

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 9/6/2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
DAVID CASPER, Individually and On Behalf
of All Others Similarly Situated,

Plaintiff,

- against -

SONG JINAN, TAO (TRAVIS) CAI, HUI S.
CHANG, CHIN JI WEI, DU WEN MIN, SIMON
YICK, YAN LI, and CHINA-BIOTICS, INC.,

Defendants.

-----X
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

MEMORANDUM AND ORDER

12 Civ. 4202 (NRB)

This action is brought against China-Biotics, Inc. ("China-Biotics") and certain of its officers and directors on behalf of a purported class of investors who purchased or otherwise acquired China-Biotics shares between February 9, 2011 and July 1, 2011 (the "Class Period"). Two motions have been filed seeking appointment as lead plaintiff and approval of lead counsel. These motions were filed by (1) Scott Crist ("Crist") and (2) a group of investors consisting of Robert Blanck; Robert Blanck, Jr.; and Geoffrey Blanck (collectively, the "Blanck Investor Group"). For the reasons set forth below, we appoint the Blanck Investor Group as lead plaintiff and approve its selection of lead counsel.

DISCUSSION

The Private Securities Litigation Reform Act of 1995 (the "PSLRA") governs the appointment of a lead plaintiff in "each private action arising under [the Securities Exchange Act of 1934] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(1). In appointing a lead plaintiff, we are to presume that the "most adequate plaintiff" is the person or group of persons that:

- (aa) has either filed the complaint or made a motion in response to a notice (published by a complainant);
- (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
- (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23").

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). This presumption may be rebutted only upon proof by a member of the purported class that the presumptive lead plaintiff:

- (aa) will not fairly and adequately protect the interests of the class; or
- (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

I. The Presumptive Lead Plaintiff

A. Timely Motions

Within 20 days of filing an action subject to the PSLRA, a complainant must publish a notice informing class members of their right to move the court, within 60 days of the notice being published, for appointment as lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(A). Here, the complainant published notice of the lead plaintiff deadline on May 25, 2012. (Decl. of Thomas J. McKenna in Supp. of the Blanck Investor Group Mot. to be Appointed Lead Pl. and for Approval of Selection of Counsel ("McKenna Decl."), Ex. C.) Crist and the Blanck Investor Group both filed motions for lead plaintiff status on July 24, 2012, which was within 60 days of the complainant's publication. Accordingly, both parties satisfy the first requirement of the PSLRA.

B. Financial Interest

The PSLRA is silent as to the methodology for determining which plaintiff has the largest financial interest in the relief sought by the class, and the Second Circuit has not definitively ruled on the proper method. Courts in this District "overwhelmingly rely" on the four-factor test first set forth in Lax v. First Merchs. Acceptance Corp., Nos. 97 Civ. 2715 et al., 1997 WL 461036 (N.D. Ill. Aug. 11, 1997). Varghese v. China Shenghuo Pharm. Holdings, Inc., 589 F. Supp. 2d 388, 394-

95 (S.D.N.Y. 2008). These factors include: "(1) the total number of shares purchased during the class period; (2) the net shares purchased during the class period (in other words, the difference between the number of shares purchased and the number of shares sold during the class period); (3) the net funds expended during the class period (in other words, the difference between the amount spent to purchase shares and the amount received for the sale of shares during the class period); and (4) the approximate losses suffered." Id. at 395 (internal quotation marks omitted); see also Goldstein v. Puda Coal, Inc., 827 F. Supp. 2d 348, 353-54 (S.D.N.Y. 2011) (applying the four Lax factors); Janbay v. Canadian Solar, Inc., 272 F.R.D. 112, 118-19 (S.D.N.Y. 2010) (same). Although courts have differed on how much weight to assign to each of the Lax factors, this Court, like many others, places the most emphasis on the last of the four factors: the approximate loss suffered by the movant. See, e.g., Goldstein, 827 F. Supp. 2d at 354 (stating that financial loss is "the most important element" of the test); Varghese, 589 F. Supp. 2d at 395 (same).

Here, there is no dispute that the Blanck Investor Group has alleged greater losses during the Class Period than Crist: While the Blanck Investor Group claims losses of \$155,781.99 (Mem. of Law in Support of the Blanck Investor Group's Mot. to be Appointed as Lead Pl. and for Approval of Selection of

Counsel at 4), Crist claims losses of \$104,790.25 (Mem. of Law in Support of Movant Scott Crist's Mot. for Appointment as Lead Pl. and Approval of Lead Counsel ("Crist Mem.") at 6).¹ The other Lax factors also weigh in the Blanck Investor Group's favor. Although it is true that Crist acquired more shares during the Class Period, the Blanck Investor Group's net shares and net expenditures exceeded those of Crist:

Movant	Shares Purchased	Net Shares Purchased	Net Funds Expended
Crist	56,924	18,674	\$132,698.54 ²
The Blanck Investor Group	23,200	23,200	\$191,275.00

(Gonnello Decl., Ex. C; McKenna Decl., Ex. B.) Thus, we conclude that the Blanck Investor Group has a greater financial interest in the relief sought by the putative class.

C. Rule 23 Requirements

In order to qualify as the presumptive lead plaintiff, a movant must also satisfy the requirements of Rule 23. However, "[a]t this stage of the litigation, the [movant] must only make a preliminary showing that the adequacy and typicality requirements have been met." Blackmoss Invs., Inc. v. ACA

¹ The Blanck Investor Group argues that Crist overstates his losses by virtue of his status as an in-and-out trader. For purposes of the present motions, it is sufficient to find that, under any analysis, the Blanck Investor Group's financial interest exceeds that of Crist. Crist has not suggested otherwise.

² Although Crist claims \$447,750.19 in net expenditures (Crist Mem. at 6), this figure does not account for \$315,051.65 in sales proceeds that Crist received during the Class Period. (Decl. of Richard W. Gonnello in Support of Movant Scott Crist's Mot. for Appointment as Lead Pl. and Approval of Lead Counsel ("Gonnello Decl."), Ex. C.)

Capital Holdings, Inc., 252 F.R.D. 188, 191 (S.D.N.Y. 2008);
accord Strougo v. Brantley Capital Corp., 243 F.R.D. 100, 105
(S.D.N.Y. 2007).

1. Typicality

"The typicality threshold is satisfied where the claims arise from the same conduct from which the other class members' claims and injuries arise." Goldstein, 827 F. Supp. 2d at 354 (internal quotation marks omitted). Here, the Blanck Investor Group and other putative class members allege that they purchased China-Biotics shares during the Class Period, suffered damages as a result of the company's allegedly false and misleading statements, and possess claims against China-Biotics and its officers and/or directors under federal securities law. Therefore, the Blanck Investor Group satisfies the typicality requirement under Rule 23 for purposes of qualification for lead plaintiff.

2. Adequacy

The adequacy requirement is satisfied where: (1) "there is no conflict between the proposed lead plaintiff and the members of the class;" (2) "the proposed lead plaintiff has a sufficient interest in the outcome of the case to ensure vigorous advocacy[;]" and (3) "class counsel is qualified, experienced, and generally able to conduct the litigation[.]" Id. (internal quotation marks omitted); accord Peters v. Jinkosolar Holding

Co., No. 11 Civ. 7133 (JPO), 2012 WL 946875, at *11 (S.D.N.Y. Mar. 19, 2012). The Blanck Investor Group's financial interest should ensure vigorous advocacy on behalf of the class. Further, there is no reason to believe that the Blanck Investor Group has interests that are adverse to those of the putative class members or any other noteworthy conflict. Finally, the Blanck Investor Group has retained Gainey & McKenna as its lead counsel. As discussed below, this firm is experienced in prosecuting securities class actions.

D. Rebuttal Evidence

The presumption in favor of the Blanck Investor Group may only be rebutted upon "proof by a member of the purported plaintiff class" that the presumptive lead plaintiff will not fairly or adequately protect the interests of the class or is subject to unique defenses rendering it incapable of adequately representing the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II) (emphasis added). In this case, Crist contends that the Blanck Investor Group is inadequate to serve as lead plaintiff because its selected counsel, Gainey & McKenna, lacks the necessary experience and resources to protect the interests of the class. However, rather than offering specific evidence to this effect, Crist resorts to speculation about the firm's size, resources, and involvement in other securities class actions. Having reviewed Gainey & McKenna's submissions as to its relevant

background and experience, we join other courts in this District in concluding that the firm is qualified to serve as lead counsel. See, e.g., In re New Energy Sys. Grp. Sec. Litig., No. 12 Civ. 1041 (ER) (S.D.N.Y. May 10, 2012), Dkt. No. 18 at 2 (appointing Gainey & McKenna lead counsel in securities class action); Hanson v. Frazer, LLP, 12 Civ. 3166 (JSR) (S.D.N.Y. June 20, 2012), Dkt. No. 23 at 3 (same); see also In re Lehman Brothers ERISA Litig., No. 08 Civ. 5598 (LAK) (S.D.N.Y. Sept. 4, 2008), Dkt. No. 39 at 2 (appointing Gainey & McKenna co-counsel in ERISA class action and noting that "Gainey & McKenna appears to be entirely capable of handling the case, with appropriate consultation with co-counsel").

E. Conclusion

For the foregoing reasons, the Blanck Investor Group is the presumptive lead plaintiff, and no member of the class has established its inadequacy. Therefore, we appoint the Blanck Investor Group as lead plaintiff.

II. Appointment of Lead Counsel

Finally, the PSLRA directs the lead plaintiff to select and retain counsel to represent the class, subject to the Court's approval. 15 U.S.C. § 78u-4(a)(3)(B)(v). Although the Court maintains discretion in appointing lead counsel to protect the interests of the class, Kuriakose v. Fed. Home Loan Mortg. Co., No. 08 Civ. 7281 (JFK), 2008 WL 4974839, at *9 (S.D.N.Y. Nov.

24, 2008), the "statute evidences a strong presumption in favor of approving a properly-selected lead plaintiff's decisions as to counsel selection and counsel retention." Id. (internal quotation marks omitted). As noted supra, the Blanck Investor Group has selected Gainey & McKenna as its lead counsel. We find that this law firm has the experience and resources necessary to adequately litigate this case. Accordingly, we approve the selection.

CONCLUSION

For the aforementioned reasons, the Blanck Investor Group is appointed lead plaintiff and its selection of lead counsel is approved. The Blanck Investor Group's counsel is hereby ordered to submit a proposed scheduling order or otherwise be in contact with the Court regarding the next steps in this case within two weeks of the date of this filing.

Dated: New York, New York
September 5, 2012



NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Order have been mailed on this date to the following:

Attorneys for the Blanck Investor Group

Thomas J. McKenna, Esq.
Gainey & McKenna, LLP
440 Park Avenue, South 5th Floor
New York, NY 10016

Attorneys for Scott Crist

Richard W. Gonnello, Esq.
Faruqi & Faruqi, LLP
369 Lexington Avenue, 10th Floor
New York, NY 10017

Attorneys for Defendant China-Biotics

Jerome S. Fortinsky, Esq.
Jeffrey J. Resetarits, Esq.
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022