



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE REVLON INC.
SHAREHOLDERS LITIGATION

Consol. C.A. No. 4578-VCL

PLAINTIFFS GUTMAN AND CORNECK'S MEMORANDUM OF LAW
CONCERNING LEADERSHIP DESIGNATION

By Stipulation and Order entered February 3, 2010 (the "February 3 Order"),¹ this Court consolidated: *In Re Revlon Inc. Shareholders Litigation*, Consol. C.A. No. 4578-VCL (the "Prior Action"); *Gutman v. Perelman, et al.*, C.A. No. 5158-VCL (the "Gutman Action"); and *Corneck v. Perelman, et al.*, C.A. No. 5160-VCL (the "Corneck Action") (the *Gutman* and *Corneck* Actions are together referred to as the "Gutman Actions"). The issue now before this Court is the leadership structure of the consolidated action, *i.e.*, whether plaintiffs' counsel in the Prior Action ("Original Plaintiffs' Counsel") should serve as lead counsel with respect to all claims, or whether separate lead counsel should be appointed for a subclass of plaintiffs who tendered Revlon Inc. ("Revlon" or the "Company") Class A common stock into the Exchange Offer (the "Tendering Stockholders Sub-Class").

Plaintiffs in the Gutman Actions submit this memorandum (1) in opposition to Original Plaintiffs' Counsel's motion for leadership designation, and (2) in support of

¹ Filing ID 29368012.

Gutman and Corneck’s motion for the appointment of (a) the Law Offices of Curtis V. Trinko LLP (the “Trinko Firm”) and Harwood Feffer LLP (“Harwood Feffer”), as co-lead counsel for the Tendering Stockholders Sub-Class, and (b) Smith, Katzenstein & Furlow LLP (“Smith Katzenstein”), as liaison counsel for the Tendering Stockholders Sub-Class (the Trinko Firm, Harwood Feffer, and SKF are collectively referred to as “Gutman Counsel”).

BACKGROUND

1. The Gutman Actions assert claims on behalf of those persons who tendered their shares in an “Exchange Offer”,² pursuant to which Revlon offered to exchange each outstanding share of its Class A common stock for one share of a newly-issued series of Revlon Preferred Stock (the “Series A Preferred”), the value of which was capped at \$12 per share. Revlon’s controlling stockholder, MacAndrews & Forbes (“MacAndrews”), used the Exchange Offer to attempt to acquire the shares of Revlon’s common stock that it did not already own. On October 8, 2009, the Exchange Offer was consummated, with Sub-Class members exchanging 9,336,905 shares of Revlon Class A common stock for an equal number of shares of Series A Preferred. Three weeks thereafter, on October 29, 2009, Revlon announced positive financial results for its quarter ended September 30, 2009, results that stunned the marketplace. Thereafter, the

² Unless otherwise noted, defined terms have the same meaning as in the Motion for Consolidation of Later-Filed Related Actions and Opposition to the Motion of Plaintiffs Gutman and Corneck filed on January 12, 2010 (Filing ID 28973623) (“the Prior Action Motion”).

market price of Revlon's common stock increased from a close of \$5.75 per share on October 28, 2009, to a close of \$8.75 per share on October 29, 2009, subsequently increasing to a high of \$19.75 per share on December 14, 2009.

2. Notwithstanding that the Exchange Offer closed a mere week after the close of Revlon's 2009 third quarter, Revlon failed to provide its public stockholders with any current information about the Company's financial results prior to the closing of the Exchange Offer -- information to which Revlon's common stockholders were entitled before deciding whether to tender their Revlon common shares. Plaintiffs Gutman and Corneck thus seek rescissory damages for the losses they (and the other Tendering Stockholders) suffered as a result of defendants' violation of their disclosure obligations.

3. As described in the February 3 Order, between April 24 and May 12, 2009, four separate class actions were filed in this Court against Revlon, challenging a proposal made by MacAndrews (announced on April 20, 2009) pursuant to which all outstanding shares of Revlon's Class A common stock not owned by MacAndrews and its affiliates would be converted into shares of a newly issued series of Revlon preferred stock. Those actions were filed on behalf of all public stockholders of Revlon (Prior Action Motion at ¶2). By Order dated June 24, 2009, those actions were consolidated into the Prior Action; an operative complaint was designated; and Original Plaintiffs' Counsel was designated to serve as co-lead and liaison counsel for all plaintiffs. (*Id.* at ¶3).

4. According to Original Plaintiffs' Counsel, they "vigorously litigated the claims asserted" in the Prior Action (*see* Prior Action Motion at ¶ 4). Apparently vigor was manifested solely by discussions with defendants' counsel, and not through any discovery (*Id.*). Indeed, on August 10, 2008, less than seven weeks after this Court consolidated the Prior Action, the parties agreed in principle to settle that action and executed a memorandum of understanding (the "MOU") reflecting that agreement (a copy of the MOU is attached as Ex. 3 to the Prior Action Motion). Pursuant to the MOU, it was agreed that instead of the transaction contemplated in the Proposal, Revlon stockholders would now have the opportunity (but would not be required) to participate in the Exchange Offer (described in ¶1 above). The settlement contemplated by the MOU was subject to four conditions (a) the prompt completion of confirmatory discovery by Original Plaintiffs' Counsel; (b) execution of a formal Stipulation, which the parties bound themselves to prepare in good faith; (c) consummation of the Exchange Offer (which occurred on October 8, 2009); and (d) approval of the Court. *See* Motion to Enforce Settlement Agreement filed by defendants on January 8, 2010 at ¶8 ("Defendants' Motion") (Filing ID 28894554).

5. Revlon commenced the Exchange Offer on August 10, 2008. On September 23, 2009 (after it became apparent that the minimum tender threshold would not be met), the parties to the Prior Action agreed to an Amendment No. 1 to the MOU (a copy of which is attached as Ex. 4 to the Prior Action Motion). The Amendment was also subject to confirmatory discovery by Original Plaintiffs' Counsel and Court

approval. On September 24, 2009, Revlon filed Amendment No. 7 to Revlon's Tender Offer Statement and Schedule 13E-3 Transaction Statement on Schedule TO with the SEC (the "September 24 Exchange Offer Documents") in which it revised the Exchange Offer pursuant to Amendment No. 1 to the MOU. Plaintiffs' Original Counsel "reviewed and contributed to" the September 24 Exchange Offer Documents "as part of the settlement" but those documents did not include adequate information concerning Revlon's impending quarterly results (Defendants' Motion at ¶15; *see also* Supp. Compl. (defined below) at ¶69).

6. The Exchange Offer was consummated on October 8, 2009, eight days after the close of Revlon's third quarter (with 9,336,905 shares of Class A common stock exchanged).³ On October 29, 2009, Revlon announced its positive financial results for that quarter, resulting in a substantial increase in the market price of its common stock.

7. On December 21, 2009, the Gutman Actions were filed on behalf of the proposed Tendering Stockholders Sub-Class, challenging (among other matters) the non-disclosure of Revlon's current financial information prior to consummation of the Exchange Offer, and seeking rescissory damages for the losses suffered by the Sub-Class. Plaintiffs Gutman and Corneck have a substantial interest in those claims; Mr. Gutman owned and tendered 26,000 shares of Revlon Class A common stock (Gutman Complaint at ¶2) and Mr. Corneck owned and tendered 20,000 shares. (Rosen Aff., attached as Ex.

³ None of the original plaintiffs in the Prior Action tendered their shares of common stock into the Exchange Offer.

A.) On January 4, 2010, Gutman and Corneck moved to consolidate the Gutman Actions separately from the Prior Action and to have Gutman Counsel appointed as co-lead and liaison counsel (the “Gutman Motion”). (Filing ID 28828805).

8. On January 6, 2010, almost three months after the Exchange Offer closed, Original Plaintiffs’ Counsel attempted to bypass the Gutman Actions by filing a Verified Amended and Supplemental Consolidated Class Action Complaint, asserting claims similar to those raised in the Gutman Actions (the “Supplemental Complaint” or “Supp. Compl.”), (Filing ID 28828805). The Supplemental Complaint used a new plaintiff, Earl Gallegos, who apparently was recently retained.⁴ Although the Supplemental Complaint still refers to the original plaintiffs from the Prior Action as plaintiffs who continue to hold their Class A common stock (Supp. Compl. ¶8), it does not assert any claims on their behalf or on behalf of the class they originally sought to represent (most likely because those persons have no interest in undoing the Exchange Offer). The claims previously asserted on behalf of those plaintiffs have simply disappeared without explanation, with a description of the settlement inserted in their place. The Supplemental Complaint adds Gallegos as a new plaintiff, who allegedly tendered an unspecified number of shares in the Exchange Offer (Supp. Compl. ¶9). All of the claims

⁴ Given the sequence of events here, we do not understand the statement at ¶12 of the Prior Action Motion that “[n]otwithstanding that plaintiffs in the Action were necessarily addressing the new Exchange Offer disclosure claims, . . . Gutman . . . and . . . Corneck filed class action lawsuits on December 21, 2009 . . . based solely on such a claim.” If the Original Plaintiffs were “necessarily” adding the disclosure claims before they filed the Supplemental Complaint, that is news to us.

asserted in the Supplemental Complaint relate to the defendants' failure to disclose material information in the Exchange Offer documents.⁵

9. On January 8, 2010, counsel for defendants in the Prior Action moved to enforce the settlement agreement in that action because Original Plaintiffs' Counsel refused to abide by the terms of the MOU. Defendants contend, in part, that the disclosure claims asserted in both the Supplemental Complaint and the Gutman Actions were settled in the MOU and the plaintiffs in the Prior Action are bound by the MOU to seek a stay or dismissal of those claims (Defendants' Motion at ¶¶6-7, 19, 23). Defendants also contend that had Original Plaintiffs' Counsel engaged in the confirmatory discovery mandated by the MOU, they would have learned that the disclosure claims are factually and legally baseless (*Id.* at ¶14).⁶ As Defendants' Motion further explains, the Supplemental Complaint filed in the Prior Action asserts claims only on behalf of the newly added plaintiff who tendered his Revlon common stock in the Exchange Offer, while leaving the original plaintiffs in the Prior Action, who still hold

⁵ Despite its title as an "Amended and Supplemental Complaint," the document involves only events that occurred after the date of the initial complaints. Thus, pursuant to Court of Chancery Rule 15(d), Original Plaintiffs' Counsel were required to seek leave of Court before filing it. In their haste to supplant the Gutman Action, they did not do so.

⁶ Defendants' Motion repeatedly asserts that Original Plaintiffs' Counsel refused to conduct good faith confirmatory discovery (Defendants' Motion at page 1 and ¶¶13-14, 16-18, 23-24), contrary to the representation at paragraph 22 of the Prior Action Motion that Original Plaintiffs' Counsel have shown their diligence and vigor "by their insistence on confirmatory discovery concerning the merits of the disclosure claim."

Revlon common stock, seeking to keep the gains they received from the increased stock price following the Exchange Offer (Defendants' Motion at ¶¶15-24).

10. On January 12, 2010, the plaintiffs in the Prior Action moved to consolidate the Gutman and Corneck Actions with that proceeding, sought affirmation in the new consolidated action of the existing leadership structure for plaintiffs' counsel, and opposed the Gutman Motion. By letter dated January 15, 2010 (Filing ID 29059792), this Court advised the parties that it believed the Prior Action and Gutman Actions should be consolidated, and that the leadership structure issue remained to be decided. The Court explained that it believed the Defendants' Motion should be adjudicated first, with Original Plaintiffs' Counsel and Gutman Counsel filing separate opposition papers on behalf of their respective plaintiffs. The Court then left it up to plaintiffs to decide "whether they would like to brief issues relating to the leadership structure and potential sub-classes prior to my ruling on [D]efendants' [M]otion". The parties were directed to prepare a Stipulation and proposed Order addressing consolidation and the remaining issues discussed in the January 15 letter.

11. Despite the Court's clear directive, Original Plaintiffs' Counsel again tried to supplant the Gutman Action. On January 26, 2010, the parties to the Prior Action (without consulting with Gutman Counsel) submitted a Stipulation and Proposed Order to the Court in which defendants proposed to withdraw without prejudice their motion to enforce the settlement and Original Plaintiffs' Counsel agreed to complete confirmatory discovery, and to "present the settlement to the Court on behalf of all plaintiffs" unless

confirmatory discovery demonstrated the settlement to be unfair and unreasonable (January 26 Stipulation at ¶¶1-3) (Filing ID 29226022). In the Stipulation, Original Plaintiffs' Counsel "confirmed their understanding that the settlement-in-principle, set forth in the MOU, remains in force with respect to all of plaintiffs' claims" (January 26 Stipulation at page 1). This Court, however, rejected the January 26 Stipulation noting that the parties had not yet provided for consolidation of the Prior Action and Gutman Actions, and stating that the parties were not permitted to "proceed with confirmatory discovery or the presentation of the settlement until the leadership structure has been addressed." (Filing ID 29235512).

12. Pursuant to the February 3 Order, the Prior Action and Gutman Actions were consolidated and Original Plaintiffs' Counsel and Gutman Counsel were directed to complete briefing on the issue of the leadership structure.

ARGUMENT

13. This Court typically considers the following factors in determining the appointment of lead counsel:

- The absence of any conflict between larger, often institutional, stockholders and smaller stockholders;
- The willingness and ability of all contestants to litigate vigorously on behalf of an entire class of shareholders;
- The relative economic stakes of the competing litigants in the outcome of the lawsuit (to be accorded "great weight");
- The "quality of the pleading that appears best able to represent the interests of the shareholders class and derivative plaintiffs;"

- 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.

Hirt v. U.S. Timberlands Serv. Co., No. 19575, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002); *TCW Tech, Ltd. Partnership v. Intermedia Communications, Inc.*, No. 18336, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000). *See also Allen v. News Corp.*, No. 979, 2005 WL 415095, at *1 (Del. Ch. Feb. 3, 2005); 5 J.W. Moore, Moore's Fed. Prac. 3d, §23.120[1][b] (the principal requirement for lead counsel involves what is in the best interest of absent class members). These factors show that Original Plaintiffs' Counsel cannot adequately represent the Tendering Stockholders Sub-Class but Gutman Counsel can.

14. First, defendants contend that the disclosure claims asserted by the tendering stockholders were settled pursuant to the MOU and that Original Plaintiffs' Counsel are bound to seek dismissal of those claims. Gutman Counsel disagrees; because those claims arose after the MOU, they could not have been settled pursuant to the MOU. Original Plaintiffs' Counsel apparently now agrees with us, stating that the disclosure claims "arose following the execution of an MOU and Amendment No. 1" (Prior Action Motion at ¶4; see also ¶11). Original Plaintiffs' Counsel, however, are hampered in effectively advocating this position, because they previously claimed to have *settled* the disclosure claims pursuant to the MOU (*see supra*, ¶11) and will provide releases for those claims. Of course, Original Plaintiffs' Counsel may not have been in this awkward

position had they not rushed to settle the Prior Action a mere seven weeks after its consolidation, apparently without the benefit of any discovery. All of this raises significant questions about the willingness and ability of Original Plaintiffs' Counsel to vigorously litigate the disclosure claims asserted on behalf of the tendering stockholders.

15. Second, having taken the position that the settlement of the disclosure claims was contemplated in the MOU, Original Plaintiffs' Counsel can only litigate these claims if it can find a right to walk away from the settlement – and this can only occur if confirmatory discovery reveals it to be unfair and unreasonable (Prior Action Motion ¶¶11, 22). Should Original Plaintiffs' Counsel take the lead here, this would present an additional hurdle for their clients to overcome before being allowed to proceed with their claims. Further, Original Plaintiffs' Counsel may well be hampered in effectively attacking the settlement given their review of and contribution to the September 24 Exchange Offer Documents (*see supra*, ¶5).

16. Third, Original Plaintiffs' Counsel's contention that they can avoid the settlement if it is unfair to the tendering stockholders emphasizes the inescapable (and fatal) conflict between the two now distinct classes of Revlon stockholders that they seek to represent. When the Prior Action was filed, Original Plaintiffs' Counsel represented all public stockholders of Revlon in challenging MacAndrews' initial Proposal. The claims asserted were purportedly resolved pursuant to the MOU and Exchange Offer. In the Exchange Offer, some public stockholders (including all plaintiffs to the Prior Action) held on to their common stock while others tendered theirs. Given the significant

increase in the price of Revlon's common stock, it is likely that the non-tendering stockholders are happy with the settlement and do not want to risk it being undone or amended. However, by also trying to assert the disclosure claims of the tendering stockholders, Original Plaintiffs' Counsel are in an untenable position. If they vigorously seek to undo or amend the settlement, on behalf of the tendering stockholders (who obviously do not want their claims released), there is a substantial risk that the original settlement will either be rescinded or that Revlon will be forced to pay rescissory damages to the tendering stockholders. Neither is in the interests of the non-tendering stockholders who still own Revlon common stock. This significant conflict between the tendering and non-tendering stockholders can only be resolved by having separate lead counsel for each sub-class.

17. In the Prior Action Motion, Original Plaintiffs' Counsel pretend there is no conflict between the two classes of stockholders based on the puzzling assertion that they now assert claims in the Supplemental Complaint only on behalf of those stockholders who tendered their shares and that "no claims are being asserted . . . on behalf of those who chose not to tender" (Prior Action Motion at ¶23). How can that be? The Prior Action asserted claims on behalf of all public stockholders; claims that were resolved in the settlement, which has yet to be approved by the Court. Original Plaintiffs' Counsel cannot just walk away from those claims now. Rather, they must pursue approval of that settlement for the stockholders they claim to have benefitted from it.

18. The amount of common stock owned and tendered by the plaintiffs represented by Gutman Counsel versus the plaintiffs represented by Original Plaintiffs' Counsel also weighs in favor of appointing Gutman Counsel. As this Court recognized in *TCW*, the relative size of the holdings of the various plaintiffs is an important factor in the lead counsel determination:

[T]he 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 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.

2000 WL1654504, at *4.

19. Plaintiffs Gutman and Corneck together owned 46,000 shares of Revlon common stock, all of which were tendered into the Exchange Offer -- Gutman owned and tendered 26,000 shares (see Verified Complaint of Gutman at ¶2), while Corneck owned and tendered 20,000 shares (see Rosen Aff. attached as Ex. A). Earl Gallegos is the only plaintiff in the Prior Action to have tendered his shares into the Exchange Offer (Supp. Compl. ¶9). Original Plaintiffs' Counsel, however, have never provided the number of shares of Revlon common stock that Mr. Gallegos owned or exchanged. Thus, it can be

inferred that he possessed and exchanged a comparatively small amount of Revlon common stock as compared to the plaintiffs in the Gutman Actions.⁷

20. In addition, the quality of the pleadings filed in the Gutman Actions and the Prior Action weigh against Original Plaintiffs' Counsel's effort to take over the disclosure claims. While the complaints in each of these actions exhibit a clear understanding of the wrongdoings surrounding the disclosures made in connection with the Exchange Offer, the Gutman Actions were commenced solely on behalf of the Tendering Stockholders Sub-Class, and thus do not need to attempt to reconcile their claims with the interests of the non-tendering stockholders. Moreover, the complaints in the Gutman Actions are the only complaints asserting those disclosure claims that are properly before the Court. Although Original Plaintiffs' Counsel title their recent complaint as an Amended and Supplemental Complaint, the disclosure claims that it asserts are only supplemental (based solely on events occurring after the filing of the Prior Action). Thus, under Court of Chancery Rule 15(d), Original Plaintiffs' Counsel were required to seek leave of this Court before filing the supplemental claims, and they failed to do so. Further, where the Supplemental Complaint amends the operative complaint in the Prior Action, it does so by simply dropping the claims previously

⁷ Original Plaintiffs' Counsel claim that their Supplemental Complaint is more detailed than the complaints in the Gutman Actions because they plead "the theory of the claim based on the failure to disclose the third quarter results." The theory of the non-disclosure claim is the same in all the complaints. Original Plaintiffs' Counsel merely took the facts already asserted in the Gutman Actions and elaborated on them with argument; the minor additions, however, do not make their complaint superior.

asserted on behalf of all public stockholders of Revlon, including those who did not tender their shares in the Exchange Offer (likely because counsel could not reconcile the conflicts between asserting claims on behalf of both tendering and non-tendering stockholders). We do not understand how Original Plaintiffs' Counsel can do so.

21. Accordingly, the significant conflicts of interest between tendering and non-tendering Revlon stockholders, Original Plaintiffs' Counsel's inability to effectively and vigorously advocate on behalf of the tendering stockholders, the economic stakes of the Gutman Action plaintiffs and the Prior Action Plaintiff, and the quality of the pleadings asserting the disclosure claims all militate against allowing Original Plaintiffs' Counsel to assume leadership of the disclosure claims belonging to the tendering stockholders, and in favor of the appointment of Gutman Counsel as co-lead and liaison counsel for the Tendering Stockholders' Sub-Class.⁸

Date: February 12, 2010

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⁸ Gutman Counsel possess significant experience in prosecuting claims of the type asserted by the tendering stockholders. Attached as Ex. B are resumes of each of the firms constituting Gutman Counsel.

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