

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

In re CHIQUITA BRANDS)	No: 08-MD-01916-KAM
INTERNATIONAL, INC., ALIEN TORT)	
STATUTE AND SHAREHOLDERS)	
DERIVATIVE LITIGATION)	
)	
<hr/>)	
CITY OF PHILADELPHIA PUBLIC)	Civil Action No. 1:07-cv-00851 (S.D. Ohio)
EMPLOYEES RETIREMENT SYSTEM,)	
Derivatively On Behalf of CHIQUITA)	
BRAND INTERNATIONAL, INC.,)	
)	
Plaintiff,)	
)	
vs.)	
)	
FERNANDO AGUIRRE, et al.,)	
)	
Defendants,)	
)	
– and –)	
)	
CHIQUITA BRANDS INTERNATIONAL,)	
INC.,)	
)	
Nominal Defendant.)	
)	
<hr/>)	

[Caption continued on following page.]

MOTION TO CONSOLIDATE RELATED SHAREHOLDER DERIVATIVE
ACTIONS AND ESTABLISH A LEADERSHIP STRUCTURE

SHEET METAL WORKERS LOCAL #218(S)) Civil Action No. 1:07-cv-01957 (D.D.C.)
PENSION FUND, Derivatively On Behalf of)
CHIQUITA BRANDS INTERNATIONAL,)
INC.,)

Plaintiff,)

vs.)

RODERICK M. HILLS, et al.,)

Defendants,)

- and -)

CHIQUITA BRANDS INTERNATIONAL,)
INC., a New Jersey corporation,)

Nominal Defendant.)

HENRY TAYLOR, Derivatively On Behalf of) Civil Action No. 3:07-cv-06002 (D.N.J.)
Nominal Defendant CHIQUITA BRANDS)
INTERNATIONAL, INC.,)

Plaintiff,)

vs.)

FERNANDO AGUIRRE, et al.,)

Defendants,)

- and -)

CHIQUITA BRANDS INTERNATIONAL,)
INC.,)

Nominal Defendant.)

[Caption continued on following page.]

HAWAII ANNUITY TRUST FUND FOR) Civil Action No. 1:08-cv-00081-PLF (D.D.C.)
OPERATING ENGINEERS, Derivatively On)
Behalf of CHIQUITA BRANDS)
INTERNATIONAL, INC.,)
)
Plaintiff,)
)
vs.)
)
RODERICK M. HILLS, et al.,)
)
Defendants,)
)
- and -)
)
CHIQUITA BRANDS INTERNATIONAL,)
INC., a New Jersey corporation,)
)
Nominal Defendant.)
)
_____)

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL AND PROCEDURAL HISTORY	6
III. ARGUMENT	12
A. The Related Shareholder Derivative Actions Should Be Consolidated.....	12
B. Cohen Placitella and Coughlin Stoia Are Uniquely Qualified to Serve as Co-Lead Derivative Counsel.....	14
C. Co-Lead Counsel Should be Limited to the Two Firms Proposed	18
IV. CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page
CASES	
<i>Eckstein v. Balcors Film Investors</i> , 8 F.3d 1121 (7th Cir. 1993)	13
<i>Ernst & Young, LLP v. Tucker ex rel. HealthSouth Corp.</i> , 940 So. 2d 269 (Ala. 2006)	11
<i>Horn v. Raines</i> , 227 F.R.D. 1 (D.D.C. 2005).....	4, 13, 16
<i>In re Air Crash Disaster at Florida Everglades</i> , 549 F.2d 1006 (5th Cir. 1977)	4, 12, 13
<i>In re Enron Corp., Sec. Litig.</i> , 206 F.R.D. 427 (S.D. Tex. 2002).....	15
<i>In re Guidant Corp. S'holders Derivative Litig.</i> , No. 1:03-CV-00955-SEB-WTL, 2003 U.S. Dist. LEXIS 19880 (S.D. Ind. Nov. 5, 2003).....	5
<i>In re Sunbeam Sec. Litig.</i> , No. 98-8258-CIV, 1998 WL 1990884 (S.D. Fla. Dec. 4, 1998).....	13
<i>In re Wells Fargo Sec. Litig.</i> , 156 F.R.D. 223 (N.D. Cal. 1994).....	19
<i>In re XM Satellite Radio Holdings Sec. Litig.</i> , 237 F.R.D. 13 (D.D.C. 2006).....	15
<i>Landis v. N. Am. Co.</i> , 299 U.S. 248 (1936).....	12
<i>Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach</i> , 523 U.S. 26 (1998).....	11
<i>Malin v. IVAX Corp.</i> , No. 96-1843-CIV-MORENO, 1996 U.S. Dist. LEXIS 22452 (S.D. Fla. Nov. 1, 1996).....	19
<i>Millman v. Brinkley</i> , No. 1:03-CV-3831-WSD, 2004 U.S. Dist. LEXIS 20113 (N.D. Ga. Oct. 1, 2004).....	5, 15, 17, 19

Page

Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc.,
184 F.R.D. 688, 692 (S.D. Fla. 1999).....24

Vincelli v. Nat'l Home Health Care Corp.,
112 F. Supp. 2d 1309 (M.D. Fla. 2000).....19

STATUTES, RULES AND REGULATIONS

28 U.S.C.
§1404.....1, 4, 13
§1407.....4, 11, 13, 14

Federal Rules of Civil Procedure
Rule 42.....1, 4, 12
Rule 42(a).....13

SECONDARY AUTHORITIES

3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*
§9.35 (4th ed. 2002).....15

I. INTRODUCTION

Plaintiffs, the City of Philadelphia Public Employee Retirement Systems (the “Retirement System”), the Sheet Metal Workers Local #218(S) Pension Fund (the “Sheet Metal Workers”) and the Hawaii Annuity Trust Fund for Operating Engineers (the “Annuity Trust Fund”) (collectively, the “Pension Fund Plaintiffs”), all long-term institutional shareholders of Chiquita Brands International, Inc. (“Chiquita” or the “Company”), jointly bring this motion pursuant to Fed. R. Civ. P. 42 and 28 U.S.C. §1404 to consolidate the related shareholder derivative actions pending in or later transferred to this District which arise out of the same or similar conduct alleged in this action and to establish a leadership structure to direct the prosecution of the Consolidated Action, including approving plaintiffs’ selection of Cohen Placitella & Roth, P.C. (“Cohen Placitella”) and Coughlin Stoia Geller Rudman & Robbins, LLP (“Coughlin Stoia”) as Co-Lead Derivative Counsel.

Pursuant to an Order by the Panel on Multi District Litigation (“MDL Panel”) entered February 20, 2008, the Pension Fund Plaintiffs’ three derivative actions, plus a fourth, later-filed derivative action, were all transferred to this District for coordinated pre-trial proceedings. The Retirement System filed the first derivative action on behalf of Chiquita on October 12, 2007 in federal court in the District of Ohio, the state where Chiquita is headquartered. The Annuity Trust Fund originally filed its shareholder derivative action in Chiquita’s home state of New Jersey on October 30, 2007. Both actions named as defendants the entire Chiquita Board of Directors (the “Board”) and several of Chiquita’s other present and former officers and directors (collectively, the “Chiquita Defendants”) who were charged with intentional, reckless and/or negligent breaches of their fiduciary duties of care, control, compliance and candor, and/or aiding and abetting such breaches of fiduciary duty, involving illegal, improper and/or *ultra vires* conduct, including causing

Chiquita to violate the laws of the United States, Colombia and international business conduct codes. The Annuity Trust Fund also named as a defendant Chiquita's longtime outside auditor, Ernst & Young LLP ("E&Y") for aiding and abetting the Chiquita defendants' breach of fiduciary duty and for professional malpractice. The Sheet Metal Workers's complaint filed one day later in D.C. contained largely the same allegations.

The alleged misconduct in movants' three derivative actions included paying, or permitting to be paid, improper and/or illegal bribes – payments to a known right-wing/fascist terrorist organization known as United Self-Defense Forces of Colombia (the "Autodefensas Unidas de Colombia" (the "AUC")), and to left-wing terrorist organizations known as The Revolutionary Armed Forces of Colombia (the "FARC") and the National Liberation Army ("ELN") – and illegally providing or facilitating the provision of arms and other weapons to the AUC.¹ As a result of this improper and illegal – indeed, criminal – misconduct, in March 2007 Chiquita was forced to plead guilty to a federal felony count of making illegal payments to a designated terrorist organization, with Chiquita agreeing – subject to court approval of the plea agreement – to pay a \$25 million fine and be placed on felony corporate probation for five years. The Company has also been sued under the Alien Tort Statute ("ATS") in four federal civil mass tort actions by the victims of the AUC's murderous rampage in Colombia – *collectively exposing Chiquita to \$8 billion in damages* – which

¹ The Annuity Trust Fund's action also alleges that this conduct was facilitated by E&Y and Robert W. Olson, the Company's long-time in-house General Counsel, who acquiesced in the making or concealment of the improper or illegal payments and the mischaracterization of them in Chiquita's accounting books and financial records, and by E&Y's repeated certifications of Chiquita's false and misleading financial statements distributed to its shareholders, while misrepresenting that they had been properly audited – all without requiring disclosure of the illegal acts, thus furthering the false and misleading statements and breaches of fiduciary duty of the Chiquita executives.

were also transferred to this District for centralization by the MDL Panel. Chiquita has also suffered huge losses due to the destruction of its business operations in Colombia – once the Company's largest source of bananas and profits.

Immediately following the September 17, 2007 acceptance of the terms of Chiquita's guilty plea in the District of Columbia the three shareholder derivative actions were filed by the Pension Fund Plaintiffs. Meanwhile, Chiquita tried but failed to have all of the ATS cases not pending in the District of Columbia transferred to that District, including the transfer Your Honor denied on November 14, 2007 in the Opinion and Order denying defendants' Motion to Change Venue to the District of Columbia in *Carrizosa, et al v. Chiquita Brands International, Inc. et al.*, S.D. Fla. No. 07-60821-CIV. Defendants then sought and obtained an intra-district coordination of all pretrial proceedings in the four ATS actions and all of the federal derivative actions through the MDL Panel. The MDL motion was heard January 30, 2008 and by Order dated February 20, 2008, all four derivative actions and the three ATS actions not filed in this District were all transferred to this District for coordinated pre-trial proceedings.

Meanwhile, citing the pendency of the MDL transfer motion then pending, and the risk of inconsistent rulings in the shareholder derivative actions pending in both federal and state venues, in early December 2007, Chiquita had moved to stay the Annuity Trust Fund's New Jersey state derivative proceedings pending resolution of the federal derivative actions. Attempting to reach a compromise between the Annuity Trust Fund's right to prosecute these important shareholder derivative claims and the Chiquita defendants' claim of hardship in being required to defend breach of fiduciary duty claims simultaneously in several courts, while recognizing that the derivative claims against E&Y cannot be prosecuted in federal court without destroying its diversity

jurisdiction, on January 7, 2008 the New Jersey Superior Court entered an order dismissing (without prejudice) – rather than staying – the claims against all defendants except E&Y and suggested that the Annuity Trust Fund join the federal derivative actions in order to prosecute its claims against the current and former Chiquita executives. Consequently, the derivative claims against E&Y remain pending in New Jersey (currently stayed pending mediation and arbitration) and on January 15, 2008, the Annuity Trust Fund filed a shareholder derivative complaint in the District of Columbia naming only the Chiquita executives as defendants. By this motion, the Pension Fund Plaintiffs jointly seek consolidation of their three federal derivative actions and all other derivative actions arising out of the same conduct filed in or transferred to this District. The Pension Fund Plaintiffs also jointly support the approval of the selection of Co-Lead Derivative Counsel.

None of the parties in these related derivative actions should object to consolidation. Consolidation increases judicial economy and reduces the risk of inconsistent rulings. Moreover, as the MDL transfer order under 28 U.S.C. §1407 merely transferred the federal shareholder derivative actions to this District for coordinated pretrial proceedings, but requires their remand to each of the originating jurisdictions for trial, barring the judicial relief sought herein, there still remains a significant risk of inconsistent rulings and litigation strategies if all of the federal derivative actions are not consolidated for all purposes and remanded to a single federal district court for trial under Fed. R. Civ. P. 42 and 28 U.S.C. §1404.

For the same reasons, it is appropriate to approve the selection of Co-Lead Derivative Counsel. Federal district courts recognize that particularly in shareholder derivative litigation, “a leadership structure is necessary to provide for an orderly litigation.” *Horn v. Raines*, 227 F.R.D. 1, 3 (D.D.C. 2005); *See also In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1014 (5th

Cir. 1977) (noting that it “is not open to serious question that a federal court in a complex, consolidated case may designate one attorney or set of attorneys to handle pre-trial activity on aspects of the case where the interests of all co-parties coincide”); *Millman v. Brinkley*, No. 1:03-CV-3831-WSD, 2004 U.S. Dist. LEXIS 20113, at *7-*8 (N.D. Ga. Oct. 1, 2004) (noting that the “orderly and economical prosecution of the [shareholder derivative] action necessitate[d] the designation of a general counsel to conduct the litigation on behalf of all the stockholders”);² and *In re Guidant Corp. S’holders Derivative Litig.*, No. 1:03-CV-00955-SEB-WTL, 2003 U.S. Dist. LEXIS 19880, at *6 (S.D. Ind. Nov. 5, 2003) (appointing a leadership structure in order to “streamline [the] litigation . . . to avoid unnecessary duplication of efforts, to control fees and expenses, and to minimize disagreements among themselves should any arise”).

The New Jersey state court’s January 7th ruling *per force* requires that the shareholder derivative claims against the Chiquita executive defendants and E&Y proceed simultaneously in separate actions – despite involving substantially similar subject matter. In fact, the aiding and abetting of the individual defendants’ breach of fiduciary duty claims being pursued against E&Y in New Jersey may require that court to make determinations concerning the scope of the Chiquita executives’ fiduciary duties and the extent to which those duties may have been violated. Barring the judicial intervention sought herein, including consolidation of all related shareholder derivative actions and the approval of plaintiffs’ selection of Co-Lead Derivative Counsel (including Coughlin Stoia which represents the Annuity Trust Fund in the New Jersey State court proceedings), there remains a serious risk that the plaintiffs in the separate derivative actions pending in state and federal

² Unless otherwise noted all emphasis is added and citations omitted.

court could adopt inconsistent litigating postures, exponentially decreasing judicial economy, risking prejudice to Chiquita's interests, and increasing the risk of inconsistent rulings. Conversely, Co-Lead Derivative Counsel, working together, have demonstrated through their course of conduct that they have the ability, resources and determination to coordinate their efforts to vigorously prosecute both actions to promote and protect Chiquita's claims and assets. The Pension Fund Plaintiffs, all long-term individual investors in Chiquita, support this leadership structure.

For these and the additional reasons detailed here, the Pension Fund Plaintiffs respectfully request that the Court: (i) consolidate the shareholder derivative actions now pending in or later filed in or transferred to this District that arise out of the same or substantially similar conduct; (ii) approve their selection of Cohen Placitella and Coughlin Stoia as Lead Derivative Counsel; and (iii) approve the proposed briefing schedule for filing plaintiffs' Consolidated Complaint and defendants' anticipated motions to dismiss.

II. FACTUAL AND PROCEDURAL HISTORY

With revenues of approximately \$4.5 billion, Chiquita was the world's single largest banana producer throughout the late 1990s and the largest employer in Latin America.³ In fact, while operating for many years as the United Fruit Company ("United Fruit"), the Company exerted so much influence that many of the Latin American countries it operated in were characterized as

³ See ¶25. Unless otherwise indicated, all "¶__" references refer to the Annuity Trust Fund's Verified Shareholder Derivative Complaint for Intentional, Reckless or Negligent Breach of Fiduciary Duty, Corporate Waste, Abuse of Control and *Ultra Vires* Conduct and Demand for Jury Trial on All Issues So Triable (the "Complaint") filed on January 15, 2008, attached as Exhibit G to the Declaration of Mary K. Blasy in Support of Motion to Consolidate Related Shareholder Derivative Actions and Establish a Leadership Structure ("Blasy Decl."). Unless otherwise indicated, all "¶__" references herein are to this Complaint and all "Ex. __" references are to the Blasy Decl.

“banana republics.” *Id.* And indeed, United Fruit had a long, dark history of improper and illegal conduct in those countries. ¶¶3, 25(b). The Company cooperated with authoritarian governments to suppress – even kill – its employees during labor protests, paid bribes (which, when exposed, led to the suicide of its CEO and the enactment of the U.S. Foreign Corrupt Practices Act), led a coup against an unfriendly government, was implicated in illegally using child labor and in serious environmental abuses and also violated the U.S. antitrust laws. *Id.* Chiquita executives now admit that “its predecessor companies . . . made a number of mistakes,” but continued claiming that it was “a different Company” right up until its recent felony criminal plea. *Id.*

Chiquita’s power and influence in Latin America did not go unchallenged. In response to dissident groups that rose up against Chiquita, in 1989 the Company began making payments to left-wing terrorist organizations FARC and ELN. ¶¶5, 25. Then, in 1997 Chiquita began making payments to the AUC, a right-wing paramilitary organization that is a brutally violent group that killed, kidnapped, raped, tortured, and caused the disappearance of thousands of Colombian citizens, trade unionists, and human rights activists. ¶¶1, 7.

On September 10, 2001, the U.S. Department of State designated the AUC as a specially designated foreign terrorist organization (which contains mostly Middle East-based groups like Al Qaeda and Hamas), meaning that U.S. companies could not legally do business with them. ¶¶59, 105. Nonetheless, defendants continued causing Chiquita to make the illegal payments such that between 1997 and 2004, defendants caused Chiquita to make over 100 bribery payments to the AUC in Colombia, totaling over \$1.7 million, on top of other bribery payments to the FARC and ELN, which payments were actively concealed by them from the owners of Chiquita, *i.e.*, its shareholders, and from government officials in the U.S. and Colombia. ¶¶5, 106-112.

Following an intense, multi-year investigation and prosecution by the DOJ, on March 19, 2007, Chiquita appeared before the Honorable Royce C. Lamberth in the District of Columbia and pled guilty to the crime of engaging in transactions with a specially-designated global terrorist. *See* Ex. I. Under the terms of the negotiated plea agreement, Chiquita agreed to pay a \$25 million criminal fine – the largest penalty ever imposed under the U.S. Global Terrorism Sanctions Act, agreed to implement and maintain an effective compliance and ethics program, and agreed to five years’ felony probation. *Id.* While Chiquita paid a multi-million dollar fine as a result of the egregious illegal conduct of its senior officers and directors, ***and is now a convicted felon serving felony corporate probation***, the Chiquita Board used its power and influence over Chiquita to spare themselves and their cronies from criminal prosecution and from the financial ruin they visited upon Chiquita. ¶17. ***Not a single Chiquita executive was prosecuted.***

Moreover, Chiquita has been sued civilly in four separate cases in four federal district courts by the families of the hundreds of victims of the AUC’s murderous rampage in Colombia, with these plaintiffs collectively seeking ***nearly \$8 billion in damages*** from Chiquita. ¶¶15, 123-124. Chiquita has also suffered millions of dollars in economic harm due to the destruction of Chiquita’s business operations in Colombia – once its largest source of bananas and profits – and immeasurable damage to its already fragile reputation. ¶¶18-19, 125-132.

Accordingly, following Chiquita’s September 17, 2007 sentencing hearing, where the sentence previously outlined in the March 2007 plea agreement was accepted by the court, the Pension Fund Plaintiffs each directed their counsel to file shareholder derivative actions for breach of fiduciary duty against the Company’s entire Board of Directors, several other current and former Chiquita executives. The Annuity Trust Fund also named the Company’s long-time outside

auditors, E&Y for aiding and abetting those breaches and professional malpractice in the New Jersey state court action. *See* Blasy Decl., ¶5 and Ex. C.

Two weeks prior to the filing of the Annuity Trust Fund's action in New Jersey state court, the Retirement System filed a shareholder derivative action in federal court in Ohio where Chiquita is headquartered. *See* Blasy Decl., ¶5, Ex. B. The Annuity Trust Fund's action was then filed in New Jersey state court on October 30, 2007. *Id.* at ¶6, Ex. C. The Sheet Metal Workers' shareholder derivative action was immediately filed on October 31, 2007 in federal court in the District of Columbia. *Id.* at ¶7, Ex. D. None of the complaints filed in any of the federal derivative actions named E&Y as a defendant because they could not without destroying diversity jurisdiction. *See* Blasy Decl., ¶10.

On November 26, 2007, Chiquita filed a motion before the MDL Panel to transfer all of the ATS cases pending against Chiquita in jurisdictions other than the District of Columbia, ***and all the federal derivative actions***, to the District of Columbia for coordinated pretrial proceedings (the "MDL Motion"). *See* Blasy Decl., ¶¶8, 12. Individual investor Henry Taylor then filed a shareholder derivative action in New Jersey federal court on December 17, 2007. *See* ¶8, Ex. E. Chiquita's MDL Motion was argued in Arizona on January 30, 2008, and on February 20, 2008, ***all four*** derivative actions and the three ATS cases not pending here were transferred to this District pursuant to the MDL Transfer Order. *Id.*, ¶12 and Ex. H. In so doing, the MDL Panel expressly recognized that the opponents of centralization's argument "that the [derivative and ATS] actions do not present substantial overlapping issues of fact, and, in particular, that the primary focus of the ATS actions, which are brought on behalf of alleged victims of the AUC, will be on unique issues of causation and damages, . . . ***has some merit.***" As such, the MDL panel expressly noted that this

Court could “formulate a pretrial program that: (1) allows discovery with respect to any *non-common issues to proceed concurrently* with discovery on common issues, []; and (2) ensures that pretrial proceedings will be conducted in a manner leading to the *just and expeditious resolution of all actions* to the overall benefit of the parties.” *Id.* at 2. In particular, the Panel held that “[i]t may be, on further refinement of the issues and close scrutiny by the transferee judge, *that one or more of the claims in a particular action or actions can be remanded to the respective transferor court(s)* in advance of other claims.” *Id.* Accordingly, the Panel held that “[s]hould the transferee judge deem remand of any claims or actions appropriate, procedures are available whereby this may be accomplished with a minimum of delay. See Rule 7.6, R.P.J.P.M.L., 199 F.R.D. at 436-38.” *Id.*

Meanwhile, on December 5, 2007, Chiquita had moved to stay the Annuity Trust Fund’s New Jersey state court action arguing that for comity reasons, the New Jersey state action should be stayed until the federal derivative actions are resolved, based solely on the fact that the Ohio federal derivative action was filed two weeks prior to the New Jersey state derivative action. See Blasy Decl., ¶10. E&Y also moved to stay the claims against it pending mediation and then arbitration. *Id.* Attempting to reach a compromise between the Annuity Trust Fund’s right to prosecute these shareholder derivative claims and the Chiquita defendants’ claim of hardship in being required to defend breach of fiduciary duty claims simultaneously in several courts, while recognizing that the claims against E&Y cannot be prosecuted in federal court without destroying its diversity jurisdiction, on January 7, 2008 the New Jersey Superior Court entered an order dismissing (without

prejudice) – rather than staying – the claims against all defendants except E&Y and recommending the Annuity Trust Fund join the federal derivative actions.⁴ See Blasy Decl., ¶10 and Ex. F at 3-5.

Accordingly, the Annuity Trust Fund will continue to pursue Chiquita's claims against E&Y for accounting malpractice and for aiding and abetting the Chiquita defendants' breaches of fiduciary duties (following mediation and arbitration proceedings). See Blasy Decl., ¶11. In recognition of Proposed Co-Lead Derivative Counsel's ability to work together to vigorously prosecute these derivative claims, the three Pension Fund Plaintiffs jointly support the selection of Cohen Placitella and Coughlin Stoia as Co-Lead Derivative Counsel.

Defendants do not dispute that these derivative claims are substantially similar. In fact, counsel for Chiquita strenuously argued the cases were substantially similar in order to obtain the stay they sought in New Jersey state court. There, defendants adamantly maintained that it was unfair to force them to respond to these derivative claims in multiple actions and that it presented a risk of inconsistent rulings. See Blasy Decl., ¶10. However, without the relief sought herein, even though Chiquita's MDL Motion was granted, the federal derivative actions and the ATS cases were simply *coordinated for pretrial purposes* under 28 U.S.C. §1407, but the derivative actions will not be *consolidated for all purposes*, requiring that each derivative action be remanded to its jurisdiction of origin at the conclusion of the pretrial proceedings. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40-41 (1998). Especially with regard to the federal derivative actions,

⁴ The state court also ruled that the mediation/arbitration provisions in E&Y's engagement agreement with Chiquita governed, and stayed plaintiff's claims on behalf of Chiquita against E&Y pending efforts to mediate/arbitrate. *Id.* at 5-6. However, the New Jersey state court retains jurisdiction to (a) enforce the arbitration award; (b) rule on the fairness of any settlement; (c) enforce any settlement agreement; and (d) award attorneys' fees should plaintiff obtain a recovery for Chiquita in connection with the arbitration. See, e.g., *Ernst & Young, LLP v. Tucker ex rel. HealthSouth Corp.*, 940 So. 2d 269, 287-88 (Ala. 2006).

such a result would be absurd and would do nothing to prevent the multiplicity of actions or the risk of inconsistent rulings the Chiquita defendants sought to prevent with their motion to stay the Annuity Trust Fund's New Jersey state court proceedings. Moreover, the MDL pretrial discovery coordination protocol does not provide for a leadership structure that ensures that these important breach of fiduciary duty claims being prosecuted *on behalf of Chiquita* against its current and former executives will be vigorously prosecuted independently from the claims being prosecuted in the ATA cases *against Chiquita*. Absent this Court's intervention, there will simply be no means of ensuring that Chiquita's interests are protected *vis-a-vis* the hundreds of tort claimants and their almost \$8 billion in unliquidated claims pending against Chiquita.

III. ARGUMENT

A. The Related Shareholder Derivative Actions Should Be Consolidated

Presently pending in this District are four related shareholder derivative actions brought on behalf of Chiquita, the real-party-in-interest. All four actions allege that various Chiquita directors and officers engaged in an illegal bribe payment scheme resulting in substantial harm to Chiquita and its shareholder owners. The marked similarity between the four actions – coupled with the advances in judicial economy which will result from consolidation of these four very similar actions – supports the consolidation of these actions pursuant to Federal Rule of Civil Procedure 42. Any inconsistencies between the four complaints on file may (and should be) later cured through the filing of a consolidated complaint.

The power to order consolidation prior to trial falls within the broad inherent authority of every court “to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Air Crash*

Disaster, 549 F.2d at 1013 (noting that under Fed. R. Civ. P. 42(a), the “trial court’s managerial power is especially **strong and flexible** in matters of consolidation”); *Horn*, 227 F.R.D. at 2 (noting that Fed. R. Civ. P. 42(a) “gives the Court **broad discretionary authority** to consolidate cases”); *see gen.* Fed. R. Civ. P. 42(a).

Further, a court has discretion to consolidate related shareholder derivative actions, which involve common questions of fact and law under Fed. R. Civ. P. 42(a), to “alleviate ‘needless duplication of time, effort, and expense on the part of the parties and the Court.’” *Horn*, 227 F.R.D. at 2 (quoting *Millman*, 2004 U.S. Dist. LEXIS 20113, at *6); *Air Crash Disaster*, 549 F.2d at 1014 (noting that in a complex federal case, the “‘purpose of consolidation is to permit trial convenience and economy in administration’”); *In re Sunbeam Sec. Litig.*, No. 98-8258-CIV, 1998 WL 1990884, at *2 (S.D. Fla. Dec. 4, 1998) (noting that “[c]onsolidation of related complex actions . . . is commonplace and an effective use of judicial resources”).

Here, the derivative actions all arise out of the same operative facts and raise similar legal issues; namely, whether various Chiquita officers and directors caused the Company to pay a series of illegal bribe payments to the AUC and whether that resulted in millions of dollars in damage to the Company and, ultimately, to its shareholder owners. Consolidation of the Federal derivative actions will promote judicial economy by avoiding the unnecessary duplicative efforts that are sure to result if these actions proceed separately. Accordingly, the shareholder derivative actions pending in (or later filed in or transferred to) this District should be immediately consolidated. *See e.g.*, *Eckstein v. Balcors Film Investors*, 8 F.3d 1121, 1124-25 (7th Cir. 1993) (questioning the district court’s decision to only partially consolidate under 28 U.S.C. §1404 after a 28 U.S.C. §1407

coordination and holding the related shareholder actions addressing the same claims “should have been consolidated for all purposes”).

B. Cohen Placitella and Coughlin Stoia Are Uniquely Qualified to Serve as Co-Lead Derivative Counsel

Cohen Placitella and Coughlin Stoia are uniquely well-equipped to serve as Co-Lead Derivative Counsel. Cohen Placitella is an established complex litigation law firm with seventeen lawyers with offices throughout Pennsylvania and New Jersey and a national practice. Cohen Placitella has litigated cases in Ohio in the past, and is involved in other matters in Ohio at present. *See* Declaration of Stewart Cohen in Support of Motion to Consolidate Related Shareholder Derivative Actions and Establish a Leadership Structure (“Cohen Decl.”). Cohen Placitella has a long history of accomplishment and dedication to its clients. *Id.*, ¶3. Cohen Placitella members have compiled a record of success on behalf of both individual and class action plaintiffs. Cohen Placitella was a lead counsel in the first certified class of third party payors in the United States in the Baycol Litigation. *Id.*, ¶4. Collectively its lawyers have tried more than 1000 cases during the course of their legal careers, resulting in groundbreaking verdicts and recoveries that have been nationally recognized. Cohen Placitella attorneys include former prosecutors, bar association leaders, elected public servants, and law professors who have been repeatedly recognized by their peers for their accomplishments and community organizations for their contributions. *Id.* Partners at Cohen Placitella have served (and continue to serve to this day) the Supreme Court of Pennsylvania on the Disciplinary Board as well as the Judicial Conduct Board. *Id.*

Coughlin Stoia is a 190-lawyer law firm with offices in San Diego, San Francisco, Los Angeles, New York, Boca Raton, Washington, D.C. and Philadelphia. *See* Blasy Decl., ¶¶3-4, Ex.

A. Coughlin Stoia is actively engaged in complex litigation around the country, emphasizing

securities, consumer, insurance, healthcare, human rights, employment discrimination and antitrust class actions. *Id.* Coughlin Stoia's unparalleled experience and capabilities in these fields are based upon the talents of its attorneys who have successfully prosecuted thousands of shareholder lawsuits. For this reason, when faced with multiple lead plaintiff motions in the largest, most complex shareholder action in U.S. history, Judge Melinda Harmon appointed Coughlin Stoia as Lead counsel to coordinate the efforts of other counsel and direct the prosecution of the *Enron* case, concluding that "the submissions of [Coughlin Stoia] stand out in the breadth and depth of its research and insight." *In re Enron Corp., Sec. Litig.*, 206 F.R.D. 427, 458 (S.D. Tex. 2002). Coughlin Stoia is a "law firm with exceptional resources and capability to prosecute this action." *Id.* at 454.

In selecting lead derivative counsel, the "'guiding principle' is who will 'best serve the interests of the plaintiffs.'" *Millman*, 2004 U.S. Dist. LEXIS 20113, at *9. "The criteria for selecting counsel when appointing a leadership structure include factors such as 'experience and prior success record, the number, size, and extent of involvement of represented litigants, the advanced stage of proceedings in a particular suit, and the nature of the causes of action alleged.'" *Id.* (citing 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §9.35 at 388 (4th ed. 2002)). "In making a selection some courts have considered the quality of the pleadings that have been filed as a factor to be weighed." *Id.* As to the first *Millman* factor, as was recently recognized when Coughlin Stoia was appointed lead counsel in another shareholder action, the "***firm has extensive experience litigating***" ***shareholder actions***. *In re XM Satellite Radio Holdings Sec. Litig.*, 237 F.R.D. 13, 21 (D.D.C. 2006). In the specific genre of shareholder derivative litigation, appointing Coughlin Stoia as lead derivative counsel in the *Fannie Mae Derivative Litigation*, the Court expressly recognized the firm's ability and resources to benefit plaintiffs in significant

shareholder derivative litigation, adding that the “firm[] ha[s] represented vigorously institutional plaintiffs, with significant financial interests in the outcome of the litigation, and have prosecuted the litigation with well-plead and thorough pleadings.” *Horn*, 227 F.R.D. at 3-4. In fact, both Cohen Placitella *and* Coughlin Stoia possess special, broad, and capable experience in class actions, representative litigation and shareholder derivative actions as their partners have represented consumers, injured victims and shareholders in class and derivative actions for decades and the firms have both been on the forefront of litigation resulting in the development of cutting edge corporate governance and therapeutics. *See* Blasy Decl., ¶¶3-4 and Cohen Decl., ¶¶3-4.

Coughlin Stoia has by far the largest litigation support staff of any plaintiffs’ securities firm in the Country, consisting of forensic accountants, investigators, financial analysts, paralegals and document clerks. *See* Blasy Decl., ¶3. Coughlin Stoia has recovered hundreds of millions of dollars in derivative litigation arising out of illegal corporate activities. *See id.* Ex. A.

Not only are Cohen Placitella’s and Coughlin Stoia’s experience and resources essentially unrivaled, their appointment here will allow for a Co-Lead Derivative Counsel who is responsible to the Court and to plaintiffs and who will be able to coordinate the various counsel whose substantial experience in representing plaintiffs in shareholder matters can be utilized and drawn upon in an effective and efficient manner. For example, Coughlin Stoia is prosecuting Chiquita’s claims against E&Y on behalf of the Annuity Trust Fund in the New Jersey state derivative action. *See* Blasy Decl., ¶11. Appointing Coughlin Stoia Co-Lead Derivative Counsel in this action will avoid not only the risk of inconsistent rulings in the state and federal actions, but will preclude the arguably more detrimental risk that derivative plaintiffs will take inconsistent positions in these actions that could irreparably damage Chiquita’s and its shareholders’ litigating posture.

As to the rest of the *Millman* factors addressing the “stage of [the] proceedings in [this] suit” and “nature of the causes of action alleged” (*Millman*, 2004 U.S. Dist. LEXIS 20113, at *9), the record reflects that immediately upon entry of Chiquita’s plea agreement, both the Retirement System and the Annuity Trust Fund directed their lawyers to undertake a thorough investigation of the available information concerning Chiquita’s misconduct in connection with the systematic and continuous illegal payments to the AUC, including a detailed background investigation of each member of its Board to determine the culpability of each and whether demand upon each to bring the causes of action alleged in their respective shareholder derivative actions would in fact have been futile. Based on these findings, the Retirement System and the Annuity Trust Fund directed their respective counsel to file detailed shareholder derivative complaints in Ohio federal and New Jersey state court addressing in detail the misconduct of the officers and the Board, how its members breached their duties as directors and why demand upon the Board to seek redress prior to filing would have been futile. *See* Exs. B and G. Indeed, the complaints filed by the Pension Fund Plaintiffs were the first actions filed, are all three quite detailed, and as the *Millman* court found, “weigh significantly in favor of” appointing proposed Co-Lead Counsel. 2004 U.S. Dist. LEXIS 20113, at *11.

Proposed Co-Lead Counsel’s diligent investigations and the subsequent thoroughness of their pleadings in these cases, coupled with their demonstrated ability to work together and their respective histories of conscientious prosecution, more than justify the Pension Fund Plaintiffs’ decision to select them, as the firms are uniquely qualified to coordinate the efforts of counsel in this case by serving as Co-Lead Derivative Counsel and guiding this complex action to the best possible result for Chiquita and its shareholders.

C. Co-Lead Counsel Should be Limited to the Two Firms Proposed

Cohen Placitella and Coughlin Stoia seek to be appointed Co-Lead Derivative Counsel because their clients have both requested that they do so. The two firms bring different, but complimentary, skill-sets and geographic advantages. Cohen Placitella is a very respected firm and regularly litigates in Ohio, where the Consolidated Derivative Action will be transferred back for trial. Cohen Placitella's close proximity to Ohio, experience with the local bench and bar, and well-developed contacts in the surrounding community will significantly aid in the prosecution of this important action. The Coughlin Stoia firm is known nationally for its preeminence in shareholder litigation. Coughlin Stoia has brought on two additional Washington D.C. lawyers, both former prosecutors with the U.S. Attorneys Office who have significant experience prosecuting cases involving illegal payments and payments to terrorist groups. Coughlin Stoia also represents the Annuity Trust Fund in the state court proceedings in New Jersey against E&Y.

To be sure, when presented with a proposed stipulation outlining the same consolidation, leadership structure and briefing schedule proposed by this motion, the law firm of Schiffrin Barroway Topaz & Kessler ("Schiffrin Barroway"), counsel for Taylor, dissented, requesting that it too be appointed Co-Lead Derivative Counsel. *See* Blasy Decl., ¶16. However, as reflected in the four federal derivative complaints lodged with the Blasy Affidavit at Exs. B, D, E and G, a total of nine law firms collaborated in the filing of the four derivative actions, including the firms of Ridrodsky & Long, P.A. and Cuneo Gilbert LaDuca LLP, which both filed actions on behalf of their clients (in a capacity other than local counsel) months before Schiffrin Barroway did and have not sought appointment as additional co-lead counsel. Every Indian cannot be a chief. Courts in this Circuit recognize that the appointment of large groups of plaintiffs' counsel, even in complex cases,

necessarily decreases efficiency, increases costs and results in the duplication of efforts. In *Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc.*, the Southern District of Florida recognized that litigation by committee can make trying a representative action cumbersome. *See* 184 F.R.D. 688, 692 (S.D. Fla. 1999) (finding that consortium of ten law firms not in best interest of class). And as the court in *Vincelli v. Nat'l Home Health Care Corp.*, 112 F. Supp. 2d 1309, 1319 (M.D. Fla. 2000) recognized, the “***possible benefits derived from appointing several lead counsel [do not] outweigh the complications and increased costs and expenses associated with the litigation by committee approach.***”

Instead of appointing multiple lead counsel, proposed Co-Lead Derivative Counsel proposed to the Schiffrin Barroway firm that they make themselves available to complete discrete tasks to be coordinated by Co-Lead Derivative Counsel. That offer stands. In fact, rather than appointing large groups of counsel, courts often encourage “lead counsel [to] distribute non-duplicative work assignments to non-lead counsel so as to facilitate the orderly and efficient prosecution of the action.” *Vincelli*, 112 F. Supp. 2d at 1319 n.5; *see In re Wells Fargo Sec. Litig.*, 156 F.R.D. 223, 227 (N.D. Cal. 1994) (appointing a single lead counsel but stating the firm may “farm[] out work on the case to another law firm because of specialized knowledge, geographic proximity to witnesses or evidence or other comparative advantages, or even to spread risk”); *Malin v. IVAX Corp.*, No. 96-1843-CIV-MORENO, 1996 U.S. Dist. LEXIS 22452, at *11-*12 (S.D. Fla. Nov. 1, 1996) (urging the utilization of other firms retained in the action by other plaintiffs); and *Millman*, 2004 U.S. Dist. LEXIS 20113, at *7-*8 (“The ‘orderly and economical prosecution of the action ***necessitates the designation of a general counsel*** to conduct the litigation on behalf of all the stockholders,’” as the

“appointment of a general counsel may in many instances prove the only effective means of channeling the efforts of counsel along constructive lines.”).

Schiffrin Barroway’s request must be rejected for more practical reasons as well. Schiffrin Barroway did not file their client’s complaint until months after the other actions were filed, in fact a month after defendants sought their MDL transfer of all the federal derivative actions to a single district. *See* Blasy Decl., ¶16. That the Schiffrin Barroway complaint eventually filed contains a mere 15 pages of non-specific allegations and simply attaches Chiquita’s Plea Agreement for content speaks volumes about the “vigor” with Schiffrin Barroway can be expected to prosecute this important action. *Id.* and Ex. E. Finally, the fact that only one of several telephone calls placed to the Schiffrin Barroway firm by proposed Co-Lead Derivative Counsel attempting to negotiate the consolidation/leadership stipulation was actually returned does not bode well for the shot-gun marriage the Schiffrin Barroway firm demands. *See* Blasy Decl., ¶16. For these, and the other reasons detailed above, the Pension Fund Plaintiffs respectfully request that the Court approve their selection of Co-Lead Derivative Counsel.

IV. CONCLUSION

For the above stated reasons, the Pension Fund Plaintiffs respectfully request the Court consolidate the shareholder derivative actions and approve its selection lead derivative counsel.

DATED: March 3, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 3, 2008.

s/ Mary K. Blasy

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Service List - 3/3/2008 (07-0235)

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