**IN THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE**

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| POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT and GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, on behalf of themselves and all other similarly situated shareholders of Yahoo! Inc.,<br><br>Plaintiffs,<br><br>v.<br><br>YAHOO! INC., JERRY YANG, ROY BOSTOCK, RON BURKLE, ERIC HIPPEAU, VYOMESH JOSHI, ARTHUR KERN, ROBERT KOTICK, EDWARD KOZEL, MAGGIE WILDEROTTER, AND GARY WILSON,<br><br>Defendants. | Civil Action No. 3561 |
| WAYNE COUNTY RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>JERRY YANG, ROY BOSTOCK, RON BURKLE, ERIC HIPPEAU, VYOMESH JOSHI, ARTHUR KERN, ROBERT KOTICK, EDWARD KOZEL, GARY WILSON, MAGGIE WILDEROTTER, AND YAHOO! INC.,<br><br>Defendants. | Civil Action No. 3538-CC |
| RONALD J. DICKE, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>YAHOO! INC., JERRY YANG, RON BURKLE, ROBERT KOTICK, GARY WILSON, MAGGIE WILDEROTTER, ROY BOSTOCK, ERIC HIPPEAU, ARTHUR KERN, EDWARD KOZEL, AND VYOMESH JOSHI,<br>Defendants. | Civil Action No. 3539-CC |

## MOTION FOR CONSOLIDATION AND APPOINTMENT OF LEAD COUNSEL

Plaintiffs in C.A. No. 3561, Police and Fire Retirement System of the City of Detroit ("PFRS") and the General Retirement System of the City of Detroit ("GRS," and together with PFRS, the "Detroit Funds" or "Plaintiffs"), hereby move the Court for an Order, in the form attached hereto, providing for the consolidation of the above-captioned proceedings and for the appointment of lead counsel.

## PRELIMINARY STATEMENT

1. Microsoft Corporation's ("Microsoft") unsolicited proposal to acquire Yahoo! Inc. ("Yahoo" or the "Company") at a 62% premium gave rise to various shareholder class actions in this Court alleging that Yahoo's board of directors (the "Board")[1] breached their fiduciary duties. Two Delaware actions were filed on February 11, 2008, the same day that Yahoo announced its rejection of Microsoft's offer.

2. Counsel for the Detroit Funds took care to draft a substantial complaint in C.A. No. 3561 (the "Detroit Funds Action"). The Detroit Funds' Action discusses Yahoo's abandonment of its failed pre-existing strategy in favor of seeking an alternative transaction, and Yahoo's newly announced employee severance plans, which have been estimated to increase the cost of an acquisition by as much as $3 billion (the "Severance Plans"). The Detroit Funds then moved with alacrity to seek an expedited trial challenging the Severance Plans and seek expedited discovery on all claims. Prompt consolidation and appointment of lead counsel is critical so that expedited proceedings can be pursued in an orderly fashion.

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[1] Defendants Jerry Yang, Roy Bostock, Ron Burkle, Eric Hippeau, Vyomesh Joshi, Arthur Kern, Robert Kotick, Edward Kozel, Maggie Wilderotter,and Gary Wilson are referred to collectively herein as the "Board" or the "Individual Defendants."

3. As set forth in the Declaration of Ronald Zajac, General Counsel to both PFRS and GRS, which is attached hereto as Exhibit A, the Detroit Funds together own about 340,000 shares of Yahoo common stock, which appears to be greater by several magnitudes than the plaintiffs in the related actions. The Detroit Funds have significant experience serving in a representative capacity in complex litigation, and they have retained Bernstein Litowitz Berger & Grossmann LLP ("BLB&G") and Bouchard Margules & Friedlander, P.A. ("BM&F"), firms that each have a track record of aggressively litigating shareholder claims in this Court. The Detroit Funds respectfully submit that BLB&G and BM&F should be appointed Lead Counsel to prosecute consolidated actions on behalf of Yahoo's shareholders.

## STATEMENT OF FACTS

### A. The Detroit Funds Action

4. On February 21, 2008, the Detroit Funds filed a Verified Class Action Complaint (the "Detroit Funds Complaint"). The following day, the Detroit Funds filed a motion for expedited proceedings and supporting brief.

5. The Detroit Funds Complaint alleges that Microsoft approached Yahoo over a year ago, and Yahoo's Board rebuffed Microsoft in favor of pursuing various strategic and operational initiatives. None of Yahoo's strategies panned out. Microsoft returned a year later with a proposal to acquire Yahoo for $31 per share in cash and stock. Microsoft's offer was widely hailed as financially attractive, especially in light of Yahoo's failure to improve its competitive position in the year since Yahoo had first rebuffed Microsoft in favor of pursuing Yahoo's strategic plan. (Verif. Compl. ¶¶ 49-52)

6. Yahoo's Board, under the leadership of CEO and co-founder Jerry Yang, is determined to pursue any alternative to Microsoft. It has been reported that several members of

the Board have recognized that Chief Executive Officer Jerry Yang is placing pride over fiduciary duty:

> The friction on the board centers on Yang and his board loyalists, ***who are so opposed to Microsoft's offer that the independent committee is worried that the Yang group might act out of emotion rather than their fiduciary duty…***
>
> According to one source close to the situation, "The emotional part of Yang would rather do anything but sell to Microsoft…."

(*Id.* ¶ 5) (emphasis added).

7. Yahoo kept its poison pill in place and initially cast about for combinations with other companies on terms that would not require stockholder approval. (*Id.* ¶¶ 53-76) One such potential defensive transaction is a combination whereby Yahoo would issue 19.99% or less of its stock to News Corp., which would transform Yahoo's business and thwart Microsoft while avoiding a stockholder vote. (*Id.* ¶ 71)

8. Apart from searching for an immediate white knight transaction, Yahoo's directors also undertook unilateral action that deters potential acquirors while destroying shareholder value. On Monday, February 12, 2008, the day after Yahoo announced that its Board had unanimously rejected Microsoft's proposal, the Compensation Committee of the Board approved the Severance Plans. Limited information about the Severance Plans was disclosed a week later. (*Id.* ¶ 77)

9. From the little that Yahoo has disclosed, it is apparent that the Severance Plans, which are effectively "golden parachutes" for every full time Yahoo employee, are highly unusual, and that their purpose and effect is to make Yahoo unattractive for Microsoft or any other acquiror. Besides covering every single one of the approximately 14,000 full-time employees of Yahoo, the Severance Plans can be self-triggered if the employee decides to

terminate his own employment for "good reason" following a change in control. The definition of "good reason" is not disclosed. (*Id.* ¶¶ 78-79)

10. The costs imposed by the Severance Plans on an acquiror are staggering – by one estimate, up to $3 billion when one considers the value of the stock options, the dilution resulting from the issuance of 100 million new shares, plus the cash severance payments from laying off one-fourth of Yahoo's staff. (*Id.* ¶ 82) Three billion dollars in added costs from the Severance Plans makes it dramatically more expensive for Microsoft (or any acquiror) to acquire Yahoo, and it lowers the equity-based merger consideration that otherwise would flow to Yahoo stockholders. The wrongful intent behind the Severance Plans is evident, as CEO Yang had announced, just days before Microsoft made its bid, his own plan to fire Yahoo employees *en masse*, without any disclosed desire to enrich those being laid off. (*Id.* ¶81)

11. The Detroit Funds are seeking invalidation of the Severance Plans under the enhanced scrutiny of *Unocal*. The Detroit Funds seek an expedited trial, especially in light of reports that Microsoft is preparing to launch a proxy fight. (*Id.* ¶ 83) Yahoo stockholders are entitled to know if the Severance Plans are invalid before casting their vote, so they can evaluate the adequacy of the price Microsoft is then willing to pay to shareholders, unencumbered by the costs of the Severance Plans. It is also important to Yahoo stockholders that Microsoft not be deterred from pursuing its proposal for Yahoo because of the cost of Severance Plans that are subject to judicial invalidation but which Microsoft, fearful of alienating thousands of potential future employees, may be unwilling to attack. The Detroit Funds also seek expedition in light the risk that the Board will follow through on publicly-leaked threats to enter defensive third-party transactions structured to circumvent shareholder approval.

### B. The Related Actions

12. On February 11, 2008, the same day Yahoo's Board publicly rejected Microsoft's offer two class action complaints were filed in this Court by Chimicles & Tikellis LLP (the "Chimicles Complaints").:

> ● *Ronald Dicke v. Yahoo! et al.,* C.A. No. 3539-CC filed on February 11, 2008 by the law firms of Chimicles & Tikellis LLP and Cohen, Milstein, Hausfield & Toll, P.L.L.C.
>
> ● *Wayne County Employees' Retirement System v. Jerry Yang, et al.*, C.A. No. 3538-CC filed on February 11, 2008 by the law firms of Chimicles & Tikellis LLP and The Miller Law firm, P.C.

13. Apart from the filing of a document request in C.A. No. 3539-CC, and the filing of answers in both actions, there has been no litigation activity in these two related actions.

## ARGUMENT

## I. CONSOLIDATION IS APPROPRIATE

14. The Court of Chancery has broad powers to control the course of class action litigation, including consolidating actions involving a common question of law or fact:

> (a) Consolidation. – When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Del. Ch. Ct. R. 42(a).

15. This Court routinely consolidates related class actions alleging similar breach of fiduciary duty claims challenging director conduct in the merger and acquisition context. *See, e.g., TCW Techn. Ltd. P'ship v. Intermedia Commc'ns, Inc.,* 2000 Del. Ch. LEXIS 147, at *11 (Oct. 17, 2000) (twelve related class actions challenging merger were consolidated) (Ex. B); *Hirt v. U.S. Timberlands Serv. Co. LLC*, 2002 Del. Ch. LEXIS 89, at *8 (July 3, 2002) (eight class actions challenging proposed buy-out were consolidated) (Ex. C).

16. The Detroit Funds Complaint and the Chimicles Complaints each assert claims arising from the Board's response to Microsoft's offer. Each of the plaintiffs in these actions is a member of the putative class and each of the actions has been recently commenced. Accordingly, consolidation is appropriate to avoid unnecessary duplication and waste, expedite pre-trial and trial proceedings, and avoid the risk of varying or inconsistent adjudications.

17. The Detroit Funds request that the Detroit Funds Complaint be deemed the operative complaint, as provided in the proposed Order submitted herewith.

## II. THE DETROIT FUNDS' COUNSEL SHOULD BE APPOINTED LEAD COUNSEL

18. The Detroit Funds respectfully submit that the Court should appoint the Detroit Funds' chosen counsel as Lead Counsel. This Court examines the following factors for purposes of selecting lead counsel:

- the "quality of the pleading that appears best able to represent the interests of the shareholders 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
- the "competence of counsel and their access to the resources necessary to prosecute the claims at issue."

*Wiehl v. Eon Labs*, 2005 Del. Ch. LEXIS 40, at *4 (Mar. 22, 2005) (Ex. D) (quoting *Hirt*); *see also TCW Technology*, 2000 Del. Ch. LEXIS 147, at *10-11. "[N]o special weight or status will

be accorded to a lawsuit simply by virtue of having been filed earlier than any other pending action." *Wiehl*, *supra*, at *5 (quoting *Hirt*).

19. All of the relevant factors weigh in favor of counsel for the Detroit Funds.

**A. The Detroit Funds' Complaint Is Superior**

20. The "quality of the pleading" factor tilts decidedly in one direction. The Chimicles Complaints are necessarily cursory and limited in scope, given that they were filed on the same day that Yahoo rejected Microsoft's proposal. They say nothing about the Severance Plans, or about Yahoo's maneuverings to find an alternative transaction that would transform Yahoo's business, contradict its pre-existing strategic plan, thwart Microsoft, and avoid a stockholder vote.

**B. The Detroit Funds Have The Largest Relative Economic Stake**

21. GRS has current holdings of 258,300 Yahoo shares, and PFRS has current holdings of 81,454 Yahoo shares. *See* Zajac Decl. ¶ 8. By comparison, the Wayne County Employees' Retirement System is alleged to own only 13,600 shares of Yahoo common stock, while the individual shareholder plaintiff, Ronald Dicke, does not specify his holdings in Yahoo common stock.

**C. The Detroit Funds Have A Proven Track Record Of Vigorously Litigating Class Actions On Behalf Of Shareholders**

22. The Detroit Funds are willing and able to litigate vigorously on behalf of an entire class of shareholders, as required. *See* Zajac Decl. ¶¶ 9-13; *see Wiehl*, *supra*, at *1. Their willingness and ability is demonstrated by the Detroit Funds' experience acting as a fiduciary for their pension beneficiaries and serving as a representative of other shareholders in class action and derivative litigation. *See, e.g.*, *In re OM Group, Inc. Sec. Litig.*, No. 02-2163 (N.D. Ohio) (PFRS obtained $92.4 million settlement); *In re Gemstar-TV Guide Int'l Sec. Litig.*, No. 02-2775

(C.D. Cal.) (GRS obtained $92.5 million settlement); *In re Legato Sys. Inc. Sec. Litig.*, No. 00-20111 (N.D. Cal.) (PFRS obtained $85 million settlement). Yahoo shareholders deserve the same caliber of leadership.

**D. The Detroit Funds Are Vigorously Prosecuting This Action**

23. The Detroit Funds are vigorously prosecuting this action on behalf of Yahoo's shareholders. The Detroit Funds filed a comprehensive Complaint and promptly moved for expedited discovery and an expedited trial. The other plaintiffs have not undertaken the effort to tailor a litigation strategy that addresses the exigencies of the situation.

**E. BLB&G and BM&F Have the Experience and Resources to Effectively Prosecute this Action**

24. The Detroit Funds have proposed the law firms of BLB&G and BM&F to serve as Lead Counsel. BLB&G is among the preeminent class action law firms in the country, having been appointed sole or co-lead counsel in numerous complex class action suits nationwide. BLB&G has also served as Lead Counsel in significant matters before the Court of Chancery for the State of Delaware, including, for example, *Louisiana Municipal Police Employees' Retirement System et al. v. Edwin M. Crawford, et al.* (Caremark Merger Litigation), C.A. No. 2635-N, and *Minneapolis Firefighters' Relief Association v. Ceridian Corp. et al.*, C.A. No. 2996-CC, which BLB&G prosecuted together with BM&F.

25. BLB&G served as co-lead counsel in *In re WorldCom, Inc. Securities Litigation*, No. 02-CV-3288 (DLC) (S.D.N.Y.), in which settlements totaling in excess of $6 billion – one of the largest recoveries in securities class action history – were obtained for the class. Other cases in which Bernstein Litowitz has been recognized as an appropriate lead or co-lead counsel include: *In re Cendant Corporation Securities Litigation*, Master File No. 98-1664 (WHW) (D.N.J.) (settled for more than $3.2 billion in cash); *In re Nortel Networks Corporation*

*Securities Litigation* 05-MD-1659 (LAP) (S.D.N.Y.) (settled for $1.3 billion in cash and common stock); and *In re Williams Securities Litigation* 02-CV-72 (D. Okla.) (settled shortly before trial for $311 million in cash).

26. BM&F has achieved significant benefits for shareholders in numerous representative actions, including: *In re Chaparral Resources, Inc. Shareholders Litigation*, C.A. No. 2001-VCL (pending settlement after trial of $41 million; 45% above merger price); *In re Prime Hospitality, Inc. Shareholders' Litigation*, C.A. No. 652-CC (settled for $25 million, after BM&F successfully objected to disclosure-only settlement); and *In re TeleCorp PCS Inc. Shareholders Litigation*, C.A. No. 19260 (settled shortly before trial for $47.5 million).

## CONCLUSION

For all the foregoing reasons, the Detroit Funds respectfully request that the Court enter the Proposed Order submitted herewith, which will (i) consolidate and organize the above-captioned actions and any subsequently filed or transferred related actions; (ii) approve the Detroit Funds' selection of BLB&G and BM&F as Lead Counsel; and (iii) grant such other and further relief as the Court may deem just and proper.

/s/ Joel Friedlander

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Dated: February 25, 2008

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# EXHIBIT A

**IN THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE**

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| POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT and GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, on behalf of themselves and all other similarly situated shareholders of Yahoo! Inc.,<br><br>Plaintiffs,<br><br>v.<br><br>YAHOO! INC., JERRY YANG, ROY BOSTOCK, RON BURKLE, ERIC HIPPEAU, VYOMESH JOSHI, ARTHUR KERN, ROBERT KOTICK, EDWARD KOZEL, MAGGIE WILDEROTTER, AND GARY WILSON,<br><br>Defendants. | Civil Action No. 3561 |

**DECLARATION OF RONALD ZAJAC, ESQ.**

RONALD ZAJAC, hereby declares, under penalty of perjury, as follows:

1. I am General Counsel to the Police and Fire Retirement System of the City of Detroit ("PFRS") and General Counsel for the General Retirement System of the City of Detroit ("GRS," and together with PFRS, the "Detroit Funds"), co-plaintiffs in the above captioned class action. I have personal knowledge about the information in this Declaration.

2. I am a resident of Northville, Michigan and am of full legal age.

3. In this matter, the Detroit Funds are challenging the improper response of the board of directors of Yahoo! Inc. ("Yahoo") to the $31 per share acquisition proposal (the "Acquisition Proposal") presented to the Yahoo board by Microsoft Corporation ("Microsoft"). I respectfully submit this Declaration in support of the motion of the Detroit Funds for the appointment of Bernstein Litowitz Berger & Grossmann LLP

("BLB&G"), together with Bouchard Margules & Friedlander, P.A. ("BM&F"), as Lead Counsel on behalf of the proposed class of Yahoo shareholders.

4. PFRS is a public pension system organized for the benefit of the current and retired police officers and firefighters of the City of Detroit, Michigan. PFRS is a separate entity from GRS, which is a public pension fund organized for the benefit of current and retired municipal employees of the City of Detroit.

5. I am the General Counsel and Walter Stampor is the Executive Secretary of both PFRS and GRS. Each of PFRS and GRS are separate independent entities, each of which are qualified trusts under applicable sections of the Internal Revenue Code. PFRS has eleven Trustees and GRS has ten trustees, with no overlap in their membership except for two Ex-Officio Trustees who serve on both Boards.

**Background on the Detroit Funds' Filing of the Lawsuit**

6. Several days after reading about Microsoft's Acquisition Proposal in the media, and given the Detroit Funds significant holdings of Yahoo common shares, I was advised by my counsel at BLB&G regarding the rights of the Detroit Funds, and of Yahoo shareholders in general, with respect to that offer. I determined to continue to monitor developments, waiting to see the reaction of the Yahoo board of directors to the Acquisition Proposal.

7. After the Yahoo board formally refused to consider Microsoft's Acquisition Proposal, as publicly disclosed on February 11, 2008, I again consulted with outside counsel at BLB&G regarding the situation. Over the following days, I presented the current state of affairs at meetings of the Boards of Trustees of each of the Detroit Funds. Both Boards determined that the economic interests at stake and corporate

governance principles that underlie the Yahoo board's actions were sufficiently significant to warrant action by the Detroit Funds. Accordingly, each of the boards, at separate meetings, have formally authorized me to pursue any actions I believed were appropriate to vindicate the rights of the Detroit Funds, as well as of all Yahoo shareholders.

**The Detroit Funds Hold Nearly 340,000 Yahoo Shares and Will Best Serve the Interests of All of Yahoo's Shareholders**

8. GRS is the record or beneficial holder of 258,300 shares of Yahoo stock, all of which it has owned since before Microsoft's February 1, 2008 announcement of its merger offer. PFRS is the record or beneficial holder of 81,454 shares of Yahoo stock, all of which it has owned since before Microsoft's February 1, 2008 announcement of its Acquisition Proposal. GRS and PFRS have instructed the applicable parties to segregate Yahoo shares and ensure that the Detroit Funds' holdings of Yahoo shares are not liquidated during the pendency of this lawsuit.

9. Each of the Boards of Trustees of the distinct Detroit Funds holds weekly meetings, and all matters under the jurisdiction of the Boards, including all litigation in which PFRS or GRS, as the case may be, is involved, are reviewed and discussed, as befitting Trustees who are fully committed to their fiduciary responsibilities. In my capacity as General Counsel to each of the Detroit Funds, I regularly advise the Boards about potential and pending litigation matters and I am tasked with overseeing and managing, through outside counsel, the prosecution of any representative litigation authorized by the boards of Trustees.

10. When the Board of either of the Funds decides that pursuing litigation advances the interests of the respective fund, I, as General Counsel, monitor the litigation

and keep in regular contact with our outside counsel as the case progresses. I review the pleadings and also report developments to the relevant board. Our outside counsel provides frequent reports to me and makes telephonic or personal presentations to the Board(s), when requested. I participate in responding to discovery and ensuring that the appropriate representatives of each of the Detroit Funds are selected to testify in depositions. When necessary, a representative from each of the Detroit Funds – usually a Trustee – attends important Court hearings and settlement conferences. If this Action goes to trial, and it is determined that the presence of representatives of the Detroit Funds at the trial is beneficial, our officers and Trustees have the resources to attend the trial and are committed to doing so.

11. My colleagues and I have sufficient time to fulfill the Detroit Funds' responsibilities to all of Yahoo's shareholders through the effective prosecution of this Action, which we believe raises very significant corporate governance issues. I understand that, if counsel for the Detroit Funds is selected to serve as Lead Counsel in this matter, it will be part of the Detroit Funds' fiduciary duty to pursue and attempt to obtain the best possible result for all of Yahoo's shareholders. The Detroit Funds stand committed to doing so.

12. Further, we believe that it is essential to the best interests of all Yahoo shareholders to be represented by Lead Counsel that have a proven track record in handling these types of cases and that will be dedicated to achieving the best possible results for the Class, while operating pursuant to the Detroit Funds' direction and oversight. The Detroit Funds are familiar with the law firms that handle this type of litigation and believe that the firm of BLB&G is highly experienced and more than

qualified to represent the Class as Lead Counsel in this Action. In addition, although I have not worked with BM&F previous to this Action, I have been informed that they are highly respected in the field of corporate litigation, with a strong track record for zealous, professional and effective advocacy in a wide range of the most challenging of corporate transactional litigations. Together, these firms have the ability and resources to provide the highest caliber representation for the benefit of Yahoo's shareholders.

13. Finally, I also understand that one of the primary responsibilities of the Detroit Funds in overseeing the work of Lead Counsel in this Action will be to ensure that the litigation is handled efficiently, and that the resulting fees and expenses are fair and reasonable, relative to the size, complexity and risk of the litigation. Accordingly, the Detroit Funds are committed to actively directing this litigation and monitoring the work of counsel. In fact, one reason the Detroit Funds seek appointment of BLB&G and BM&F as Lead Counsel is the Detroit Funds' desire to ensure that their choice of counsel is appointed Lead Counsel and empowered to prosecute this Action for the benefit of the Class efficiently and cost-effectively. If BLB&G and BM&F are appointed Lead Counsel and they are successful in their efforts to achieve results for Yahoo shareholders and seek the Court's approval of an attorneys' fee award, the Detroit Funds will review the fee application before it is submitted and will only consent to a fee request that they believe is appropriate under the circumstances.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 22ND day of February, 2008.

RONALD ZAJAC

# EXHIBIT B

LEXSEE 2000 DEL CH. LEXIS 147

Caution
As of: Feb 25, 2008

**TCW Technology Limited Partnership v. Intermedia Communications, Inc., et al.; Hug v. Intermedia Communications, et al.; Steinberg v. Ruberg, et al.**

**Civil Action No. 18336, Civil Action No. 18289, Civil Action No. 18293**

**COURT OF CHANCERY OF DELAWARE, SUSSEX**

***2000 Del. Ch. LEXIS 147***

**October 17, 2000, Decided**

**SUBSEQUENT HISTORY:** [*1] Released for Publication by the Court November 3, 2000.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendants applied for an order seeking consolidation of multiple derivative, class, and individual actions, or imposing equivalent relief.

**OVERVIEW:** Plaintiffs filed class and derivative suits challenging the merger of one defendant with another company. Plaintiffs thought purpose of the merger was to acquire defendant merged company's crown jewel, and that defendant merged company diverted to itself the opportunity for the crown jewel company to be sold at a market premium by arranging the merger. One institutional plaintiff sought and was granted an expedited preliminary injunction hearing. That resulted in conflicting discovery demands on defendants. Counsel for plaintiffs could not agree upon a consolidation order, despite the court's request. No plaintiffs were entitled to special status as lead or coordinating lawsuit simply by virtue of having filed their suit earlier than the others. Institutional plaintiffs were designated to serve as lead plaintiff for the preliminary injunction hearing. The derivative and class claims arose from the same facts and were not internally inconsistent or in conflict with the legal theories supporting other claims. Counsel for institutional plaintiffs vigorously pursued the shareholders' interests and moved the litigation forward aggressively.

**OUTCOME:** The suits were consolidated for purposes of a preliminary injunction hearing, and institutional plaintiffs were designated lead plaintiff for the hearing, since their counsel had aggressively pursued the action, and there were no conflicting claims.

**LexisNexis(R) Headnotes**

***Civil Procedure > Discovery > General Overview***
[HN1] Expedited litigation imposes severe burdens on the court and it inflicts not insubstantial costs on private litigants.

***Civil Procedure > Class Actions > General Overview***
[HN2] Although it might be thought, based on myths, fables, or mere urban legends, that the first to file a lawsuit wins some advantage in the race to represent the shareholder class, that assumption has neither empirical nor logical support.

***Civil Procedure > Class Actions > Derivative Actions > General Overview***
[HN3] Among the factors that should guide the court in determining which lawsuit should assume a lead or coordinating role in a class action are: (1) the quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs; (2) the shareholder plaintiff that has the greatest economic stake in the outcome of the lawsuit. The second factor is similar to the federal system that uses a model whereby the class member with the largest economic interest in the action is given responsibility to control the litigation.

Delaware courts have not formally adopted the federal model, and it should not be mechanically applied in every case. But it is appropriate to give recognition to large shareholders or significant institutional investors who are willing to litigate vigorously on behalf of an entire class of shareholders, provided no economic or other conflicts exist between the institutional shareholder and smaller, more typical shareholders.

*Civil Procedure > Class Actions > General Overview*
[HN4] The third factor the court should accord some weight to in the analysis of which lawsuit should assume a lead or coordinating role in class action litigation is whether a particular litigant has prosecuted its lawsuit with greater energy, enthusiasm, or vigor than have other similarly situated litigants.

**COUNSEL:** Stuart Grant, Grant & Eisenhofer, P.A., Wilmington, DE.

Pamela S. Tikellis, Chimicles & Tikellis LLP, Wilmington, DE.

Joseph A. Rosenthal, Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington, DE.

Robert Payson, Stephen C. Norman, Potter Anderson & Corroon, Wilmington, DE.

William O. LaMotte, III, Morris, Nichols, Arsht & Tunnell, Wilmington, DE.

Collins J. Seitz, Jr., Henry E. Gallagher, Jr., Connolly, Bove, Lodge & Hutz, Wilmington, DE.

**JUDGES:** William B. Chandler III, CHANCELLOR.

**OPINION BY:** William B. Chandler III

**OPINION**

This is my decision on defendants' October 11 application seeking an Order consolidating, or imposing equivalent relief in, these multiple derivative, class and individual actions. Defendants seek consolidation, or equivalent relief, because of the immense practical difficulties occasioned by the simultaneous prosecution of three separate groups of class and derivative lawsuits on an expedited basis. A brief recitation of the procedural background will provide the context for my decision.

I.

Approximately twelve separate lawsuits have been filed in the Court of Chancery challenging a merger [*2] agreement between Intermedia Communications, Inc. ("ICI") and WorldCom, Inc. ICI owns a 62 percent interest in Digex, Inc., a Delaware corporation engaged in the managed web hosting business. Digex's stock price has increased by more than 2 1/2 times over the past year, rising from $ 32.50 per share on September 1, 1999, to more than $ 84.00 per share on September 1, 2000. In contrast, ICI's stock price has fallen over this same period by more than 13 percent. After the merger agreement between ICI and WorldCom was announced on September 1, the reaction from Digex's minority public shareholders was swift and negative. In the days following the merger announcement, several Digex shareholders filed lawsuits attacking the proposed ICI/WorldCom merger. The gist of these lawsuits is that WorldCom's real purpose for purchasing ICI is to acquire Digex, ICI's crown jewel, and that ICI diverted to itself Digex's opportunity to be sold at a market premium by instead arranging ICI's sale to WorldCom.

As I mentioned above, approximately twelve lawsuits have been filed in the Court of Chancery arising out of the basic facts surrounding the proposed WorldCom/ICI merger. On September 20, however, [*3] TCW Technology Limited Partnership ("TCW"), a Delaware limited partnership which owns 1,042,000 shares or about 4.25 percent of Digex's outstanding stock, filed a class and derivative complaint challenging the merger. TCW's claims are substantially similar to the claims asserted in the pending dozen or so lawsuits. Unlike the other pending actions, TCW promptly sought an expedited preliminary injunction hearing on its complaint. ICI and Digex vigorously opposed TCW's motion to expedite. Because WorldCom is not a named defendant in TCW's complaint, it did not appear during the hearing on TCW's motion. Despite the fact that no other counsel for any other plaintiff shareholder action filed a motion for expedition, all counsel representing the various shareholder plaintiffs attended the hearing. Counsel for the other shareholder plaintiffs participated in the conference and spoke in favor of TCW's motion to expedite an injunction hearing.

On October 2, 2000, I granted TCW's motion to expedite and established a schedule for discovery and briefing. I also set a preliminary injunction hearing on November 29.

In light of the Court's accelerated schedule for the preliminary injunction hearing, [*4] counsel in the various shareholder actions began sending requests for production to the various defendants and proposing deposition schedules for several individual defendants named in the various lawsuits. Because these requests were uncoordinated, at least to some extent, defendants faced a barrage of conflicting deposition notices, as well as duplicative document requests and sundry other discovery

demands. Besieged by conflicting discovery demands, and facing a radically compressed injunction schedule, defendants have appealed to the Court to consolidate these cases, or at least exert a firm managerial hand over them.

In a conference on October 13, I invited all plaintiffs' counsel to attempt to reach agreement on an appropriate consolidation order. Several derivative plaintiffs, represented by Pamela S. Tikellis of Chimicles & Tikellis LLP, insist that the class and derivative lawsuits assert potentially conflicting claims. Thus, these plaintiffs endorse only coordination, and not consolidation, of the various lawsuits. In a similar vein, the shareholder class plaintiffs, represented by Joseph A. Rosenthal of Rosenthal, Monhait, Gross & Goddess, P.A., urge me to enter an order [*5] of consolidation along the lines that then-Vice Chancellor (now Justice) Steele was persuaded to enter in the *SFX* litigation. [1] The shareholder class's representative counsel insists that the *SFX* consolidation order worked successfully (and could do so again in this situation) because it combined the prosecution skills of counsel for the large institutional shareholders with counsel for the typical shareholder class lawsuits. This dual, co-lead counsel approach worked in *SFX,* and counsel insists it could work in this circumstance as well. The third category of lawsuits is comprised of institutional shareholders (TCW and the Kansas Public Employees Retirement System), represented by Stuart M. Grant of Grant & Eisenhofer, P.A. This group proposes that "all of the traditional plaintiffs' bar lawsuits" be consolidated into one action. That consolidated action would then proceed on a parallel course with the two institutional investor lawsuits (which would be consolidated into one action). This would produce two parallel actions, one involving the traditional plaintiffs' bar and one involving the institutional shareholder's bar.

1 *See In re SFX Entertainment, Inc. Shareholders Litig.,* Consol. C.A. No. 17818, Steele, V.C. (April 25, 2000) (ORDER).

[*6] II.

Notwithstanding my request that counsel for all three groups of plaintiffs agree upon a consolidation order, they have been unable to do so. The Court's schedule, and the parties' schedule, will not allow further delay in resolving this problem. With the limited time available to me, I offer the following opinion.

None of the proposed solutions is satisfactory to the Court. Each method would result in a proliferation of actions, with attendant practical burdens on the defendants and the Court. Ms. Tikellis's proposal effectively creates three parallel litigation tracks (the derivative actions, the class actions, and TCW/Kansas action), with multiple layers of coordination required among counsel. This procedure is cumbersome, duplicative, unnecessary, and unworkable. Mr. Rosenthal's proposal--the model used in the *SFX* litigation--labors under similar infirmities. The SFX model results in at least two parallel consolidated lawsuits, requiring coordination between a traditional shareholder plaintiffs' action and the institutional shareholder plaintiffs' action. Mr. Grant initially supported this model, but then reversed course and complained about it. From my vantage point, [*7] I agree that it is unnecessarily cumbersome and results in a duplication of effort.

Finally, I am not persuaded that the institutional shareholders' proposal for a bifurcated consolidation order--carving out a traditional plaintiffs' bar action--adds anything to the analysis. This suggestion is no different, so far as I can tell, from Mr. Rosenthal's *SFX* model proposal--a model that, in my opinion, papers over the problem without solving it. Indeed, I think that the inability of the traditional shareholder plaintiffs' bar and the institutional shareholders' bar to reach agreement--especially in Delaware's specialized corporate law practice environment and with the threat of judicial intervention hanging over counsel like the sword of Damocles--illustrates the practical coordination and scheduling problems posed by the various consolidation models.

III.

[HN1] Expedited litigation imposes severe burdens on the Court and it inflicts not insubstantial costs on private litigants. Traditionally, the Court of Chancery has allowed counsel representing individual, class or derivative plaintiffs to engage in a type of private ordering, that is, to coordinate prosecution of the litigation and [*8] to propose the most efficient means of consolidation. Over the past ten years, members of the Court of Chancery have been asked, with increasing frequency, to become involved in the sometimes unseemly internecine struggles within the plaintiffs' bar over the power to control, direct and (one suspects) ultimately settle shareholder lawsuits filed in this jurisdiction. In every single instance that I am able to recall, this Court has resisted being drawn into such disputes. In every instance, the plaintiffs' bar has been able to work out a consolidation compromise. It may have been imperfect, but the compromise has always seemed, in the end, to accommodate reasonably the interests of all the parties and the Court. My attempt to encourage a similar compromise of competing interests in these shareholder actions, unfortunately, has failed.

I turn then to the underlying problem. At the outset, I note that no rule, statute or decisional authority has been brought to my attention that bears upon this question. One thing is clear, however. [HN2] Although it

might be thought, based on myths, fables, or mere urban legends, that the first to file a lawsuit in this Court wins some advantage in the race [*9] to represent the shareholder class, that assumption, in my opinion, has neither empirical nor logical support.

Too often judges of this Court face complaints filed hastily, minutes or hours after a transaction is announced, based on snippets from the print or electronic media. Such pleadings are remarkable, but only because of the speed with which they are filed in reaction to an announced transaction. It is not the race to the courthouse door, however, that impresses the members of this Court when it comes to deciding who should control and coordinate litigation on behalf of the shareholder class. In fact, this Court and the Delaware Supreme Court have repeatedly emphasized the importance of plaintiffs' counsel taking the time to use the "tools at hand" (such as a § 220 books and records action) to develop a record sufficient to craft pleadings with particularized factual allegations necessary to survive the inevitable motions to dismiss. [2] Accordingly, none of the pending lawsuits in this litigation is entitled to any special status as the lead or coordinating lawsuit simply by virtue of having been filed earlier than any other pending action.

2 *See, e.g., Ash v. McKesson HBOC, Inc., 2000 Del. Ch. LEXIS 144*, *55-56, n.56, Del. Ch., C.A. No. 17132, Chandler, C. (Sept. 15, 2000) (citing cases).

[*10] [HN3]

Among the factors that should, in my opinion, guide the Court, in determining which lawsuit should assume a lead or coordinating role, are the following. First, this Court should consider the quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs. [3] Second, the Court should give weight to the shareholder plaintiff that has the greatest economic stake in the outcome of the lawsuit. This factor, of course, is similar to the federal system that now uses a model whereby the class member with the largest economic interest in the action is given responsibility to control the litigation. Delaware courts have not formally adopted the federal model, and I am not suggesting that it should be mechanically applied in every case. But it seems appropriate, at least, to give recognition to large shareholders or significant institutional investors who are willing to litigate vigorously on behalf of an entire class of shareholders, provided no economic or other conflicts exist between the institutional shareholder and smaller, more typical shareholders. [HN4] Finally, the Court should accord some weight in the analysis to whether a [*11] particular litigant has prosecuted its lawsuit with greater energy, enthusiasm or vigor than have other similarly situated litigants.

3 In fact, this Court has recently expressed this philosophy in a different context, when it stayed a class action filed in Delaware in deference to a class and derivative action in California, precisely because the pleading in California was much more detailed and of far better quality, than the Delaware pleading. *See Derdiger v. Tallman, 2000 Del. Ch. LEXIS 107*, *22-23, Del. Ch., C.A. No. 17276, Chandler, C. (July 20, 2000).

IV.

Based on these considerations, I conclude that the institutional shareholders, TCW Technology Limited Partnership and Kansas Public Employees Retirement System, represented by Grant & Eisenhofer, should serve as lead plaintiff, with all of the other shareholder actions consolidated with the two institutional lawsuits for purposes of the scheduled preliminary injunction hearing. The derivative and class claims all arise from the same basic facts and none of [*12] the claims are internally inconsistent or conflict with the legal theories supporting any other claim. Counsel for the institutional shareholders has vigorously pursued the shareholders' interests and has moved the litigation forward aggressively. The institutional shareholders assert both class and derivative claims, so their interests are strategically aligned with the small shareholder class and derivative lawsuits. Because of the pressing need for resolution of this issue, this brief explanation of my rationale for selecting the institutional shareholder plaintiffs as the lead plaintiffs will have to suffice.

V.

Based on the above, I ask Mr. Grant, on behalf of all the shareholder plaintiffs, to submit and prepare a proposed form of Consolidation Order, implementing this decision. I also ask Mr. Grant to file an amended complaint, to include defendant WorldCom, within two days of this letter. Defendants shall have two days to answer the amended complaint. Mr. Grant is responsible for coordinating all document production and deposition schedules, as well as briefing in connection with the preliminary injunction hearing.

With this framework in place, I do not expect there to be [*13] any duplication of document production or deposition notices. Briefing of the preliminary injunction shall be coordinated among counsel, but I expect the traditional opening, answer and reply, with the reply to be filed no later than 4:00 p.m., November 27. I will not authorize extensions to the page limitations fixed by Court Rule.

IT IS SO ORDERED.

William B. Chandler III

# EXHIBIT C

LEXSEE 2002 DEL. CH. LEXIS 89

Positive
As of: Feb 25, 2008

**Hirt v. U.S. Timberlands Service Company, LLC, et al., Bowers v. Rudey, et al., Cutler v. Rudey, et al., Eberlin, et al. v. Rudey, et al., Susser v. Rudey, et al., Tisch v. Rudey, et al., Kosseff v. Rudey, et al., Obstfeld v. Rudey, et al.**

**C.A. No. 19575, C.A. No. 19577, C.A. No. 19578, C.A. No. 19584, C.A. No. 19592, C.A. No. 19608, C.A. No. 19613, C.A. No. 19632**

**COURT OF CHANCERY OF DELAWARE, NEW CASTLE**

***2002 Del. Ch. LEXIS 89***

**June 18, 2002, Submitted**
**July 3, 2002, Decided**

**SUBSEQUENT HISTORY:** [*1] Revised July 9, 2002.

**DISPOSITION:** Plaintiff Eberlin's motion to appoint lead counsel granted and Plaintiff Hirt's cross-motion denied.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff owner of common limited partnership units of defendant company sought the appointment of various law firms as lead counsel. Defendant holder opposed the owner's motion and sought the appointment of his law firm as sole lead counsel.

**OVERVIEW:** The consolidated actions concerned a proposed buy-out transaction of the public interest in the company. The actions were the second series that had been filed in the court. The first series related to an earlier proposal to accomplish a similar transaction. Because that proposal stalled, those earlier cases were never pursued. The buy-out proposal was revived and the second round of cases were filed. The holder argued that the vote taken on that proposal was unfairly influenced by a proliferation of cases brought by the owner, and that the earlier case were not vigorously pursued. The court held that the issues relating to the organization of the earlier litigation were of only limited relevance to the pending motions where the law firms involved in the earlier litigation were not involved in the pending cases. The court rejected the argument that the earlier cases were not vigorously pursued because those cases related principally and directly to a management buy-out proposal that stalled. There was no ripe claim to litigate and any effort to move those cases forward would properly have been met by motions to dismiss and stay discovery.

**OUTCOME:** The owner's motion was granted.

**LexisNexis(R) Headnotes**

***Civil Procedure > Class Actions > Judicial Discretion***
[HN1] When multiple related class and derivative actions are filed, the plaintiffs and their counsel are able to negotiate acceptable governance structures for the management of the litigation without involving the court in that process. Nevertheless, it is occasionally necessary for the court to manage class litigation to the extent of designating lead counsel.

***Civil Procedure > Class Actions > Derivative Actions > General Overview***
***Civil Procedure > Class Actions > Judicial Discretion***
***Civil Procedure > Counsel > General Overview***
[HN2] The factors that should be considered in ruling on a motion to designate a lead plaintiff or to appoint lead counsel may be summarized as follows: (1) the quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs; (2)

the relative economic stakes of the competing litigants in the outcome of the lawsuit to be accorded great weight; (3) the willingness and ability of all the contestants to litigate vigorously on behalf of an entire class of shareholders; (4) the absence of any conflict between larger, often institutional, stockholders and smaller stockholders; (5) the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit; and (6) the competence of counsel and their access to the resources necessary to prosecute the claims at issue.

***Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview***
[HN3] No special weight or status will be accorded to a lawsuit simply by virtue of having been filed earlier than any other pending action.

***Civil Procedure > Class Actions > Judicial Discretion***
***Civil Procedure > Counsel > General Overview***
[HN4] It is customary and desirable, where multiple lawsuits are filed relating to the same transaction or set of facts, for the plaintiffs' lawyers involved to meet and vote on an organizational structure for the prosecution of the litigation. While such a decision is not binding on the court, it will be accorded weight when the outcome is challenged by one or more of the litigants or their counsel, unless it appears to have been improperly obtained.

**COUNSEL:** R. Bruce McNew, Esquire, Taylor & McNew, Greenville, DE.

Joseph A. Rosenthal, Esquire, Rosenthal, Monhait, Gross & Goddess, Wilmington, DE.

Pamela S. Tikellis, Esquire, Chimicles & Tikellis, Wilmington, DE.

Jesse A. Finkelstein, Esquire, Richards, Layton & Finger, Wilmington, DE.

Bruce L. Silverstein, Esquire, Young, Conaway, Stargatt & Taylor, Wilmington, DE.

James S. Green, Esquire, Seitz, VanOgtrop & Green, P.A., Wilmington, DE.

**JUDGES:** STEPHEN P. LAMB, VICE-CHANCELLOR.

**OPINION BY:** STEPHEN P. LAMB

**OPINION**

On June 18, 2002, the court heard argument in these eight consolidated actions on cross-motions to appoint lead counsel, one made by Harry R. Eberlin (a named plaintiff in C.A. No. 19584) and the other by Harold Hirt (the named plaintiff in C.A. No. 19575). Having considered the matter further, the court has decided to grant Eberlin's motion and deny Hirt's.

Eberlin seeks the joint appointment of the law firms of Stull, Stull & Brody and Abbey Gardy LLP as plaintiffs' lead counsel. Eberlin's affidavit discloses that he is the owner of 134,000 common limited partnership units of defendant U.S. Timberlands [*2] Company, L.P. According to his brief, this represents approximately 1.1 percent of the public interest in Timberlands and has a value of approximately $ 387,500. Eberlin's motion is supported by six of the eight groups of lawyers representing the plaintiffs in these actions. Hirt, of course, opposes Eberlin's motion and seeks the appointment of his counsel, Bull & Lipshitz, LLP, as sole lead counsel. It appears from the record that Hirt has only a relatively modest holding in the issuer. None of the other plaintiffs or their counsel support Hirt's application. [1]

1 Apparently, one group of plaintiffs take no position on the cross-motions.

These cases all concern a proposed buy-out transaction of the public interest in Timberlands. These are the second series of such actions that have been filed in this court. The first were filed in 2000 and related to an earlier proposal to accomplish a similar transaction. Because that proposal stalled, those earlier cases were never pursued and were eventually dismissed at [*3] the urging of the court. Shortly thereafter, the buy-out proposal was revived and the second round of cases filed.

Much of Hirt's argument relating to the organization of the new cases consists of attack on the organization of the earlier cases, in which his lawyers competed unsuccessfully to be appointed co-lead counsel with Abbey Gardy. Hirt complains that the vote taken on that proposal was unfairly influenced by a proliferation of cases brought by plaintiffs and lawyers allied with Abbey Gardy. Hirt also complains that those earlier cases were not vigorously pursued.

In my view, issues relating to the organization of the earlier litigation are of only limited relevance to the pending motions. In particular, I note that a number of the law firms involved in the earlier cases are not, as least as of this date, involved in the cases now pending. Included among these missing firms are the two who originally supported Bull & Lipshitz as co-lead counsel with Abbey Gardy. Similarly, there are several firms involved in the pending cases that had no role in the earlier cases and who either support the decision to appoint

Abbey Gardy and Stull, Stull & Brody as co-lead counsel in the new [*4] cases or (in one case) take no position on the issue.

I am also not persuaded by Hirt's arguments that the earlier cases were not vigorously prosecuted. The fact is that those cases related principally and directly to a management buy-out proposal that stalled. There was no ripe claim to litigate and any effort to move those cases forward would properly have been met by motions to dismiss and stay discovery. In fact, in response to an inquiry from the court, the parties properly agreed to a voluntary dismissal without prejudice. It was mere coincidence that the latest buy-out proposal was announced only one month later, prompting the filing of the new complaints.

It is the usual experience [HN1] when multiple related class and derivative actions are filed in this jurisdiction that the plaintiffs and their counsel are able to negotiate acceptable governance structures for the management of the litigation without involving the court in that process. Nevertheless, as has been observed, it is "occasionally ... necessary for the court to manage class litigation to the extent of designating lead counsel." [2]

> 2 *Silverstein v. Warner Communications, Inc., 1991 Del. Ch. LEXIS 15, 1991 WL 12835 (Del. Ch. 1991)* (citing 5C WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1206 (1990)).

[*5] The court has had the opportunity on those occasions to address [HN2] the factors that should be considered in ruling on a motion to designate a lead plaintiff or to appoint lead counsel. These may be summarized as follows:

> . the "quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs;" [3]
>
> . the relative economic stakes of the competing litigants in the outcome of the lawsuit (to be accorded "great weight"); [4]
>
> . the willingness and ability of all the contestants to litigate vigorously on behalf of an entire class of shareholders; [5]
>
> . the absence of any conflict between larger, often institutional, stockholders and smaller stockholders; [6]
>
> . the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit; [7]
>
> . competence of counsel and their access to the resources necessary to prosecute the claims at issue. [8]

The court has also recognized that [HN3] no special weight or status will be accorded to a lawsuit "simply by virtue of having been filed earlier than any other pending action." [9]

> 3 *TCW Technology Limited Partnership v. Intermadia Communications, Inc., 2000 Del. Ch. LEXIS 147, 2000 WL 1654504 (Del. Ch. 2000)*; *In re SFX Entertainment, Inc. Shareholders Litig.*, Consol. C.A. No. 17818, Steele, V.C. (Apr. 25, 2000) (ORDER).

[*6]

> 4 *TCW Technology 2000 Del. Ch. LEXIS 147, 2000 WL 1654504* at *4.
>
> 5 *Id.*
>
> 6 *Id.*
>
> 7 *Id.*
>
> 8 Court of Chancery Rule 23(a) (ability of representative parties to "fairly and adequately protect the interests of the class" a prerequisite to class action certification); *Youngman v. Tahmoush, 457 A.2d 376 (Del.Ch. 1983)* (derivative plaintiff must be qualified to act in fiduciary capacity on behalf of corporation and its stockholders.).
>
> 9 *TCW, 2000 Del. Ch. LEXIS 147, 2000 WL 1654504* at *3.

In addition, the court recognizes that [HN4] it is customary and desirable, where multiple lawsuits are filed relating to the same transaction or set of facts, for the plaintiffs' lawyers involved to meet and vote on an organizational structure for the prosecution of the litigation. While such a decision is not binding on the court, it will be accorded weight when the outcome is challenged by one or more of the litigants or their counsel, unless it appears to have been improperly obtained. In his motion, for instance, Hirt claims that the vote to organize the original suits was wrongly influenced by the vote of a lawyer who was retained separately [*7] to represent a regular client of Abbey Gardy and, thus, is said to have lacked independence of that firm. Although this charge is controverted, the court sees no reason to form any conclusions about it, both because the conduct at issue relates to the earlier suits and because the consensus of the

plaintiffs' counsel in the pending suits is obviously not the product of the improper conduct alleged. As a general matter, however, the court assumes that plaintiffs' counsel are, as a rule, fully aware of the problems associated with the conduct that is alleged and are capable of neutralizing its effect on the process of selecting lead counsel. Where that is not the case, the court will give no weight to the improperly procured or influenced vote of plaintiffs' counsel.

Weighing all of these factors leads the court to grant Eberlin's motion and deny Hirt's cross-motion. The pleadings are all similar in quality and, in cases of this sort, discrepancies are often eliminated by the filing of a consolidated complaint incorporating the strongest elements of the various complaints on file. Eberlin has a very substantial economic stake in the outcome of the litigation, one that is far greater [*8] than Hirt's. There is also no suggestion that the size of Eberlin's stake gives rise to any conflict of interest between him and the other members of the putative class. Finally, the other factors, including the lopsided preference of the group of plaintiffs' counsel as a whole, all either favor Eberlin's choice of lead counsel or favor neither moving party.

For these reasons, plaintiff Eberlin is directed to submit an appropriate form of order within 10 days of the date of this opinion consolidating these actions and appointing counsel in accordance with this decision.

STEPHEN P. LAMB

# EXHIBIT D

**Wiehl v. Eon Labs, et. al.; Paulena Partners LLC v. Eon Labs, et. al.; Robert Kemp, IRRA v. Eon Labs, et. al.; Calcagno v. Eon Labs, et. al.; Erste Sparinvest Kapitalanlagegesellshaft MBH v. Eon Labs, et. al.; Huntsinger v. Eon Labs, et. al.; Hung v. Eon Labs, et. al.**

**C.A. No. 1116-N, C.A. No. 1117-N, C.A. No. 1119-N, C.A. No. 1125-N, C.A. No. 1134-N, C.A. No. 1136-N, C.A. No. 1139-N**

**COURT OF CHANCERY OF DELAWARE, NEW CASTLE**

***2005 Del. Ch. LEXIS 40***

**March 10, 2005, Submitted**
**March 22, 2005, Decided**

**NOTICE:**

[*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

**DISPOSITION:** Motion to consolidate three law firms proceeding in class action suit.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** In a disputed motion to consolidate, movant law firms sought lead counsel positions to pursue class action claims by plaintiffs against defendants, a pharmaceuticals company and others. The instant matter followed.

**OVERVIEW:** The three firms herein focused on the quality of the pleading, the relative economic stakes of plaintiffs, and the process of an organizational vote by plaintiffs' counsel. However, after a review of the facts, the instant court was unable to distinguish between the firms in any meaningful way. In addition, the court could not fully accept the shareholder vote because it did not appear to be fair based on the number of firms filing complaints. Thus, the court required that counsel convene another organizational meeting and vote to adopt an organizational structure consistent with the instant court's opinion. At that meeting, the participants were, before voting, to agree on the appropriate structure best suited to manage the present litigation in the interests of the class they sought to represent. This included a determination whether a co-lead counsel structure was necessary or desirable for the efficient management of the case. Only after those matters were settled would a vote be taken. If one lead counsel was chosen, that firm was to assign work in a manner consistent with the interests of the class and the talents and availability of participating counsel.

**OUTCOME:** Lead counsel could not be determined, and a new organizational vote was ordered.

**LexisNexis(R) Headnotes**

***Civil Procedure > Class Actions > Derivative Actions > General Overview***
***Civil Procedure > Class Actions > Prerequisites > General Overview***

[HN1] The relevant factors for selecting lead counsel in a class action lawsuit include: (1) the quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs; (2) the relative economic stakes of the competing litigants in the outcome of the lawsuit (to be accorded "great weight; (3) the willingness and ability of all the contestants to litigate vigorously on behalf of an entire class of shareholders; (4) the absence of any conflict between larger, often

institutional, stockholders and smaller stockholders; and (5) the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit. Further, competence of counsel and their access to the resources necessary to prosecute the claims at issue is another factor to consider. Finally, in regard to the timing of the complaints, no special weight or status will be accorded to a lawsuit simply by virtue of having been filed earlier than any other pending action.

***Civil Procedure > Class Actions > Class Counsel > Appointments***
***Civil Procedure > Class Actions > Prerequisites > General Overview***
[HN2] In selecting lead counsel in a class action lawsuit, plaintiffs' lawyers should work out the lead counsel or other leadership structure among themselves. It is customary and desirable, where multiple lawsuits are filed relating to the same transaction or set of facts, for the plaintiffs' lawyers involved to meet and vote on an organizational structure for the prosecution of the litigation. But the process for choosing lead counsel must be fair and include all firms. If the vote is improperly obtained, the court will disregard the resulting leadership structure.

**COUNSEL:** Joseph A. Rosenthal, Esquire, Carmella P. Keener, Esquire, Rosenthal, Monhait, Gross & Goddess, PA, Wilmington, DE.

Seth D. Rigrodsky, Esquire, Milberg Weiss Bershad & Shuman LLP, Wilmington, DE.

Michael Hanrahan, Esquire, Gary F. Traynor, Esquire, Paul A. Fioravanti, Jr., Esquire Prickett Jones & Elliott, P.A. Wilmington, DE.

Raymond J. DiCamillo, Esquire, Richards, Layton & Finger, Wilmington, DE.

Kurt M. Heyman, Esquire, The Bayard Firm, Wilmington, DE.

Donald J. Wolfe, Jr., Esquire, Brian C. Ralston, Esquire Mark A. Morton, Esquire Potter Anderson & Corroon LLP Wilmington, DE.

Stephen E. Jenkins, Esquire Ashby & Geddes, Wilmington, DE.

**OPINION**

In this disputed motion to consolidate, three law firms seek lead counsel positions to pursue the claims against Eon Labs, Inc. and the other defendants. Milberg Weiss Bershad & Shulman LLP and Faruqi & Faruqi, LLP argue that they have been elected co-lead counsel by the plaintiff shareholder groups. [1] Prickett Jones & Elliot, P.A. responds that it was shut out of the shareholder voting process because [*2] the Milberg/Faruqi result was predetermined by the number of shares owned by their clients instead of the factors specified under Delaware case law. In addition, Prickett challenges the process by which the plaintiffs' counsels' organizational meeting occurred.

1 Milberg has taken the lead in arguing for the co-lead counsel position. For the sake of simplicity, the court will refer to Milberg and Faruqi as "Milberg," unless otherwise noted.

These class action lawsuits [2] against Eon and the other defendants began on February 22, 2005 with the filing of a complaint by Faruqi. There were two other, complaints filed the same day, one by the Brualdi Law Firm and one by Bull & Lifshitz, LLP. Milberg filed a complaint the next day, and a second one the following week. [3] Prickett filed its complaint on March 1, the same day that Milberg filed its second complaint. Faruqi & Faruqi also filed a second complaint on March 3.

2 The general allegation in all of the complaints is that the defendants breached their fiduciary duties in connection with a tender offer from Novartis AG. The tender offer was announced on February 21, 2005.

[*3]

3 In the first complaint, Milberg represents an individual shareholder. In the second complaint, Milberg represents an institutional shareholder.

Although it was not the first firm to file, Prickett was the first firm to move for expedited proceedings. The court responded by scheduling a hearing within two days, on March 4, based on Prickett's representation that the tender offer challenged in the litigation was set to commence on March 7 and to close 20 business days thereafter. During the hearing, which was attended either in person or by telephone by at least 10 law firms, the defendants immediately made clear to the court that the tender offer would not commence on March 7 and would not close before May 12 due to regulatory issues. They further asserted that the tender offer was not expected to close until the second half of this year, as stated in their press release announcing the offer.

Based on the representations of the defendants, which were communicated to all the plaintiffs' firms and the court immediately before the hearing, the court denied the motion to expedite. The entire [*4] hearing took less than 10 minutes, most of which involved introducing counsel.

The three firms seeking leadership, Milberg, Faruqi, and Prickett, now return to this court in a disputed motion to consolidate. All agree that this court set out [HN1] the relevant factors for selecting lead counsel in *TWC Technology Limited Partnership v. Intermedia Communications, Inc.* [4] Those factors were summarized more recently in *Hirt* as follows:

> . 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; and
>
> . the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit. [5]

4 *2000 Del. Ch. LEXIS 147, 2000 WL 1654504, at * 4 (Del. Ch. Oct. 17, 2000).*

[*5]

5 *Hirt v. U.S. Timberlands Serv. Co. LLC, 2002 Del. Ch. LEXIS 89, 2002 WL 1558342, at * 2 (Del. Ch. July 3, 2002)* (citing *TWC Technology, 2000 Del. Ch. LEXIS 147, 2000 WL 1654504, at * 4*).

Looking to Court of Chancery Rule 23(a), I the *Hirt* court also listed "competence of counsel and their access to the resources necessary to prosecute the claims at issue" as another factor to consider. Finally, in regard to the timing of the complaints, the *Hirt* court noted 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.'" [6]

6 *Id.* (quoting *TWC Technology, 2000 Del. Ch. LEXIS 147, 2000 WL 1654504, at * 4*).

The firms here focus on three issues: the quality of the pleading, the relative economic stakes of the plaintiffs, and the process of the plaintiffs' counsels' organizational vote. [7]

7 The court does not ignore the other factors or consider them less important. The firms, through their documents and arguments, impliedly concede that any of the three could meet the standard for lead counsel based on the other factors, such as competence, willingness, and vigor. Therefore the court narrows its discussion to the pertinent arguments.

[*6] A. Quality Of The Pleading

Both sides claim the other's complaint is deficient. Milberg claims that Prickett grossly, and perhaps intentionally, misread the merger agreement and, based on the misreading, filed an ill-founded and wasteful motion to expedite. Milberg also claims that Prickett's complaint contains factual errors, such as whether the defendants' stock options vest immediately. In response, Prickett lists several alleged deficiencies in the Milberg/Faruqi complaints. For example, Prickett alleges that the complaints do not list all of the correct parties, do not properly lay out the relationship of the defendants, and do not contain important allegations concerning the defendants' fiduciary duty and the allegedly coercive nature of the challenged tender offer.

The court finds that Milberg's attack on the motion to expedite somewhat overstates the case. Milberg relies on both the language from the merger agreement, which allows for the tender offer to commence at a later date if the buyer and seller agree, as well as the language from the press release that declares the transaction would not close until the second half of 2005. Armed with those two facts, Milberg [*7] now claims that Prickett's motion to expedite was unwarranted. What Milberg omits from its analysis is that it did not know when the tender offer was due to commence and had no assurance that it would not occur on the schedule set forth in the merger agreement and repeated in the motion to expedite. Furthermore, Milberg asks the court to look to information from a press release that does not correspond with the defendants' position. The press release states that the offer will not close until the second half of 2005, but the defendants' position is that it would not close until after May 12. Therefore, given the information available when it filed the motion to expedite, Prickett's actions were not unreasonable.

Turning to the other purported deficiencies of the complaints, the court finds that each side's arguments have some merit. There are improvements that could be made with regard to all of the complaints, a fact that is

not unexpected given the rapid filing. This does not, however, provide support for Milberg's assertion that Prickett grossly or intentionally misread the agreement in presenting its summary of the facts.

Finally, in terms of overall quality, Prickett's complaint [*8] is more detailed and organized than the others, although all address the same issues. That being said, Milberg did not alter or expand its complaint from the time it filed for an individual stockholder on February 23 until it filed for an institutional investor on March 1. Prickett's complaint appears to be more targeted, better researched, and more challenging for the defendants. On the whole, Prickett's complaint, at the outset, appears superior to the others.

B. Economic Stakes Of The Plaintiffs

Milberg emphasizes the economic stakes factor from *Hirt*, especially the "great weight" to be accorded it. While not arguing that the size of the economic stake should be dispositive, Milberg refers to it as the driving force of the analysis. Milberg's position should come as no surprise, given that it represents the plaintiff with the largest number of shares, an institutional investor with 57,000 shares, while Faruqi represents the largest individual stockholder, who owns 38,000 shares. Prickett, on the other hand, represents an individual with 1,000 shares.

The court agrees with Milberg that economic stakes should be given great weight. However, the court finds that Milberg [*9] has overlooked a critical word in the factor stated in *Hirt:* relative. *Hirt* stands for the proposition that *relative* economic stakes are given great weight, not simply economic stakes. If every difference in economic stakes were given great weight, the court could simply add up the number of shares and select the law firm with the largest absolute representation. This is not Delaware law.

Here, Prickett's client has fewer shares than the clients of Milberg or Faruqi. But the analysis should not stop there. In this case, Eon has 88 million shares outstanding. Thus, each of the plaintiffs' respective stakes in Eon is minuscule. Indeed, even the largest plaintiff owns only 0.065% of Eon's shares. Its stake is simply not large enough to demonstrate a substantial relative difference that would require the court to give this factor great weight under *Hirt.* In addition, Prickett's client owns 1,000 shares having a market value in excess of $ 30,000. One supposes that this investment is of some significance to Huntsinger, an individual investor, and would cause him to monitor his counsels' conduct of the litigation.

C. Plaintiffs' Counsels' Organizational Vote

Milberg [*10] also stresses the outcome of the plaintiffs' counsels' organizational vote. Again, Milberg's position should be no surprise given that Milberg and Faruqi "won" the vote.

This court has frequently stated its position that the [HN2] plaintiffs' lawyers should work out the lead counsel or other leadership structure among themselves. "The court recognizes that it is customary and desirable, where multiple lawsuits are filed relating to the same transaction or set of facts, for the plaintiffs' lawyers involved to meet and vote on an organizational structure for the prosecution of the litigation." [8] But the process for choosing lead counsel must be fair and include all firms. [9] If the vote is improperly obtained, the court will disregard the resulting leadership structure. [10]

8 *Hirt, 2002 Del. Ch. LEXIS 89, 2002 WL 1558342, at * 2.*

9 *Black v. Cox Communications, Inc.*, C.A. No. 630, transcript at 82 (Del. Ch. Aug. 24, 2004) ("[The shareholder vote] process . . . does need to be fair and people need to talk to each other and include everybody.").

10 *Hirt, 2002 Del. Ch. LEXIS 89, 2002 WL 1558342, at * 2.*

[*11] In this case, the process was not fair. Although five law firms filed complaints, only three voted at the meeting. [11] As a result, two of the three voting firms elected themselves co-lead counsel, although the need for more than one lead counsel is not obvious. At least on the face of things, it appears that the process was structured to exclude one firm, Prickett. Of the three firms seeking a leadership position, Milberg and Faruqi voted for themselves and each other as co-lead counsel, presumably by prior agreement. This process is not easily described as either fair or democratic. The court does not find that the process went so far as to allow Milberg and Faruqi to improperly obtain their leadership positions, but the conduct of the meeting clearly disfavored Prickett and is therefore not accorded the weight described in *Hirt.*

11 The Brualdi Law Firm did not attend the meeting. The Bull & Lifshitz firm attended the meeting but could not provide confirmation of its client's share ownership. Therefore, while Milberg contends that all participants except Prickett voted for the Milberg/Faruqi co-leadership, Prickett argues that the vote was two to one, with Milberg and Faruqi voting for themselves.

[*12] D. Conclusion

After analyzing the *Hirt* factors, the court is unable to distinguish between the firms in any meaningful way. In addition, the court cannot fully accept the shareholder vote because it does not appear to have offered a fair, democratic process based on the number of firms filing complaints. Therefore, the court will require that the plaintiffs' counsel convene another organizational meeting at which they will again vote to adopt an organizational structure consistent with this opinion. At that meeting, the court expects that participants will discuss and consider the factors addressed herein. In particular, the participants should, before voting, agree on the appropriate structure best suited to manage this litigation in the interests of the class they seek to represent. This includes a determination whether a co-lead counsel (or co-Delaware coordinating counsel) structure is necessary or desirable for the efficient management of this case. Only after those matters are settled should a vote be taken. If one lead counsel is chosen, the court expects that firm to assign work in a manner consistent with the interests of the class and the talents and availability [*13] of participating counsel.

IT IS SO ORDERED.

Stephen P. Lamb

Vice Chancellor

**IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE**

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|---|---|
| POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT and GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, on behalf of themselves and all other similarly situated shareholders of Yahoo! Inc.,<br><br>Plaintiffs,<br><br>v.<br><br>YAHOO! INC., JERRY YANG, ROY BOSTOCK, RON BURKLE, ERIC HIPPEAU, VYOMESH JOSHI, ARTHUR KERN, ROBERT KOTICK, EDWARD KOZEL, MAGGIE WILDEROTTER, AND GARY WILSON,<br><br>Defendants. | Civil Action No. 3561 |
| WAYNE COUNTY RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>JERRY YANG, ROY BOSTOCK, RON BURKLE, ERIC HIPPEAU, VYOMESH JOSHI, ARTHUR KERN, ROBERT KOTICK, EDWARD KOZEL, GARY WILSON, MAGGIE WILDEROTTER, AND YAHOO! INC.,<br><br>Defendants. | Civil Action No. 3538-CC |
| RONALD J. DICKE, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>YAHOO! INC., JERRY YANG, RON BURKLE, ROBERT KOTICK, GARY WILSON, MAGGIE WILDEROTTER, ROY BOSTOCK, ERIC HIPPEAU, ARTHUR KERN, EDWARD KOZEL, AND VYOMESH JOSHI,<br>Defendants. | Civil Action No. 3539-CC |

**ORDER OF CONSOLIDATION**

It appearing that the above-captioned actions involve the same subject matter, and that the administration of justice would be best served by consolidating the actions,

**IT IS HEREBY ORDERED** this ___ day of _____, 2008:

1. The above captioned actions shall be consolidated for all purposes.

2. Hereafter, papers need only be filed in Civil Action No. 3561.

3. The caption of the Consolidated Action shall be:

| | |
|---|---|
| In re Yahoo! Shareholders Litigation | Consolidated C.A. No. 3561 |

4. BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP, 1285 Avenue of the Americas, New York, New York 10019, and BOUCHARD MARGULES & FRIEDLANDER, P.A., 222 Delaware Avenue, Suite 1400, Wilmington Delaware 19801, are hereby designated as plaintiffs' Lead Counsel.

5. All documents previously filed to date in any of the cases consolidated herein are deemed part of the record in the Consolidated Action. The Complaint filed in C.A. No. 3561 is hereby designated as the operative complaint in the Consolidated Action. Defendants need not respond to any other complaints filed in the constituent actions.

6. Plaintiffs' Lead Counsel shall conduct the Consolidated Action and set policy for plaintiffs for the prosecution of the Consolidated Action, delegate and monitor the work performed by plaintiffs' attorneys to ensure that there is no duplication of effort or unnecessary expense, coordinate on behalf of plaintiffs the initiation and conduct of all

discovery proceedings, and provide direction, supervision and coordination of all activities of plaintiff's counsel.

_____

Chancellor

## CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2008, I caused a copy of the foregoing **Motion for Consolidation and Appointment of Lead Counsel** to be served on the following counsel via LexisNexis File & Serve:

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