IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ARTHUR E. BENNING, SR., BARBARA LEE BENNING, ARTHUR E. BENNING, JR. and JANESSA DABLER,	)	
Plaintiffs,	)	C.A. No. 99C-06-157 MMJ
v.	)	
WIT CAPITAL GROUP, INC., and WIT CAPITAL CORPORATION d/b/a WIT CAPITAL,	)	
Defendants.	)	

Submitted : January 18, 2005
Decided: January 25, 2005

ORDER GRANTING LEAVE TO APPEAL FROM INTERLOCUTORY ORDER

(1) Defendants applied pursuant to Supreme Court Rule 42 for an order certifying an appeal from the interlocutory Memorandum Opinion of this Court, dated November 30, 2004. The Court finds that this Memorandum Opinion determines substantial issues and establishes legal rights. The Court also finds that the criterion set forth in Supreme Court Rule 42(b)(v) applies ("Case dispositive issue. A review of the interlocutory order may terminate the litigation").

(2) Wit Capital Corporation, a wholly owned subsidiary of Wit Capital Group, Inc. (collectively "Wit Capital"), is an internet brokerage firm.. Plaintiffs Arthur E. Benning, Sr., Barbara-Lee Benning, Arthur E. Benning, Jr. and Janessa Dabler[1] were customers of Wit Capital. Plaintiffs filed their complaint on June 16, 1999, seeking declaratory relief and damages in connection with certain brokerage transactions.

(3) On August 13, 1999, Wit Capital filed a Motion to Dismiss or Stay the Initial Complaint on the basis that the account agreements mandated a separate arbitration for each customer. At the November 9, 1999 hearing on the motion, the Court directed Plaintiffs to move for class certification following receipt of Wit Capital's responses to class certification discovery.

(4) Plaintiffs filed a Motion for Class Certification on December 16, 1999. The Court denied class certification.[2] The Delaware Supreme Court reversed the denial and remanded the action to this Court:

> Once the parties complete appropriate discovery, the Superior Court should then weigh the relevant factors to determine if Plaintiffs have met the requirements of Rule 23(b)(3) for purposes of class certification. The trial judge should take care to consider not only

---

[1]Plaintiff Dabler was not a party to the Initial Complaint. Rather, Dabler was permitted to intervene as a named Plaintiff in April 2000.

[2]*Benning v. Wit Capital Group, Inc.,* Del. Super., C.A. No. 99C-06-157, Alford, J. (Jan. 10, 2001).

> whether questions of law or fact common to the class predominate over the questions affecting individual members, but to also give equal weight to the question of whether or not a class action remains the superior method for the fair and efficient adjudication of this litigation.[3]

The parties subsequently conducted additional discovery on the issues of numerosity[4], typicality[5] and predominance.[6]

(5) Plaintiffs filed a Renewed Motion for Class Certification. In its November 30, 2004 Memorandum Opinion, the Court found that Count III of the Complaint (claims for damages sustained as a result of Wit Capital's purported failure to adhere to its anti-flipping policy) could not be pursued as part of a class action. To the extent other allegations assert reliance as an element of any cause of action, the Court also found those claims inappropriate for class certification.

(6) The Court certified a class comprised of Wit Capital customers who applied for IPO allocations and were denied allocations because of alleged violations of Wit Capital's policies. Four sub-classes were certified: (1) qualified

---

[3] *Benning v. Wit Capital Group, Inc.,* Del. Supr., No. 116, 2001 (Order) (Nov. 1, 2001).

[4] Super. Ct. Civ. R. 23(a)(1) (whether the class is so numerous that joinder of all members is impracticable).

[5] Super. Ct. Civ. R. 23(a)(3) (whether the claims or defenses of the representative parties are typical of the claims or defenses of the class).

[6] Super. Ct. Civ. R. 23(b)(3) (whether questions of law or fact common to the members of the class predominate over any questions affecting only individual members).

customers whose accounts may not have been adequately funded as of the effective date for each IPO, but who subsequently could have or did fund their accounts for the order in question, but were denied IPO allocations because Wit Capital determined account balances on or before the effective date, rather than the settlement date; (2) qualified customers who had sufficient cash and stock in their accounts, but were denied IPO allocations because Wit Capital improperly calculated the minimum account balances as though the customer had to have an all cash balance; (3) qualified customers who received no IPO shares because Wit Capital allocated more that the proper number of shares to other customers; and (4) qualified customers who had not been identified as "flippers," but were denied IPO allocations because Wit Capital disregarded its preference policy and, as part of the same IPO, allocated stock to customers identified as "flippers."

(7) Ordinarily, an order certifying a class is not appealable on an interlocutory basis. Class certification generally is a procedural decision and does not determine a substantive issue. A contrary ruling on class certification would not terminate the litigation. The named plaintiffs would remain free to pursue their cause of action as individuals.[7]

---

[7] *Erickson v. Centennial Beauregard Cellular LLC,* 2003 Del. Ch. LEXIS 143, at *1-2.

(8) In this case, however, all putative class members are subject to an Account Agreement. Paragraph 33 of the Agreement requires mandatory arbitration and Plaintiffs have waived their rights to seek remedies in court, including the right to a jury trial. The only exception to binding arbitration is court certification of a class action. Therefore, should the Supreme Court find that the class should not have been certified, this action in the Superior Court would be terminated and Plaintiffs' remedy would be limited to individual arbitrations with Defendants.

THEREFORE, IT IS ORDERED that the Court's Memorandum Opinion of November 30, 2004, is hereby certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court.

The Honorable Mary M. Johnston

oc: Prothonotary