

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

WILLIAM B. CHANDLER III  
CHANCELLOR

COURT OF CHANCERY COURTHOUSE  
34 THE CIRCLE  
GEORGETOWN, DELAWARE 19947

Date Submitted: September 23, 2009

Date Decided: October 2, 2009

Seth D. Rigrodsky  
Brian D. Long  
Timothy J. MacFall  
Rigrodsky & Long, P.A.  
919 North Market Street, Suite 980  
Wilmington, DE 19801

David A. Jenkins  
Smith, Katzenstein & Furlow LLP  
800 Delaware Avenue  
Suite 1000  
Wilmington, DE 19899

William M. Lafferty  
Morris, Nichols, Arsht & Tunnell LLP  
1201 North Market Street, 18<sup>th</sup> Floor  
P.O. Box 1347  
Wilmington, DE 19899

Daniel Dreisbach  
Meredith M. Stewart  
Richards, Layton & Finger, P.A.  
One Rodney Square  
920 North King Street  
Wilmington, DE 19801

Re: *Dutiel v. Tween Brands, Inc., et al.*  
Civil Action No. 4743-CC  
*Hirsh, et al. v. Rayden, et al.*  
Civil Action No. 4845-CC

Dear Counsel:

Plaintiff Cheryl Dutiel seeks consolidation of the above-captioned cases and appointment of Rigrodsky & Long, P.A. as lead counsel. Plaintiffs Edward Hirsh, Claire Rand, and Sarah Elliott (“Ohio Plaintiffs”) also seek consolidation of the above-captioned cases but seek appointment of Levi & Korsinsky, LLP (“L&K”) as lead counsel.

For the reasons set forth briefly below, I grant in part and deny in part the motion of Plaintiff Dutiel and grant in full the motion of Ohio Plaintiffs.

**I. BACKGROUND**

On June 25, 2009, Tween Brands Corporation (“Tween Brands” or the “Company”) and Dress Barn, Inc. (“Dress Barn”) announced an agreement under

which a subsidiary of Dress Barn will merge with Tween Brands in a stock-for-stock transaction (the “Proposed Merger”).

On June 29, 2009, Claire Rand filed in the Franklin County Common Pleas Court, Columbus, Ohio (the “Franklin County Court”), a putative class action challenging the Proposed Merger. On July 8, 2009, Sarah Elliott likewise filed a putative class action against Tween Brands in the Franklin County Court. And on August 4, 2009, Edward Hirsh also filed a putative class action against Tween Brands in the Franklin County Court.

At some point in time after August 4, the plaintiffs and their legal counsel in these three actions (the “Ohio Actions”) “agreed among themselves to cooperate, for the benefit of the Class and for the convenience of the Court and all parties concerned.”<sup>1</sup> Before Ohio Plaintiffs filed an amended complaint, Defendants in the Ohio Actions filed Motions to Dismiss or Stay the Ohio Actions, and “argued in their motion papers that they wished to have any actions concerning the Proposed Merger proceed in Delaware, the state of Tween Brands’ incorporation.”<sup>2</sup> Ohio Plaintiffs agreed with Defendants, filed a combined putative class action complaint in Delaware on August 28, 2009, and voluntarily dismissed the Ohio Actions without prejudice during the week of August 31, 2009.

On July 17, 2009—several weeks before Ohio Plaintiffs filed their combined putative class action complaint in Delaware, but subsequent to two of the three Ohio actions having been filed—Plaintiff Dutiel brought a putative class action in Delaware against Tween Brands, Dress Barn, and Tween Directors.

Plaintiff Dutiel and Ohio Plaintiffs now seek consolidation of the two Delaware Actions and appointment of lead counsel. They do not dispute the propriety of consolidation. Their dispute rests entirely on whom the Court should appoint as lead counsel in the consolidated action.

## II. ANALYSIS

Both parties have pointed to the factors that I have said this Court should consider when ruling on a motion to designate a lead plaintiff or to appoint lead counsel. Briefly, these factors include but need not be limited to: (1) the quality of

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<sup>1</sup> Ohio Pls.’ Mot. for Consolidation and Appointment of Lead Counsel, and Resp. to Mot. of Plaintiff Dutiel (“Ohio Pls.’ Mot.”) 5.

<sup>2</sup> *Id.* at 6.

the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs; (2) weight to the shareholder plaintiff that has the greatest economic stake in the outcome of the lawsuit; and (3) weight to whether a particular litigant has prosecuted its lawsuit with greater energy, enthusiasm or vigor than have other similarly situated litigants.<sup>3</sup> Not surprisingly, both parties have reached very different conclusions regarding the balance of these factors in the present Actions.

Plaintiff Dutiel's counsel touts a record of vigorous litigation, including success in obtaining Defendants' agreement to provide discovery on an expedited basis and in reaching agreement concerning a confidentiality stipulation,<sup>4</sup> as well as in filing several motions and stipulations throughout the months of July, August, and September 2009.<sup>5</sup> Plaintiff Dutiel's counsel also alleges that Ohio Plaintiffs "have engaged in forum shopping and have done absolutely nothing to advance the best interests of the plaintiffs and putative class they supposedly represent...."<sup>6</sup>

Ohio Plaintiffs' counsel promotes its record of having negotiated document production with Defendants and thereby obviating the need for a motion for expedited discovery,<sup>7</sup> of representing a greater economic stake in the outcome of the lawsuit than does Plaintiff Dutiel's counsel,<sup>8</sup> and of having prosecuted its Delaware Action with greater energy, enthusiasm, and vigor than has Plaintiff Dutiel's counsel.<sup>9</sup> And, of course, both counsel claim their respective pleadings to be superior.<sup>10</sup>

This Court always prefers that plaintiffs' counsels work out an appropriate consolidation compromise. Such a solution appears to be unworkable here, however, and so I am forced to declare a winner.

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<sup>3</sup> See *TCW Tech. Ltd. P'ship v. Intermedia Comm's, Inc.*, 2000 WL 1654504, at \*4 (Del. Ch. Oct. 17, 2000).

<sup>4</sup> Pl. Dutiel's Mot. for Consolidation and Appointment of Lead Counsel ("Pl. Dutiel's Mot.") 10.

<sup>5</sup> Reply Mem. in Supp. of Pl. Dutiel's Mot. for Consolidation and Appointment of Lead Counsel ("Reply Mem. of Pl. Dutiel") 3-4.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> Ohio Pls.' Mot. 7.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Id.*

<sup>10</sup> See Ohio Pls.' Mot 11-12; Pl. Dutiel's Mot. 9.

Notwithstanding their important differences, the pleadings of respective counsel do not appear to differ meaningfully in quality such that I can hold one pleading better represents the interests of the shareholder class and derivative plaintiffs. I also cannot begin to measure—qualitatively or quantitatively—the level of enthusiasm each party has presented, other than to say that both parties have appeared equally ardent in promoting their own accomplishments.

I likewise cannot rely on the timing of the different counsels' respective filings, as the notion "that the first to file a lawsuit in this Court wins some advantage in the race to represent the shareholder class..., in my opinion, has neither empirical nor logical support."<sup>11</sup>

I do note the different levels of economic interest in this Action. Ohio Plaintiffs appear to have nearly \$11,000 at stake, while Plaintiff Dutiel's economic interest is closer to \$900.<sup>12</sup> While I am not aware of the specific breakdown of this \$11,000 among the three members of Ohio Plaintiffs, I am aware that this increase in economic stake is one of more than 1200 percent.

I also believe it important to recognize the representation that Ohio Plaintiffs' counsel has already forged among the many law firms involved in the Ohio Actions. Plaintiff Dutiel points to the fact that L&K did not represent the plaintiff in the earliest Ohio filings, and relies on this fact as support for an argument that Ohio Plaintiffs' counsel has not been as aggressive and enthusiastic about litigating these matters,<sup>13</sup> as if a firefighter who arrives second to a fire is any less committed to dousing the flames. I have a different interpretation. While I cannot measure individual levels of enthusiasm, I do believe it important to recognize that the various law firms involved in the Ohio Actions have worked together and determined that L&K is the best counsel to represent their consolidated action in Delaware. That their choice of leadership happened to become involved in the Ohio Actions subsequent to Plaintiff Dutiel's counsel filing a complaint in Delaware has no import here.

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<sup>11</sup> *TCW Tech. Ltd. P'ship v. Intermedia Comm's, Inc.*, 2000 WL 1654504, at \*3 (Del. Ch. Oct. 17, 2000). Nor can the notion rely on idioms; while the early bird may get the worm, sometimes it is the second mouse that gets the cheese.

<sup>12</sup> Reply Mem. of Ohio Pls.' 3.

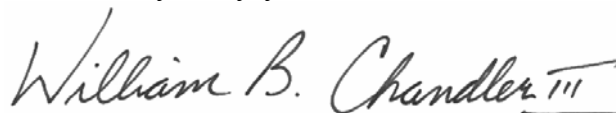
<sup>13</sup> Reply Mem. of Pl. Dutiel 5-6.

### III. CONCLUSION

After reviewing the relevant motions, briefs, and pleadings in this case, I conclude that the two above-captioned cases should be consolidated, that Ohio Plaintiffs be appointed lead plaintiffs and, accordingly, Levi & Korsinsky, LLP should be appointed lead counsel. I hereby grant in part and deny in part the motion of Plaintiff Dutiel and grant in full the motion of Ohio Plaintiffs.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and includes a horizontal line under the "III" at the end.

William B. Chandler III

WBCIII:bjt