

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TOPAZ REALTY, et al,)
)
 Plaintiffs,)
) 06 C 1493
 v.)
) Judge George M. Marovich
 NORTHFIELD LABORATORIES, INC.)
 and STEVEN A. GOULD,)
)
 Defendants.)

MEMORANDUM OPINION AND ORDER

This is the second time the Court has been called upon to appoint lead counsel in this (consolidated) securities class action. Before the Court are several plaintiffs' motions 1) for appointment of lead counsel and 2) for approval of class counsel.

I. Background

On June 19, 2006, the Court appointed Jonathan Meyers ("Meyers") as lead plaintiff in this consolidated securities class action and approved his choice of lead counsel. The Court ordered Meyers to file a consolidated complaint on behalf of the class by July 7, 2006. Instead, Meyers moved to withdraw as lead counsel, and the Court granted that motion. At the same time, two other plaintiffs asked to be substituted as lead counsel and filed a consolidated complaint on behalf of the purported class. The Court, concerned that allowing counsel to crown a new lead plaintiff would turn the Private Securities Litigation Reform Act on its head, set an August 16, 2006 deadline for anyone wishing to be lead plaintiff to file a motion for appointment.¹

¹This Court agrees with the analysis of the court in *In re Neopharm, Inc. Securities Litigation*, Case No. 02 C 2976, 2004 WL 742084 (N.D. Ill. April 7, 2004), where the court explained, "merely accepting counsel's suggestion with input from no other potential lead

Several individuals and groups filed on or before the August 16, 2006 deadline motions to be appointed lead plaintiff in the case. Those motions were filed on behalf of: 1) Topaz Realty and Galaxy Electronics Corp.; 2) the Paul H. Shield, M.D. Inc. Money Purchase Plan and the Paul H. Shield, M.D. Inc. Profit Sharing Plan (the “Shield Plans”); 3) Jerry Siver (“Siver”); and 4) Scott and Judith Westly, Karen McFadden and Steven Kroll (the “Westly/McFadden/Kroll Group”).

II. Discussion

A. Appointment of lead plaintiff

The Private Securities Litigation Reform Act of 1995 (“PSLRA”) sets out procedures for selecting a lead plaintiff in private securities litigation. *See* 15 U.S.C. § 78u-4. These provisions

were designed to prevent races to the courthouse by removing any presumption in favor of the first plaintiff (and law firm) to file a securities fraud claim. These provisions were also designed to avoid situations in which a named class representative has a minimal financial stake in the case and acts primarily as a tool of the lawyers who may well have recruited him. The PSLRA was enacted with the explicit hope that institutional investors, who tend to have the largest financial stakes in securities litigation, would step forward to represent the class and exercise effective management and supervision of the class lawyers.

Marwil v. Ent & Imler CPA Group, PC, Case No. 03CV0678, 2005 WL 1115960 at *2 (S.D. Ind. May 9, 2005) (citing 1995 U.S.C.C.A.N. 679, 689-90 & 733-34).

Under the PSLRA, the court:

shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be the *most capable of adequately representing* the interests of class members . . .

plaintiff is contrary to the PSLRA. Instead, allowing potential lead plaintiffs to move for such appointment after withdrawal permits this court to make a reasoned analysis under the PSLRA rather than summarily accept the submissions provided by lead counsel for the former lead plaintiff.” *In re Neopharm*, at *3.

15 U.S.C. § 78u-4(a)(3)(B)(i) (emphasis added). The statute creates a rebuttable presumption 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 under subparagraph (A)(i);

(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.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I) (emphasis added).

As the Court has previously explained, it agrees with other courts that have decided against appointing “artificial” groups of plaintiffs as lead plaintiffs. By artificial groups, the Court means groups that have nothing in common besides their shares in the defendant company and their attorneys. While the PSLRA allows the appointment of groups, the Court agrees that appointment of an artificial group as lead plaintiffs “should be rare under the PSLRA.” *In re Bally Total Fitness Litigation*, Case No. 04C3530, 2005 WL 627960 at * 2 (N.D. Ill. March 15, 2005) (quoting *Sakhrani v. Brightpoint, Inc.*, 78 F. Supp.2d 845 (S.D. Ind. 1999)). There, the court adopted the reasoning outlined in *Sakhrani*, which explained:

the appointment of an artificial group as lead plaintiffs will tend to undermine the goals of the PSLRA . . . [Such appointment creates] powerful incentives for lawyers competing to represent the class to solicit clients and to create misleading forms of notice under the PSLRA that prompt plaintiffs ‘to volunteer’ as lead plaintiffs when they think they are merely providing notice to preserve their claims.

* * *

[S]electing as ‘lead plaintiff’ a large group of investors who have the largest aggregate losses but who have nothing in common with one another beyond their investment is not an appropriate interpretation of the term ‘group’ in the PSLRA. Such an interpretation rewards lawyers who solicit plaintiffs and can produce an unmanageably large group of scores, hundreds, or perhaps even thousands of ‘lead

plaintiffs.’ Such groups could not effectively manage the litigation and oversee class counsel for the benefit of the class.

Bally Total Fitness, 2005 WL 627960 at * 2 (quoting *Sakhranhi*, 78 F. Supp.2d 845). This Court agrees.

In this case, two of the three proposed groups have provided the Court information that makes clear that the members have some independent connection (beyond their counsel) that will allow them, as a group, to make decisions for the class and supervise class counsel. For example, the Shield Plans are two benefit plans controlled by the same individual, Paul Shield. Similarly, Topaz Realty and Galaxy Electronics Corp. have shown that they are a proper group because they are both owned by David Rosenfeld, who serves as President of each company. The third group, the Westly/McFadden/Kroll Group, however, has not given the Court any reason to think its members have a link beyond their counsel. Accordingly, the Court will consider the members of the Westly/McFadden/Kroll Group separately.

When comparing the potential lead plaintiffs, the Court first considers each individual’s financial interest. The statute does not state (and the Seventh Circuit has not said) how courts should measure a potential lead plaintiff’s “financial interest” for purposes of the PSLRA. Different courts have tried different methods, but this Court thinks the best method is to look at the number of shares an individual held on the day the market learned of the alleged fraud, rather than to look at the individuals’ asserted paper losses. The prices of stocks rise and fall daily for many reasons unrelated to an alleged fraud. Some of the individuals have large purported paper losses because they bought shares years ago, when the stock traded at higher prices. Given that many of those same individuals suffered large paper losses *before* the market learned about the

alleged fraud and that much of those losses are likely attributable to factors *other* than the alleged fraud, it seems unwise to measure financial interest based on paper loss alone. Other individuals sold some of their shares before the market learned of the alleged fraud, which suggests that, with respect to those shares, they may have actually benefitted from the alleged fraud. Accordingly, the Court will look at the number of shares each individual owned as of the date the market learned of the alleged fraud in determining who has the largest financial interest.

By this standard, the Shield Plans, which held 9,300 shares on the date the market learned of the alleged fraud, has the largest financial interest.² In determining who is presumptively the most adequate plaintiff, the Court must also consider whether the Shield Plans would “otherwise satisf[y] the requirements of Rule 23”. At this point, the Court has no reason to think the Shield Plans faces any unique defenses or would otherwise fail to meet the adequacy and typicality requirements of Rule 23. Thus, the Court concludes that, based on the statutory factors, the Shield Plans, with the largest financial interest, is presumptively the most-adequate group of plaintiffs. The Shield Plans are hereby appointed as lead plaintiffs in this matter.

B. Approval of class counsel

The PSLRA provides that the most adequate plaintiff “shall, subject to the approval of the court, select and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). The decision to approve class counsel is within the discretion of the district court. *Johnson v. Tellabs, Inc.*, 214 F.R.D. 225, 229 (N.D. Ill. 2002).

²Siver held 1,000 shares. Scott and Judith Westly held 100 shares. Karen McFadden held 100 shares. Steven Kroll held 500 shares. Topaz Realty and Galaxy Electronics held no shares but bought puts and calls (options to buy and sell shares) with a claimed net loss of \$3,480. By any measure, the financial interest of these other plaintiffs is smaller than that of the Shield Plans.

The Shields Plans have selected the Rosen Law Firm, P.A. of New York as lead counsel and Pomerantz, Haudek, Block, Grossman & Gross LLP of Chicago as liaison counsel.

Although these firms have not provided the Court with information on 1) how the firms plan to staff the case; or 2) the fee agreement reached between the Shield Plans and the firms, the Court approves the selection of counsel. The Court notes that it takes seriously its role in reviewing the reasonableness of proposed fee awards and will not hesitate to reject an unreasonable proposal, should an award of fees be necessary in this case. *See* 15 U.S.C. § 78u-4(a)(6).

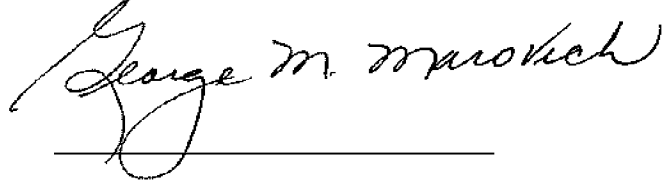
III. Conclusion

For the reasons set forth above, the Court denies the motions (61, 65, 68) filed on behalf of plaintiffs: 1) Topaz Realty and Galaxy Electronics Corp.; 2) Jerry Siver; and 3) Scott and Judith Westly, Karen McFadden and Steven Kroll. The Court grants the Shield Plans' motion (63) for appointment as lead counsel.

Plaintiffs the Paul H. Shield, M.D. Inc. Money Purchase Plan and the Paul H. Shield, M.D. Inc. Profit Sharing Plan are hereby appointed the lead plaintiffs in this case. The Court approves their choice of counsel. Lead plaintiffs are required to file by September 8, 2006 a consolidated class action complaint in 06-CV-1493 under the caption *In re Northfield Laboratories, Inc. Securities Litigation*. Defendants are granted until October 13, 2006 to answer or otherwise plead. This case is set for a status hearing on October 18, 2006 at 11:00 a.m.

The amended complaint filed on July 17, 2006 by Topaz Realty and Galaxy Electronics Inc. is hereby stricken.

ENTER:

A handwritten signature in cursive script that reads "George M. Marovich". The signature is written in black ink and is positioned above a horizontal line.

George M. Marovich
United States District Judge

DATED:08/24/06