



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

IN RE JOHN Q. HAMMONS HOTELS INC.  
SHAREHOLDER LITIGATION

CONSOLIDATED  
CIVIL ACTION NO. 758-N

**PLAINTIFFS' OPENING BRIEF IN SUPPORT  
OF THEIR MOTION FOR CLASS ACTION CERTIFICATION**

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## NATURE AND STAGE OF THE PROCEEDINGS

On October 19, 2004, plaintiffs Jolly Roger Fund I.P and Jolly Roger Offshore Fund, Ltd. ("Jolly Roger Funds") filed their original complaint challenging a proposed merger whereby Barcelo Crestline Corp. ("Barcelo") would acquire, at \$13 per share, all Class A common stock of John Q. Hammons Hotels, Inc. ("JQH" or the "Company"), with the acquiescence of Mr. John Q. Hammons ("Hammons"), JQH's founder and majority shareholder. A subsequent action was filed by plaintiff Garco Investments LLP,<sup>1</sup> and both actions were consolidated by Order dated November 22, 2004 ("the breach of fiduciary duty action").

On February 3, 2005, plaintiffs filed an Amended Complaint which defendants moved to dismiss on May 6, 2005.

On May 16, 2005, the Jolly Roger Funds filed a complaint pursuant to 8 *Del. C.* §220 (the "§220 Complaint"). In response, defendant JQH on October 20, 2005, produced a limited number of documents by agreement of the parties, and on October 25, 2005 filed an Answer to the § 220 Complaint.<sup>2</sup>

On August 24, 2005, JQH filed a Schedule 14A in connection with the transaction ultimately approved by JQH's Board of Directors involving the acquisition of all outstanding shares of JQH Class A common stock by JQH Acquisition Corp., an entity controlled by Jonathan Eilian, at a price of \$24 per share and certain arrangements between Hammons and JQH Acquisition Corp. (the

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<sup>1</sup> Robert Garfield, the principal of Garco Investments LLP ("Garco") recently discovered that he owned JQH stock in an entity named Lemon Bay Partners, of which he is the managing partner. On November 14, 2006, the Court approved a substitution of Lemon Bay Partners in place of Garco. This motion is brought on behalf of the Jolly Roger Funds and Lemon Bay Partners.

<sup>2</sup> The § 220 Complaint was voluntarily dismissed on February 27, 2006.

“Merger”). On August 20, 2005, plaintiffs in this action filed a Motion to Amend the Amended Complaint.<sup>3</sup>

On January 13, 2006, the Jolly Roger Funds filed a Petition for Appraisal (“Appraisal Action”). Respondent JQH filed an Answer to the petition on February 6, 2006.

By Order dated April 10, 2006, this action and the Appraisal Action were coordinated for purposes of discovery.

On September 19, 2005, plaintiffs filed a revised Motion to Amend, which defendants did not oppose. On October 31, 2006, the Court granted the Motion.

Plaintiffs submit this brief in support of their motion for an order pursuant to Court of Chancery Rule 23, certifying a class consisting of:

All record and beneficial holders of JQH, Inc. Class A common stock as of August 25, 2005 (the record date for the September 15, 2005 special shareholder meeting) and their successors in interest, transferees and assigns, immediate and remote (excluding defendants and any person, firm, trust, corporation or other entity related to or affiliated with any of the defendants) except for claims involving defendants’ breach of the duty of candor, which are brought by all record and beneficial holders of JQH, Inc. Class A common stock as of August 25, 2005 and their successors in interest (excluding defendants and any person, firm, trust, corporation or other entity related to or affiliated with any of the defendants) (the “Class”).

As demonstrated below, plaintiffs satisfy the requirements of Chancery Court Rule 23 and respectfully request that the Court issue an order: (i) determining that this action shall be maintained as a class action under Rules 23(a) and 23(b)(1); (ii) designating plaintiffs as Class representatives; and (iii) designating plaintiffs’ counsel as Class counsel.

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<sup>3</sup> The arrangements between Hammons and JQH Acquisition corp. were restructured from those contemplated between Hammons and Barcelo.

## STATEMENT OF FACTS

### The Parties And The Merger

Defendant JQH was a Delaware corporation with executive offices in Springfield, Missouri. JQH owned and operated 44 hotels in 20 states and managed 15 other hotels in 9 states under the Embassy Suites, Holiday Inn and Marriott trade names. (Compl. ¶2)<sup>4</sup> As of August 5, 2005, JQH had issued and outstanding 5,253,262 shares of Class A common stock (one vote per share) which were held by 232 shareholders of record. (*Id.*) JQH also had 294,100 shares of Class B common stock outstanding (50 votes per share), held by Hammons, through related entities which effectively provided Hammons with 79% voting control of the Company. (Compl. ¶3)

Hammons, John E. Lopez-Ona ("Lopez-Ona"), Jacqueline A. Dowdy ("Dowdy"), Daniel L. Earley ("Earley"), William J. Hart ("Hart"), Donald H. Dempsey ("Dempsey"), David C. Sullivan ("Sullivan") and James F. Moore ("Moore") (collectively, "Individual Defendants") were, at all relevant times up to the date of the Merger, directors of JQH. (Compl. ¶¶ 4-11)

Defendants JQH Acquisition and JQH Merger Corporation are Delaware entities controlled by Jonathan Eilian ("Eilian"), which were formed to effectuate the Merger. (Compl. ¶13)

On October 18, 2004, JQH announced that Barcelo Crestline Corporation ("Barcelo") had submitted an offer to acquire JQH Class A common stock at \$13 per share. Hammons had already entered into an agreement with Barcelo whereby he would receive an equity stake in Barcelo, among other things, for his majority stake in JQH. (Compl. ¶¶ 19-20)

The JQH Board of Directors ("Board") formed a special committee, ultimately consisting of defendants Sullivan, Dempsey and Moore ("Special Committee"). (Compl. ¶¶ 22, 26)

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<sup>4</sup> "Compl. ¶" refers to the numbered paragraphs in the Second Amended Consolidated Class Action Complaint filed on September 19, 2006.

However, Acquisition emerged as a second bidder for JQH, and ultimately offered a price of \$24 per share for each JQH share. (Compl. ¶¶36, 46) Acquisition also entered into an agreement with Hammons whereby Hammons received lucrative benefits not shared by JQH's public stockholders, including an equity interest in the post-merger company. (Compl. ¶ 58)

Ultimately, the Special Committee recommended, and the Board approved, the Merger. On September 15, 2005, at a Special Meeting of JQH shareholders, the Merger was approved. It was consummated on September 16, 2005. (Compl. ¶¶ 56, 58, 66)

### **The Complaint's Allegations**

The Complaint alleges that Hammons, who hand-picked the members of the JQH Board, controlled the process of negotiating with parties interested in JQH, in order to ensure that Hammons' interests (i.e. to defer taxes while obtaining capital to pursue projects) were maximized. (Compl. ¶¶ 23-25, 27, 38-41, 48, 58, 64-66)

Although a Special Committee was established, first to consider the Barcelo bid, then later the Merger, the Special Committee suffered from various infirmities which rendered it incapable of functioning independently. (Compl. ¶¶ 77-85) In the face of this unfair process, which resulted in an unfair price, JQH public stockholders were also deprived of material information required to determine whether to accept the Merger, or seek appraisal. (Compl. ¶86)

The Complaint also alleges that Acquisition aided and abetted the Individual Defendants' breaches of fiduciary duty. (Compl. ¶91)

As a result, plaintiffs contend that the Merger: was inherently self-dealing; constituted a breach of the Individual Defendants' fiduciary duties as directors and/or majority shareholder; resulted from a flawed process and offered an unfair price; and was improper due to the failure to disclose material information in the proxy statement. (*See, inter alia*, Compl. ¶¶67-91)

## ARGUMENT

### I. PLAINTIFFS SATISFY THE REQUIREMENTS OF DELAWARE COURT OF CHANCERY RULE 23(A)

#### A. Policy Considerations

The United States Supreme Court has noted that “[c]lass actions serve an important function in our system of civil justice.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) (footnote omitted).<sup>5</sup> Indeed, courts have recognized the efficiency of class treatment in a wide variety of actions where the defendants have acted to injure a group of similarly situated persons. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (securities litigation); *Senter v. Gen. Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), (civil rights litigation). This Court consistently invokes the class action device in actions alleging breaches of fiduciary duty.

The purpose of the class action device is to preserve the rights of individuals who, for practical reasons, could not or would not bring multiple individual lawsuits based on identical claims. 2 Franklin Balotti & Jesse A. Finkelstein, *Del. Law of Corp. & Bus. Orgs.*, §13.11 (1992). Consistent with this purpose, courts liberally interpret the requirements of Rule 23. *E.g., Parker v. Univ. of Del.*, 75 A.2d 225, 227 (Del. Ch. 1950).<sup>6</sup>

#### B. Plaintiffs Satisfy The Requirements Of Rule 23 (a)

The threshold requirements for a class action, as delineated in Court of Chancery Rule 23(a), are: (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. Ch. Ct. R. 23(a).

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<sup>5</sup> Because Court of Chancery Rule 23 is almost identical to Fed. R. Civ. P. 23, federal case law interpreting Fed. R. Civ. P. 23 is persuasive authority for interpreting Chancery Court Rule 23. *Nottingham Partners v. Dana*, 564 A.2d 1089, 1094 (Del. 1989).

<sup>6</sup> Federal courts interpreting Fed. R. Civ. P. 23 have reached the same conclusion. *See, e.g., Eisenberg v. Cagnon*, 766 F.2d 770, 785 (3d Cir. 1985).

In addition, class action certification requires that the action fit within one or more of the three categories set forth in Court of Chancery Rule 23(b). Class certification under Rule 23(b)(1) is appropriate when, absent a class action, there would be a risk of either “[i]nconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class” or “[a]djudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.” Ch. Ct. R. 23(b)(1)(A) and (B).

As demonstrated below, plaintiffs satisfy each of the requirements of Rule 23(a) and 23(b)(1). Accordingly, plaintiffs respectfully submit that the Court should certify this action as a class action, with plaintiffs as representatives of the Class.

**1. The Numerosity Requirement  
Of Rule 23(a)(1) Is Satisfied**

Rule 23(a)(1) requires that the proposed class be “so numerous that joinder of all members is impracticable. . . .” Impracticability does not mean impossibility, only difficulty or inconvenience in joining all members of the class. *Farley v. Baird, Patrick & Co.*, 1992 WL 321632 (S.D.N.Y.) (citing *Northwestern Nat’l Bank v. Fox & Co.*, 102 F.R.D. 507, 510 (S.D.N.Y. 1984)). *See also, In re Mellon Bank S’holders Litig.*, 120 F.R.D.35, 37 (W.D. Pa. 1988).

Precise enumeration or identification of the class members is not required for the litigation to proceed as a class action. *Deutschman v. Beneficial Corp.*, 132 F.R.D.359, 371 (D. Del. 1990); *Marshall v. Elec. Hose & Rubber Co.*, 68 F.R.D.287, 291 (D. Del. 1975); *Herbst v. Able*, 47 F.R.D.11, 21 (S.D.N.Y. 1969), *amended*, 49 F.R.D.286 (S.D.N.Y. 1970) (“To require such exactitude would defeat class actions by making them prohibitively burdensome and expensive for the initial plaintiff, especially in securities fraud cases where individual losses may be relatively small.”) (citations omitted.) *See also*, 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions, §3.04 at 139-40

(2d ed. 1985) (“A contrary rule would foreclose most class litigation because of the impossibility of identifying all class members at the outset and would make other class suits unduly burdensome because of the great expense involved in identifying members of a large class”).

Plaintiffs clearly satisfy the numerosity requirement of Rule 23(a)(1). As of August 5, 2005, there was 232 stockholders of record who held at the time of the Merger, approximately 5 million shares of JQH Class A common stock (Compl. ¶ 3).

Where, as here, the action involves numbers of class members who are geographically dispersed, courts have held that the numerosity requirement of Rule 23(a)(1) is satisfied. *See e.g., Meeker v. Bryant*, 1981 WL 7633 (Del. Ch.). In fact, even in cases with substantially fewer class members than herein, courts have certified the actions as class actions. *Leon N. Weiner & Assocs., Inc. v. Krapp*, 584 A.2d 1220, 1225 (Del. Ch. 1991) (“Numbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement.”) (internal citation omitted); *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D.74, 78 (D. Md. 1991) (class of 25 to 30 members raises the presumption that joinder would be impracticable. (internal citations omitted); *Noerr v. Greenwood*, 2002 WL 31720734 (Del. Ch.) at \*3 (The numerosity requirement is satisfied where there are over 100 class members). Consequently, there can be no doubt the Class is so numerous that joinder of all members is impracticable under Rule 23(a)(1).

## **2. The Commonality Requirement Of Rule 23 (a)(2) Is Satisfied**

Rule 23 (a)(2) requires that there be “questions of law or fact common to the class.” Rule 23(a)(2) requires that the question of law or fact be common to the class, not identical. *Leon N. Weiner & Assocs.*, 584 A.2d at 1225 (commonality exists where there is no “significant factual diversity”). Indeed, the commonality requirement is satisfied by demonstrating that a single question of law or fact is common to the class. *See Emerald Partners v. Berlin*, 1991 WL 244230 (Del. Ch.) at \*3.

Here, plaintiffs predicate their claims on defendants' breaches of fiduciary duties in connection with the Merger. Defendants' conduct, therefore, affects all members of the Class similarly. Such transactions provide a classic case for class certification. *Nottingham Partners*, 564 A.2d at 1089; *Zim v. VIJ Corp.*, 1991 WL 20378 (Del. Ch.) at \*4.

Here, virtually all questions concerning defendants' liability form a "unifying thread," and are common to the Class. These questions include whether:

- a) defendants breached, or aided and abetted said breaches of, their fiduciary obligation to plaintiffs and the other members of the Class in connection with negotiating and effectuating the Merger;
- b) defendants fulfilled their fiduciary duties to plaintiffs and the Class, including their duties of fair dealing, loyalty, good faith, due care and candor;
- c) defendants disclosed all facts material to class members' voting and appraisal decisions in connection with the Merger;
- d) the Merger was grossly unfair to JQH's public stockholders; and
- e) plaintiffs and the other members of the Class were injured by the wrongful conduct alleged and, if so, what is the proper remedy and/or measure of damages.

In short, the primary objective of plaintiffs, and thus the entire Class, is the favorable resolution of these common questions. All Class members were similarly injured by defendants' breaches of fiduciary duty because they received the same inadequate and unfair consideration for their shares in the Merger, based upon a flawed process and inadequate and incomplete information. Therefore, since plaintiffs' claims arise out of the same nucleus of operative facts and are based on a common legal theory – breach of fiduciary duty – the existence of common questions of fact and law cannot be doubted. Accordingly, plaintiffs have amply satisfied the requirements of Rule 23(a)(2).

### 3. The Typicality Requirement Of Rule 23(a)(3) Is Satisfied

Rule 23(a)(3) requires that the claims of the representative parties be typical of the claims or defenses of the class that they seek to represent. The typicality requirement is satisfied where, as here, the named representatives' interests arise from the same event or course of conduct that gives rise to claims of other class members, and the claims are based on the same legal theory.<sup>7</sup> *Leon N. Weiner & Assoc.*, 584 A.2d at 1226; *Zirn*, 1991 WL 20378 at \*4, (citing *Gaffin v. Teledyne, Inc.*, 1987 WL 18430 (Del. Ch.); *Frazer v. Worldwide Energy Corp.*, 1990 WL 61192 (Del. Ch.); *Deutschman*, 132 F.R.D. at 373. *See also Van de Walle v. Unimation, Inc.*, 1983 WL 8949 (Del. Ch.) at \*4, (where it is ultimately found that a fiduciary has breached his duty, "all of the minority shareholders will have been injured in the same way and by the same acts or omissions."); 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3.13, (2d ed. 1992) (typicality requirement is usually met "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented").

Delaware courts have repeatedly certified classes arising from alleged breach of fiduciary duty claims arising out of a merger. *See Dieter v. Prime Computer, Inc.*, 681 A.2d 1068, 1074 (Del. Ch. 1996) (an action seeking to prove a breach of [a fiduciary] duty is "inescapably a true class action"); *In re Mobile Comm'n. Corp. of Am. Inc. Consol. Litig.*, 1991 WL 1392 (Del. Ch.), *aff'd*, 608 A.2d 729 (1992) (in context of objections to settlement, court found that actions attaching director conduct in connection with merger are appropriately certified under 23(b)(1) or (2)).

Here, plaintiffs' claims, like the claims of other Class members, arise out of the same misconduct by defendants – their conduct in negotiating and approving the Merger. All claims are

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<sup>7</sup> The extent to which this requirement differs, if at all, from other requirements of Rule 23(a) is unclear. Professor Moore has concluded that "There appears to be little or no need for this clause, since all meanings attributable to it duplicate requirements prescribed by other provisions in Rule 23." 3B John F. Kennedy & James W. Moore, *Moore's Federal Practice*, ¶ 23.06-2, at 23-168 (2d ed. 1992).

based upon the same legal theories – breach of fiduciary duty. Plaintiffs and the Class have suffered a common injury.<sup>8</sup> Plaintiffs’ claims are typical of the Class and thus their claims will not require “substantially more or less proof than would be required by the claims of other members of the class.” (internal citation omitted). *Singer v. Magnavox Co.*, 1978 WL 4651 (Del. Ch.) at \*2; *see also*, *Frazier*, 1990 WL 61192 at \*737.

As such, the requirements of Rule 23 (a)(3) are satisfied.

4. **The Adequacy Requirement  
Of Rule 23(a)(4) Is Satisfied**

Rule 23(a)(4) requires that the representative parties will fairly and adequately protect the interests of the class. Rule 23(a)(4) is satisfied where, as here, (i) the named plaintiffs’ interests are not antagonistic to other members of the class, and (ii) plaintiffs’ attorneys are qualified, experienced, and generally able to conduct the litigation. *Van de Walle v. Salomon Bros. Inc.*, 1997 WL 633288 (Del. Ch.) at \*2; *see also Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3rd Cir. 1975).

Plaintiffs are members of the Class that they seek to represent. *See*, affidavits submitted by Plaintiffs filed contemporaneously herewith (“Plaintiffs Affidavits”). As such, plaintiffs “possess the same interest and suffer the same injury as the class members.” *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982), (quoting *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 43 (1977)). In pursuing and establishing their own claims, plaintiffs will necessarily be protecting and promoting the interests of the Class members. *See Frazier*, 1990 WL 61192 at \* 2. There are also no conflicts of interests between plaintiffs and class members. *See* Plaintiffs’ Affidavits.

Plaintiffs’ counsel are leading practitioners in class action litigation, and have successfully prosecuted numerous securities class action suits on behalf of injured stockholders throughout the

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<sup>8</sup> The role of Jolly Roger Funds as plaintiff in the Appraisal Action does not destroy their typicality in the breach of fiduciary duty action. *See e.g., Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130 (Del. Ch. 2006); *Inco & Co. v. Silgan Corp.*, 1991 WL 17171 (Del. Ch.); *Seagraves v. Urstact Prop. Co.*, 1996 WL 159626 (Del. Ch.).

country, as set forth in the firm resumes attached as Exhibits A and B to the Affidavit of Emily C. Komlossy submitted herewith.

In short, plaintiffs are members of the Class and have no interest adverse or antagonistic to those of the Class they seek to represent. Their counsel are experienced in complex stockholder litigation. For these reasons, plaintiffs submit that they have satisfied the requirements of Rule 23(a)(4).

**C. Plaintiffs Satisfy The Requirements Of Rule 23(b)(1)**

Once the Court finds that the provisions of Rule 23(a) are satisfied, it must determine whether the action properly fits within the framework provided for in subsection (b). *Nottingham Partners*, 564 A.2d at 1095. As this action challenges the exercise of fiduciary responsibility in a corporate transaction, this action is properly certifiable under Rule 23(b)(1). *Noerr v. Greenwood*, 2002 WL 31720734 at \*5. *See also Hynson v. Drummond Coal Co.*, 601 A.2d 570, 579 (Del. Ch. 1991).

Rule 23(b)(1) provides for class certification where:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish standards of conduct for the party opposing the class, or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect interests;

Here, both Rules 23(b)(1)(A) and (B) are satisfied because if separate actions were commenced by other members of the Class, defendants would be subject to the risk of inconsistent or varying adjudications, which would be dispositive of the interests of other members. *See In re Mobile Comm'n Corp. of Am. Inc., Consol. Litig.*, 1991 WL 1392 at \*15-\*16.

Similar class action litigation has been prosecuted successfully to excellent results without undue management difficulties. This action will be no different. In sum, the prosecution of this action as a class action will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Dolgow v. Anderson*, 43 F.R.D. 472, 488 (E.D.N.Y. 1968) (quoting Advisory Committee Notes to Rule 23, 39 F.R.D. at 102-103). *See also Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968) Thus, the requirements of Rule 23(b)(1) are satisfied.

**CONCLUSION**

For all the foregoing reasons, Plaintiffs request that this Court certify this action as a Class Action pursuant to Chancery Court Rule 23, appoint plaintiffs as Class Representatives and their counsel as Class counsel.

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