

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 06-61844-CIV-MARRA

GEORGE DURGIN, individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

TOUSA, INC.,
ANTONIO P. MON, DAVID J. KELLER
and RANDY L. KOTLER,

Defendants.

OPINION AND ORDER

This cause is before the Court upon Plaintiff Agnes Jutkowitz's ("Jutkowitz") Motion for Appointment of Lead Plaintiff and Approval of Lead Counsel [DE 10]; Plaintiff Communications Workers of America's ("Communications Workers") Motion for Appointment as Lead Plaintiff and for Approval of its Selection of Lead Counsel [DE 13]; Plaintiff Central Laborers' Pension Fund's ("Central Laborers") Motion for Appointment as Lead Plaintiff and for Approval of Selection of Lead Counsel [DE 15]; Plaintiff Diamondback Capital Management, L.L.C.'s ("Diamondback") Motion for Appointment as Lead Plaintiff and Approval of its Selection of Lead and Liaison Counsel [DE 18] and Plaintiff Bricklayers & Trowel Trades International Pension Fund ("Bricklayers") for Appointment of Lead Plaintiff and Approval of its Choice of Lead Counsel [DE 20]. The Court held oral argument on March 30, 2007 and is otherwise fully advised in the premises.

Plaintiffs bring this action on behalf of all persons or entities who purchased the securities

of Defendant Touse, Inc. (“Touse”) during the period of August 1, 2005 through and including November 6, 2006. Plaintiffs allege violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 against Defendants Touse, Antonio P. Mon, David J. Keller and Randy L. Kotler. The Private Securities Litigation Reform Act of 1995 (the “PSLRA”), 15 U.S.C. § 78u-4, requires the Court to address consolidation before considering motions for the appointment of lead plaintiff and counsel. Under the PSLRA, a court should not make a determination regarding lead plaintiff until after the motion to consolidate is resolved. Once resolved, courts are instructed to appoint lead plaintiff and counsel “as soon as practicable.” 15 U.S.C. § 78u-4(a)(3)(B)(ii). On March 30, 2007, the Court consolidated the various lawsuits into one lead case, no. 06-CV-61844-Marra [DE 58].

Congress enacted the PSLRA to remedy perceived abuses in securities class action litigation. See Vincelli v. National Home Health Care Corp., 112 F. Supp. 2d 1309, 1313 (M.D. Fla. 2000); In re Party City Securities Litigation, 189 F.R.D. 91, 103 (D.N.J. 1999). “The purpose behind the PSLRA is to ‘empower investors so that [the investors], not their lawyers, control private securities litigation by allowing the Court to ensure the transfer of primary control of private securities litigation from lawyers to investors.’” See Vincelli, 112 F. Supp. 2d at 1313 citing In re Party City Securities Litigation, 189 F.R.D. at 103; Chill v. Green Tree Financial Corp., 181 F.R.D. 398, 407 (D. Minn.1998). To that end, the PSLRA seeks to encourage potential plaintiffs who are the most representative of the class as a whole. Vincelli, 112 F. Supp. 2d at 1313. It meets that goal by requiring a plaintiff, seeking to represent a class, to publish a notice in a widely circulated national business oriented publication and, once published, provides for that plaintiff to move for status of lead plaintiff no later than 60 days after the publishing of

the notice.¹ Id. citing 15 U.S.C. § 78u-4(a)(3)(A)(I).

Once accomplished, the Court must select the most adequate plaintiff. There is a rebuttable presumption that the person or entity with the largest financial interest is the most adequate plaintiff. 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I); see Newman v. Eagle Bldg. Tech., 209 F.R.D. 499, 502 (S.D. Fla. 2002) (“the most important factor in determining the lead plaintiff is the amount of financial interest claimed”). This presumption may be rebutted by a showing that a selected plaintiff will not fairly and adequately protect the interest of the class or that unique defenses would render the selected plaintiff incapable of adequately representing the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). The selection of a lead plaintiff is a question of fact for the Court. Vincelli, 112 F. Supp. 2d at 1314. Once the most adequate plaintiff is selected, the Court must consider whether to approve counsel selected by the lead plaintiff, and that decision also rests within the discretion of the court. 15 U.S.C. § 78u-4(a)(3)(B)(v); Vincelli, 112 F. Supp. 2d at 1315.

Several parties have moved for status as lead plaintiff. The Central Laborers and the Communications Workers seek appointment as co-lead plaintiffs and approval of one firm as sole lead counsel. (DE 30 at 2.) These entities claim a combined total loss of \$429,192.00, which includes a loss by Communications Workers of \$125,089.00 and a loss by Central Laborers of \$304,103.05. (DE 16 at 6; DE 30 at 2.) Diamondback claims a loss of \$1,281,160.00 (DE 43 at 2) and Bricklayers claims a loss of \$387,568.00² (DE 27 at 4). Jutkowitz’s claimed

¹ The parties have not raised any issue with respect to compliance with these rules.

² There is some debate concerning the proper method to calculate the various losses. The Court need not address this point because none of the parties dispute that Diamondback suffered the greatest monetary loss.

loss is \$4,112.00. (DE 11 at 7.) The Court will now address the parties' arguments regarding appointment of lead plaintiff and lead counsel.

A) Jutkowitz

Jutkowitz was the first Plaintiff to seek lead plaintiff status. In support of her position, Jutkowitz asserted that her claim shared "similar questions of law and facts with the members of the class," regarding Defendants' public dissemination of a series of "false and misleading statements." (DE 11 at 8.) In that initial motion, Jutkowitz observed that there is a "close alignment of interests between Movant and other class members." (DE 11 at 8.) Nonetheless, once other institutional plaintiffs came forward with larger losses, Jutkowitz sought appointment as lead plaintiff for a class of option holders and argued that she has the "largest financial interest of any of the movants for appointment as lead plaintiff of an options class." (DE 29 at 2.) Jutkowitz asserts that separate counsel is warranted based on "unique issues" that may be raised against option holders. (DE 29 at 4; DE 40 at 5.) Lastly, Jutkowitz points to Chill v. Green Tree Fin. Corp. for the position that "some courts have found that unique issues may be raised by attacking the Section 10(b) claims of option holders, which warrant separate counsel" (DE 29 at 4). Chill, 181 F.R.D. at 414.

At this point in the litigation, the Court concludes that it is unnecessary to have separate lead plaintiffs to represent the option holders as well as the stock holders. Initially, Jutkowitz acknowledged that there were similar issues of law and fact with respect to the alleged dissemination of false and misleading statements, and at this early stage in the litigation, the Court finds this remains true. Moreover, although Jutkowitz states that "unique issues" relating to option holders now require separate lead counsel, she fails to identify a specific, unique issue

present in this case. Of course, the Court may, at a later date, exercise its discretion to order certification of sub-classes. See Constance Sczesny Trust v. KPMG LLP, 223 F.R.D. 319, 325 (S.D.N.Y. 2004) (finding that the interests of option investors and shareholders are not “sufficiently differentiated to require the appointment of a ‘niche’ lead plaintiff”). Thus, the Court denies without prejudice Jutkowitz’s Motion for Appointment of Lead Plaintiff and Approval of Lead Counsel.

B) Central Laborers and Communications Workers

The Court rejects the joint application of Central Laborers and Communications Workers for lead Plaintiff and lead counsel status. Both parties initially sought appointment independently. At a later date, these entities informed the Court that their joint losses were second only to Diamondback’s losses and that the appointment of Diamondback as lead plaintiff and lead counsel would detract from an effective litigation of this case. (DE 55 at 4.) With respect to Bricklayers, Central Laborers and Communications Workers point out that their joint loss exceeds Bricklayers’ loss and criticize Bricklayers for filing an incorrect certification regarding its involvement in another securities case.³ (DE 30 at 2.)

It is clear to the Court that Central Laborers and Communications Workers joined forces for the sole purpose of defeating Bricklayers’ claim that it sustained the greatest loss. In re MicroStrategy Inc. Securities Litigation, 110 F. Supp. 2d 427, 437 (E.D. Va. 2000) (denying lead plaintiff status to a group of plaintiffs who combined solely for the purpose of obtaining the role of lead plaintiff); see also Roth v. Knight Trading Group, Inc., 228 F. Supp. 2d 524, 530-31

³ The Court will address Central Laborers and Communications Workers’ argument against Diamondback infra.

(D.N.J. 2002) (no need to appoint more than one party lead plaintiff status). To reward such action would be contrary to one of the purposes of the PSLRA, which is to prevent lawyer-driven litigation. See In re XM Satellite Radio Holdings Sec. Litig., 237 F.R.D. 13, 19-20 (D.D.C. 2006); Maiden v. Merge Techns., Inc., Lead No. Civ. 06-C-349 (RTR), 2006 WL 3404777, at * 3 (E.D. Wisc. Nov. 21, 2006). Thus, the Court will not consider joint losses in a determination of lead plaintiff. Central Laborers and Communications Workers' remaining argument can be easily dismissed as well. Bricklayers' administrative oversight in failing to disclose one securities case is hardly grounds to reject Bricklayers' application to serve as lead plaintiff and lead counsel. For these reasons, the Court denies the application of Central Laborers and Communications Workers to serve as lead plaintiff and lead counsel.

C. Bricklayers and Diamondback

Bricklayers seeks status as lead plaintiff and lead counsel. In support, Bricklayers points out that the PSLRA intended to encourage institutional investors, especially pension funds, to serve as lead plaintiff. (DE 27 at 13.) See, e.g., In re Cardinal Health, Inc. Securities Litigation, 226 F.R.D. 298, 309 (S.D. Ohio 2005); In re Vicuron Pharms., Inc., 225 F.R.D. 508, 511 (E.D. Pa. 2004) citing H.R. Conf. Rep. No. 104-369, 1995 U.S.C.C.A.N. 730, 733. Moreover, Bricklayers notes that it has sustained the largest loss compared with other institutional investors and claims to be the most typical and adequate representative of the class. Bricklayers does, however, acknowledge that Diamondback's loss is greater than its own loss. (DE 27 at 7.) Given that it is undisputed that Diamondback has suffered the largest loss, Diamondback is the presumptive lead plaintiff and Bricklayers, along with the other plaintiffs, must demonstrate that Diamondback is an atypical and inadequate party.

In this regard, Diamondback asserts that it has satisfied the requirements necessary to be appointed lead plaintiff and lead counsel under the PSLRA. In support, Diamondback argues that it suffered the largest financial loss, it is a typical and adequate lead plaintiff, it is authorized to bring suit to recover for investment losses and it is a sophisticated institutional investor. (DE 18 at 7-8; DE 28 at 5-6; DE 43 at 3, 7.) Nonetheless, the other plaintiffs challenge the appointment of Diamondback. These parties argue that Diamondback is a hedge fund, thereby making it subject to unique defenses. (DE 27 at 10-11; DE 30 at 8-9.) Moreover, they claim that Diamondback has not proven its authority to litigate this action on behalf of its clients. (DE 27 at 11; DE 41 at 6.) The parties criticize the principals of Diamondback for their alleged non-traditional and atypical investment strategies and claim that discovery is needed to explore whether Diamondback was in possession of non-public information when it purchased Tousea stock. (DE 30 at 9-10.) The parties also oppose appointment of Diamondback because it allegedly failed to disclose properly all of its trading records and because it employs a portfolio manager who formerly worked for one of Tousea's lead underwriters. (DE 30 at 1.)

The Court turns first to the argument that hedge funds, such as Diamondback, engage in unique trading strategies and thereby may be characterized as an atypical investor for purposes of a PSLRA class action. Other courts have declined to appoint hedge funds on the basis that the hedge fund at issue was not the most adequate plaintiff. See, e.g., In re Cardinal Health, 226 F.R.D. at 311 (preferring pension funds to investing firms with "complex corporate structure"); In re MicroStrategy Inc. Securities Litigation, 110 F. Supp. 2d at 437 (rejecting lead plaintiff status for an atypical institutional investor who engages in transactions far beyond the scope of a typical investor); In re Bank One Shareholder Class Actions, 96 F. Supp. 2d 780, 783-83 (N.D.

Ill. 2000) (hedge fund found to be inadequate lead plaintiff based on unusual trading pattern of extensive daytrading and on the fact the hedge fund was not a buyer for its own account). Other courts have found differently. See, e.g., In re Able Laboratories Securities Litigation, 425 F. Supp. 2d 562, 571-72 (D.N.J. 2006) (investor advisor named as lead plaintiff because investor demonstrated that it had complete investment authority over its trades and is agent and attorney-in-fact with full power and authority to act in connection with its investments); Olson v. New York Community Bancorp, Inc., 233 F.R.D. 101, 107 (E.D.N.Y. 2005) (same); Roth, 228 F. Supp. 2d at 529-30 (same). Typically, courts that have rejected hedge funds as lead plaintiffs base their decision on record evidence. For example, in Bank One, that court noted several particularities of its trading pattern that made the hedge fund an inadequate lead plaintiff. In Re Bank One, 96 F. Supp. 2d at 783-84. The court in Microstrategy Inc. rejected the hedge fund as lead plaintiff because the hedge fund provided “conclusory” and “indecipherable” evidence regarding its losses. In re Microstrategy Inc., 110 F. Supp. 2d at 436-37.

Here, the parties argue that “Diamondback likely did more than just purchase stock” and “likely purchased or sold options or some other type of [Tousa] security in order to ‘hedge’ against its investment in [Tousa] common stock.” (DE 30 at 6.) (emphasis added.) Additionally, the parties state that one of the principals of Diamondback is headed by an individual “well-known for employing numerous non-traditional and atypical investment strategies.” (DE 30 at 6.) Moreover, the parties claim that “there is reason to believe that Diamondback may have been in possession of non-public information when it made its purchases of [Tousa] stock.” (DE 30 at 10.) (emphasis added) Lastly, the parties claim that Diamondback has not been forthright, and urges the Court to find that Diamondback is an “unregulated,” “off shore entit[y] with [a]

secretive structure[]” that is “ill-suited” to be a lead plaintiff and is similar to other hedge funds that are “notorious for pulling out of securities class actions at a later stage of the litigation.” (DE 41 at 12.) These arguments, however, are entirely speculative. Without record evidence, these allegations cannot rebut the presumption in favor of Diamondback.⁴

Lastly, the parties charge that the failure of Diamondback to “prove[] its authority to litigate this action on behalf of its clients” and “provide evidence for their attorney-in-fact status” renders it ineligible for lead plaintiff status. (DE 27 at 5.) Indeed, Bricklayers states that a lead plaintiff candidate must state that it has authority to institute suit and litigate on behalf of its clients. See, e.g., In re Adelpia Communications Corp. Securities and Derivative Litigation, No. 03 MD 1529 (LMM), 03 Civ 5752, 03 Civ. 5753, 2005 WL 2087811, * 2 (S.D.N.Y. Aug. 30, 2005) (“standing exists where an investment advisor has both complete investment authority and is the attorney-in-fact for its clients”); In re Peregrine Systems, Inc. Securities Litigation, No. Civ. 02 CV 870-J (RBB), 2002 WL 32769239, * 14-15 (S.D. Cal. Oct. 5, 2002) (entity must state that it has authority to institute suit and litigate on behalf of its clients.) To address that concern, Diamondback provides a certification that its Chief Administrative and Compliance Officer is authorized to bring suit to recover investment losses and is the agent with full power and authority to bring suit. (DE 43-2.) Despite that representation, Bricklayers challenges Diamondback’s standing, claiming it is inadequate for Diamondback to rely on its certification to prove standing, as opposed to evidence, for its “attorney-in-fact status.” (DE 41 at 4.) The

⁴ Nor should the Court permit discovery on the adequacy of Diamondback as lead plaintiff. There has no been showing of a reasonable basis for finding that Diamondback cannot adequately represent the class. See Piven v. Sykes Enterprises, Inc., 137 F. Supp. 2d 1295, 1301-02 (M.D. Fla. 2000).

Court disagrees. Diamondback has provided sufficient evidence that demonstrates it is vested with authority to pursue this action and the Court does not find that additional discovery is needed on this point. Finally, with respect to lead counsel, the Court finds that the attorneys representing Diamondback are qualified to pursue this action as lead counsel.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

- 1) Jutkowitz's Motion for Appointment of Lead Plaintiff and Approval of Lead Counsel [DE 10] is **DENIED WITHOUT PREJUDICE**.
- 2) Communications Worker's Motion for Appointment as Lead Plaintiff and for Approval of its Selection of Lead Counsel [DE 13] is **DENIED**.
- 3) Central Laborers' Motion for Appointment as Lead Plaintiff and for Approval of Selection of Lead Counsel [DE 15] is **DENIED**.
- 4) Diamondback's Motion for Appointment as Lead Plaintiff and Approval of its Selection of Lead and Liaison Counsel [DE 18] is **GRANTED**.
- 5) Bricklayers' Motion for Appointment of Lead Plaintiff and Approval of its Choice of Lead Counsel [DE 20] is **DENIED**.

DONE and ORDERED at West Palm Beach, Palm Beach County, Florida this 6th day of September 2007.



KENNETH A. MARRA
United States District Judge

copies to:

All counsel of record