1989 WL 146235

Court of Chancery of Delaware, New Castle County.

Jeff WIEGAND, Plaintiff,
v.
BERRY PETROLEUM COMPANY, Defendant.

CIV. A. No. 9316.
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Submitted: Oct. 18, 1989.
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Decided: Dec. 5, 1989.

Attorneys and Law Firms

****477** Norman M. Monhait, and Kevin Gross, Morris, Rosenthal, Monhait & Gross, Wilmington, William Klein, II, Mark F. Moore, and Eve Rachel Markewich, Tenzer, Greenblatt, Fallon & Kaplan, New York City, for plaintiff.

A. Gilchrist Sparks, III, and Kenneth J. Nachbar, Morris, Nichols, Arsht & Tunnell, Wilmington, J. Michael Brennen, Robert E. Palmer, and Evan C. Borges, Gibson, Dunn & Crutcher, Newport Beach, Cal., for defendant.

MEMORANDUM OPINION

JACOBS, Vice Chancellor.

***1** Pending is the plaintiff's motion to be certified as representative of two separate plaintiff shareholder classes in this class action against ****478** Berry Petroleum Company ("Berry"). The plaintiff claims that during the period leading up to a merger of Berry and Norris Oil Corporation ("Norris") in 1987, wherein Norris stockholders received stock of Berry, Berry committed fraud upon, and breached fiduciary duties that it owed to, Norris's minority shareholders. This is the Opinion of the Court on the class certification motion, which was argued on October 18, 1989.

I.

On December 1, 1986, Berry purchased 80.6% of Norris's outstanding stock. Thereafter, plaintiff alleges, Berry engaged in conduct (claimed to be fraudulent and in breach of its fiduciary duties) that depressed the price of Norris stock, for the specific purpose of minimizing the consideration that Berry would later pay Norris's minority shareholders in the then contemplated future merger. That conduct is said to have occurred during the period from mid-December, 1986 through the announcement of the Berry-Norris merger in May, 1987.

Plaintiff alleges that as a result of Berry's wrongful conduct, two distinct classes of Norris shareholders suffered injury. The first of these (the "Selling Class") consists of those Norris shareholders who sold their Norris stock between December 14, 1986 and May 11, 1987 (the "selling period"). The Selling Class is claimed to have been injured by Berry's actions that artificially reduced the market price of Norris stock, because those actions reduced the amount the class members received when they sold their Norris stock during the selling period.

The second class (the "Merger Class") consists of those Norris shareholders who held their Norris stock on the merger record date (May 11, 1987) and who were later "frozen out" in the merger. The Merger Class is claimed to have been injured to the extent that its members received an unfairly low price for their shares by reason of Berry's aforementioned wrongful conduct and the material misrepresentations and omissions in Berry's prospectus issued in connection with the merger. The plaintiff seeks to be certified as the representative of both the Selling and the Merger Classes under Chancery Court Rule 23.

The plaintiff, Jeff Wiegand, became a Norris shareholder during the summer of 1986, when he purchased 10,000 shares of Norris stock. He sold 4,000 of those shares on December 5, 1985, and another 3,000 shares during the selling period, on February 9, 1987. ****479** As of May 11, 1987 (the record date for the Berry-Norris merger), the plaintiff continued to hold 3,000 shares of Norris stock, for which he ultimately received 99 shares of Berry stock in the merger.

II.

Under Court of Chancery Rule 23(a), this Court may certify a class if it determines that:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

***2** Only one of these requirements is disputed on this motion, namely, whether the plaintiff will "fairly and adequately" protect the interests of the two proposed classes.[1]

The defendant contends that the plaintiff will not be an adequate class representative because the interests of the two shareholder classes that he seeks to represent are in conflict. It argues that the Selling Class has an interest in establishing that the defendant caused a large drop in the Norris share price before May 11, 1987, but that a portion of the Merger Class has a conflicting interest, which is to prove precisely the contrary. The defendants' argument runs as follows: the Selling Class consists of all Norris shareholders who sold their stock during the selling period. Their claim is that Berry's fraud and breaches of fiduciary duty caused the Norris stock market price to be artificially depressed during that period when the Selling Class members sold their shares. If the Selling Class succeeds in establishing that claim, its interest would be to maximize its damage recovery by seeking to magnify the amount by which the market price was depressed. That is, the interest of the Selling Class would be to maximize the "spread" between the fair value of the Norris ****480** stock and its depressed price. That is because the larger the spread, the greater would be the class recovery.

A portion of the Merger Class, however, has a conflicting interest, because the larger the spread between the fair value and the market price of the Norris stock during the selling period, the smaller would be its recovery. The conflict arises because the Merger Class actually consists of two distinct subclasses: (i) those Merger Class members who purchased their Norris shares *before* the selling period commenced (the "Merger holding subclass"), and (ii) those Merger Class members who purchased their shares *during* the selling period (the "Merger purchasing subclass").

If the Merger purchasing subclass establishes its entitlement to a damage recovery, the amount of that recovery would depend upon two variables. On the one hand, the larger the spread between the merger price and the fair value of the Norris stock, the greater would be the recovery of that subclass. On the other hand, because the Norris shares of the Merger purchasing subclass were purchased during the selling period, those shares were necessarily purchased at a bargain price, at least to the extent that the market price was artificially depressed. Therefore, any damage to the Merger purchasing subclass occasioned by the merger would be offset by the amount of that "bargain element;" that is, any damage recovery would have to be reduced by the amount of the artificial price depression. *See Keen v. Naegele,* Del.Ch., Civil Action No. 1226-S, Chandler, V.C., Mem.Op. at 10 (November 30, 1989). That being the case, the Merger purchasing subclass would have an interest in minimizing the amount of that price spread distortion in order to maximize its recovery-an interest squarely at odds with that of the Selling Class, which is to maximize the amount of that same price distortion.[2]

***3** Moreover, defendant argues, the plaintiff has personal interests that conflict with those of the Merger purchasing subclass. Plaintiff purchased all his Norris shares before the selling period. He sold some of them during the selling period, and held his remaining shares on the merger record date. Plaintiff is, therefore, a member of both the Selling Class and the Merger holding subclass, but is not a member of the Merger purchasing subclass. Accordingly, ****481** the plaintiff's personal interest would be to establish that the defendant's actions caused a large market price distortion during the selling period. The existence of a conflicting economic interest between the named plaintiff and the class he seeks to represent is a major factor bearing upon whether he can adequately represent the members of a class. *Shingala v. Becor Western, Inc.,* Del.Ch., C.A. Nos. 8858, 8859, Berger, V.C., Mem.Op. at 13 (Feb. 3, 1988); *Schreiber v. Hudson Petroleum Corp.,* Del.Ch., C.A. No. 8513, Hartnett, V.C., Mem.Op. at 13 (Oct. 29, 1986). Because plaintiff's interest as a member of the Selling Class (which will seek to maximize the price spread or distortion during the selling period) is contrary to the interest of the Merger purchasing subclass (which will seek to minimize that selfsame distortion) he cannot adequately represent that subclass.[3]

I have considered these arguments and conclude that they are fundamentally sound. The plaintiff has made no convincing showing to the contrary.

I am also satisfied, however, that the plaintiff will adequately represent both the Selling Class and the Merger holding subclass, because the interests of those classes do not conflict. A plaintiff will fairly and adequately represent the interests of a class where "the interests of the representative party ... coincide with those of the class and ... [the representative] can be expected to prosecute the action vigorously." *Gaffin v. Teledyne, Inc.,* Del.Ch., C.A. No. 5786, Hartnett, V.C., Mem.Op. at 15 (Oct. 9, 1987), quoting *Mersay, et al. v. First Republic Corp. of America, et al.,* S.D.N.Y., 43 F.R.D. 465, 469 (1968). In this case, the plaintiff's personal interests clearly coincide with the interests of those two classes, and the plaintiff has established that he will prosecute his claims vigorously.

The defendant also argues that the plaintiff cannot adequately represent those Selling Class members who sold their Norris stock between February 9, 1987 and the end of the selling period, because ****482** (i) the plaintiff sold 3,000 shares of his Norris stock on February 9, 1987, (ii) any fraud or breach of duty that defendant committed after February 9, 1987 would not have adversely affected the plaintiff, and therefore, (iii) the plaintiff would have no interest in pursuing claims on behalf of shareholders who sold their stock after February 9, 1987.

The Court is unpersuaded by that analysis. That a class representative may not be identically situated in all respects to other members of the class does not mean that his personal interests necessarily conflict with those of the class. Such a conflict would exist only if the differences between the class representative and the class are material. *See Gaffin v. Teledyne, Inc.,* Mem.Op. at 15. ("[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.") quoting 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1768, at 327 (1986).

***4** No material conflict exists here. Although the plaintiff personally sold some of his shares in February, 1987, he has, nonetheless, an interest in proving the wrongfulness of defendant's post-February 9, 1987 conduct and its impact upon Norris stockholders. Such proof would be relevant to his claim that (i) Berry engaged in an unlawful course of conduct during the entire selling period, and that (ii) the plaintiff was injured in the merger as a result of that conduct. Therefore, the plaintiff has an interest, consistent with that of the classes of which he is a member, in presenting all pertinent evidence of wrongdoing during the entire selling period.[4]

III.

Accordingly, the Court will certify two classes of which the plaintiff will serve as class representative: (1) the Selling Class, which consists of all Norris stockholders who sold their Norris shares between December 15, 1986 and May 10, 1987, and (2) the Merger holding subclass, which consists of all Norris stockholders who held Norris stock on May 11, 1987 but who did not purchase any Norris stock during the selling period. The Court will consider an application to ****483** certify a subclass comprising the remaining persons who owned Norris stock on May 11, 1987, (*i.e.,* the Merger purchasing subclass), if and when a suitable class representative comes forward.

Counsel shall submit an appropriate form of order implementing the foregoing rulings.

All Citations

Not Reported in A.2d, 1989 WL 146235, 16 Del. J. Corp. L. 476

Footnotes

1 To be certified, a class must also meet one of the three alternative criteria specified in Rule 23(b). The defendant does not dispute plaintiff's reliance upon, or his contention that each class satisfies, Rule 23(b)(3), which requires that:
> ... questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2 Members of the Merger holding subclass are not affected by events that occurred during the selling period, and would recover the difference, if any, between what they would have received but for the defendant's wrongful behavior and what they actually did receive in the merger.

3 The plaintiff suggests that this issue should not arise, and therefore should not be considered, unless and until the Court is called upon to fix a damage award. Therefore, plaintiff argues, he should be permitted to represent both

plaintiff classes through the liability phase. The Court cannot accept this view. The same evidence of fraud and breach of duty that would bear on issues of liability (*e.g.,* whether the defendant wrongfully distorted the stock price during the selling period) could also affect any potential damage award. That being the case, it is prudent that all relevant conflicts be identified now, thereby ensuring at the outset that the interests which are on a collision course will have separate and adequate representation.

[4] Defendant also argues that the plaintiff cannot represent the class because he did not rely to his detriment upon the defendant's alleged misrepresentations. Leaving for another day the question of whether that allegation is factually correct or legally material, I conclude that the complaint adequately alleges reliance upon the claimed misrepresentations.

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