a leadership role.

overall Chancery and trial experience. While the Brosz Group attorneys' overall experience weighs in their favor, the Britt Group firms have equal resources and are equally competent. Both groups have excellent track records and can bring ample resources to bear in this action.

5. Although this matter is close, in view of the Britt Group's superior use of Section 220 and consequently superior complaint, the Britt Group has presented the superior application.

6. Britt is hereby designated as Lead Plaintiff.

7. The law firms of Labaton Sucharow LLP and Robbins Geller Rudman & Dowd LLP are hereby designated as Co-Lead Counsel, and The Schall Law Firm is hereby designated as Additional Counsel, for Lead Plaintiff and the putative class.

a. Co-Lead Counsel shall set policy for the prosecution of this litigation, delegate and monitor the work performed to ensure that there is no duplication of effort or unnecessary expense, and initiate and coordinate the activities of counsel.

b. Co-Lead Counsel shall have the power and responsibility to: coordinate and direct the preparation of pleadings; coordinate and direct the briefing and argument of motions; coordinate and direct the conduct of discovery and other pretrial proceedings; coordinate and direct class certification

proceedings; conduct any and all settlement negotiations with counsel for the Defendants; coordinate and direct the preparation for trial and trial of this matter, and delegate work responsibilities to selected counsel as may be required; and coordinate and direct any other matters concerning the prosecution or resolution of the consolidated action.

8. Lead Plaintiff shall file a consolidated complaint within thirty days of this Order, which shall serve as the operative complaint.

/s/ Morgan T. Zurn
Vice Chancellor Morgan T. Zurn