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FILED
MAR 4 2004
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re ADVANCED MARKETING
SERVICES, INC. SECURITIES
LITIGATION,

CASE NO. 04 CV 00121 JM (AJB)

ORDER GRANTING THE
POLICEMEN AND FIREMEN
RETIREMENT SYSTEM OF THE
CITY OF DETROIT'S MOTION FOR
APPOINTMENT AS LEAD
PLAINTIFF AND MOTION FOR
APPROVAL OF LEAD COUNSEL

This is a motion to appoint lead plaintiff and approve lead counsel in a securities class action. Three individuals or groups of individuals filed motions to be appointed lead plaintiff: (1) the Policemen and Firemen Retirement System of the City of Detroit ("Detroit P&F"), (2) Raymond E. Perkins, and (3) the AMS Plaintiff Group. Both Raymond E. Perkins and the AMS Plaintiff Group have withdrawn their motions. Only Detroit P&F continues to seek appointment as lead plaintiff. No opposition has been filed to Detroit P&F's motion. Pursuant to Local Rule 7.1(d)(1), this matter is appropriate for decision without oral argument.

I. Background

Advanced Marketing Services ("AMS") is a wholesale supplier of general interest books and services to warehouse clubs, speciality retailers, e-commerce companies, and bookstores. On January 14, 2004, AMS publicly disclosed that the company would restate its financial results for the prior five fiscal years. AMS admitted to miscalculating the company's net income by overstating the circulation communicated to publishers for some cooperative advertising publications and by including

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1 advertising expenses as income. AMS predicted the actual income for the five fiscal years in question
2 would be approximately \$3 to \$9 million less than the reported \$85 million. Following the January
3 14, 2004 announcement, AMS stock dropped more than 15%.

4 Three complaints were filed in this district against AMS as well as the principal officers and
5 directors of the corporation (collectively "Defendants"). Each complaint alleged that Defendants
6 misled the investing public by disseminating false statements regarding the company's operations and
7 financial results in violation of Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934
8 ("Exchange Act"). The complaints allege that AMS stock traded at artificially inflated prices and that
9 corporate insiders took advantage of the situation by selling approximately \$6 million worth of their
10 own AMS stock. The class period for each complaint is January 16, 1999 to January 13, 2004. On
11 February 24, 2004, the court entered an order consolidating the three complaints filed in this district
12 as well as any subsequently filed related actions.

13 **II. Discussion**

14 The Private Securities Litigation Reform Act of 1995 ("PSLRA") dictates the process for
15 determining lead plaintiff and lead counsel in a securities class action brought under the Exchange Act.
16 15 U.S.C. § 78u-4(a)(3)(B); In re Cavanaugh, 306 F.3d 726, 729 (9th Cir. 2002). The PSLRA requires
17 prompt publication of notice advising class members of the existence of the class action and of their
18 right to move within 60 days of the publication to be appointed lead plaintiff. 15 U.S.C. § 78u-
19 4(a)(3)(A). In this case, on January 16, 2004, the Plaintiff in Eastside Investors, et al. v. Advanced
20 Marketing Services, Inc. et al. posted a notice on the Class Action Newslines (www.primezone.com)
21 advising class members of the existence of the lawsuit and of the time limit for filing a motion to be
22 appointed lead plaintiff.

23 **A. Motion for Appointment as Lead Plaintiff**

24 The standard for appointment of lead plaintiff is established in the PSLRA. That statute
25 mandates that the court "shall appoint as lead plaintiff the member or members of the purported
26 plaintiff class that the court determines to be most capable of adequately representing the interests of
27 class members," referred to as the "most adequate plaintiff." 15 U.S.C. § 78u-4(a)(3)(B)(i). There is
28 a rebuttable presumption that the most adequate plaintiff is "the person or group of persons" that meet

1 the following three requirements:

- 2 1. has either filed the complaint or made a motion in response to a notice;
- 3 2. has, in the determination of the court, the "largest financial interest" in the relief sought by the class; and
- 4 3. otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

5 Id. § 78u-4(a)(3)(B)(iii)(I). The presumption established above may be rebutted "only upon proof by
6 a member of the purported plaintiff class that the presumptively most adequate plaintiff" either 1) "will
7 not fairly and adequately protect the interests of the class," or 2) "is subject to unique defenses that
8 render such plaintiff incapable of adequately representing the class." Id. § 78u-4(a)(3)(B)(iii)(II).

9 1. Procedural Requirements

10 In order to be considered for lead plaintiff status, a proposed lead plaintiff must, within 60 days
11 of published notice of the pendency of the action, move to be appointed lead plaintiff. 15 U.S.C. §
12 78u-4(a)(3)(A). Each prospective plaintiff must provide a sworn certification representing that he or
13 she has read the complaint, did not purchase the security at the direction of counsel or in order to
14 participate in any private action, and is willing to serve as a representative party. Id. § 78u-
15 4(a)(3)(A)(i)-(iii). The sworn certification must set forth "all of the transactions of the plaintiff in the
16 security that is the subject of the complaint during the class period specified in the complaint." Id. §
17 78u-4(a)(2)(A)(iv). Detroit P&F brought its motion within the appropriate time limit and has included
18 the requisite certification.

19 2. Largest Financial Interest

20 The second step under the PSLRA asks which proposed lead plaintiff "has the largest financial
21 interest in the relief sought by the class." Id. § 78u-4(a)(3)(B)(iii)(I). The district court must compare
22 the losses allegedly suffered by the various plaintiffs to determine the financial stakes. Cavanaugh,
23 306 F.3d at 730. In this case, Detroit P&F has reported a loss of \$600,000 during the class period in
24 connection with the retirement fund's purchase of AMS stock. Because Detroit P&F is the only
25 investor seeking appointment as lead plaintiff, Detroit P&F qualifies as the moving investor with the
26 largest financial loss.

27 3. Rule 23 Requirements

28 Although Rule 23 contains four basic requirements (numerosity, commonality, typicality, and
adequacy of representation), a presumptive lead plaintiff need only make a "preliminary showing" of

1 typicality and adequacy. Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1158 (N.D. Cal.
2 1999).

3 ***Adequacy***

4 Adequacy of representation under Rule 23 contains two factors: “1) that the representative
5 party’s attorney be qualified, experienced and generally able to conduct the litigation; and 2) that the
6 suit not be collusive and plaintiff’s interests not be antagonistic to those of the remainder of the class.”

7 In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec. Litig., 122 F.R.D. 251, 257
8 (C.D. Cal. 1998); Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978).

9 In this case, there is no reason to believe that Detroit P&F’s choice of counsel is not qualified
10 or otherwise generally able to conduct this case. Furthermore, there are no allegations and no reason
11 to believe that Detroit P&F has an antagonistic relationship to the remaining class members or that its
12 claim is collusive.

13 ***Typicality***

14 Typicality requires that the plaintiff’s claim is aligned with the claims of the remainder of the
15 class. United Energy, 122 F.R.D. at 256. This factor mandates that the presumptive lead plaintiff’s
16 claim “arise from the same event or course of conduct giving rise to the claims of other class
17 members” and be based on the same legal theory. Id. (citing In re Unioil Sec. Litig., 107 F.R.D. 615,
18 620 (C.D. Cal. 1985)) (“The theory behind this prerequisite is that a plaintiff with typical claims will
19 pursue her own self-interest and advance the interests of class members accordingly.”). In general, the
20 test considers whether other members of the class “have the same or similar injury, whether the action
21 is based on conduct which is not unique to the named plaintiffs, and whether other class members have
22 been injured by the same course of conduct.” Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal.
23 1995).

24 The factual allegations made by Detroit P&F are typical of the class. Like each of the
25 complaints filed against AMS, Detroit P&F alleges that Defendants deliberately mislead investors and
26 caused AMS stock to trade at inflated prices from January 16, 1999 to January 13, 2004 in violation
27 of section 10(b) and section 20(a) of the Exchange Act. Therefore, Detroit P&F has made a
28 preliminary showing of both adequacy and typicality under Rule 23.

1 The final step under the PSLRA allows competing plaintiffs to attempt to rebut the
2 presumptive lead plaintiff's qualifications under Rule 23. Cavanaugh, 306 F.3d at 729; 15 U.S.C. §
3 78u-4(a)(3)(B)(iii)(II); In re Advanced Tissue Scis. Sec. Litig., 184 F.R.D. 346, 350-51 (S.D. Cal.
4 1998). In this case, no party has attempted to rebut the adequacy of Detroit P&F.

5 **B. Motion for Approval of Lead Counsel**


6 Finally, Detroit P&F moves for the approval of its choice of counsel. The PSLRA dictates that
7 the lead plaintiff is to select the lead counsel subject to the court's approval. 15 U.S.C. § 78u-
8 4(a)(3)(B)(v). The court may refuse to approve a lead plaintiff's choice of counsel if it is necessary
9 "to protect the interests of the class." Id. § 78u-4(a)(3)(B)(iii)(II)(aa). In this case, Detroit P&F has
10 selected Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz") as its counsel. Bernstein
11 Litowitz is experienced in securities litigation and the court finds no reason to reject Detroit P&F's
12 selection.

13 **III. Conclusion**

14 In sum, Detroit P&F's motion for appointment as lead plaintiff is **granted** and Detroit P&F's
15 motion for approval of Bernstein Litowitz as lead counsel is **granted**.

16 **IT IS SO ORDERED.**

17 DATED: 5/3, 2004

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19 **JEFFREY T. MILLER**
United States District Judge

20 cc: all parties

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