

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF PONTIAC GENERAL
EMPLOYEES' RETIREMENT SYSTEM,
On Behalf of Itself and All Others Similarly
Situated,

Plaintiff,

v.

Case No. 1:10-CV-520

STRYKER CORPORATION, STEPHEN P.
MACMILLAN and DEAN H. BERGY,

HON. GORDON J. QUIST

Defendants.

MEMORANDUM ORDER

This putative class action alleging violations under the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and Securities and Exchange Commission Rule 10b-5 was transferred to this Court from the United States District Court for the Southern District of New York on June 2, 2010. Prior the transfer, two competing motions for appointment as lead plaintiff and approval of selection of lead counsel were filed, by the New Jersey Building Laborers Pension and Annuity Funds ("Laborers Fund") and by Alaska Electrical Pension Fund, Genesee County Employees' Retirement System, and State-Boston Retirement System (the "Pension Funds"). Defendants filed a response to both motions. For the reasons set forth below, the Court will grant the Pension Funds' motion.¹

Pursuant to the PSLRA, the district court "shall appoint as lead plaintiff the member or

¹The Court's resolution of this motion was delayed, in part, due to outstanding issues pertaining to admission of Plaintiffs' counsel in this district.

members of the purported plaintiff class that the court determines to be most capable of adequately representing the interest of class members.” 15 U.S.C. § 78u-4(a)(3)(B)(i). A rebuttable presumption is created that, of the plaintiffs who either filed the complaint or made a motion to be appointed as the lead plaintiff, “the most adequate plaintiff” is the plaintiff who “has the largest financial interest in the relief sought by the class” and who “otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. § 78u-4(a)(3)(B)(iii). The focus on the plaintiff with the largest financial interests reflects “a clear congressional preference for institutional investors to serve as lead plaintiffs.” *City of Marysville Gen. Emps Ret. Sys. v. Nighthawk Radiology Holdings, Inc.*, No. CV 09-659-EJL-CWD, 2010 WL 2000040, at *6 (D. Idaho May 19, 2010) (citing *In re Fannie Mae Sec. Litig.*, 344 F. Supp. 2d 261, 264 (D.D.C. 2005)).

The Pension Funds’ certifications disclose that they incurred a combined loss of \$1,651,399.94, comprised of \$874,172.35 for Alaska Electrical Pension Fund, \$526,586.71 for State-Boston Retirement System, and \$250,580.88 for Genesee County Employees’ Retirement System. (Rosenfeld Decl. Ex. B.) The Laborers Fund’s certification shows a loss of \$266,514.98 (Rado Decl. Ex. B.) In its reply, the Laborer’s Fund concedes that the Pension Funds group has the largest financial loss and is therefore the most adequate plaintiff based upon that factor.

In addition to having the largest financial loss, the Pension Funds must satisfy the requirements of Rule 23. This determination examines the typicality and adequacy requirements of Rule 23. 15 U.S.C. § 78u-4(a)(3)(B)((iii)(II); *Baughman v. Pall Corp.*, 250 F.R.D. 121, 126 (E.D.N.Y. 2008). The “typicality” requirement is satisfied if the proposed class representative’s claim arises from the same course of events, and its legal arguments are based on the same legal theory, as those of other class members. *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). *See also Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir. 2004)

(to meet the typicality requirement, “plaintiffs must show that their injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong done to the plaintiff” (internal quotations omitted)). The adequacy requirement is that “the representative parties will fairly and adequately protect the interest of the class.” Fed. R. Civ. P. 23(a)(4). “The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. [A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26, 117 S. Ct. 2231, 2251-52 (1997) (internal quotation marks and citations omitted).

The Pension Funds meet both Rule 23 requirements. First, the Pension Funds’ claims are typical of those of the class members because they purchased Stryker common stock during the class period, between January 25, 2007, and November 13, 2008; they allege that they were injured by Defendants’ false and misleading statements; and as a result they suffered damages. Thus, the Pension Funds’ claims align with those of the class. Second the Pension Funds satisfy the adequacy requirement. There is no indication that the Pension Funds have a conflict of interest with, or are antagonistic to, the class members or will not otherwise advance the interests of the class. In addition, the Pension Funds, being institutional investors with substantial interests, experience, and resources, are the type of investor Congress envisioned as appropriate lead plaintiffs in securities class action cases. Because no class member has offered evidence to rebut the presumption under 15 U.S.C. § 78u-4(a)(3)(B)(iii), the Court concludes that the Pension Funds are most appropriate to serve as lead plaintiffs.

The Court also finds that the Pension Funds have retained experienced and competent counsel to represent the class in this case. The Pension Funds have retained members of the firms of Robbins Geller Rudman & Dowd LLP and Labaton Sucharow LLP to serve as lead counsel for

the class. The firms and counsel have substantial experience in prosecuting securities class actions. Moreover, the Court finds it appropriate to appoint counsel from two law firms to serve as lead counsel in a class action securities case such as this. The Court assumes that counsel will not duplicate their efforts, and the Court will look for duplication if this becomes an issue.

Defendants raise two arguments in their response. First, they suggest that the Pension Plans should be barred from serving under the restriction on professional plaintiffs, which provides: “Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.” 15 U.S.C. § 78u-4(a)(3)(vi). Defendants argue that all three members of the Pension Fund group served as lead plaintiffs during the relevant 3-year period in more than five securities cases. The Pension funds dispute this assertion, arguing that Alaska Electrical Pension Fund has served as lead plaintiff in only two federal securities actions and Genesee County Employees’ Retirement System has served as lead plaintiff in only three federal securities actions. They do concede, however, that State-Boston Retirement System has been appointed as lead plaintiff in nine federal securities actions during the relevant time period. Even so, the Court will exercise its discretion not to apply the professional plaintiff provision to the Pension Funds because courts have routinely concluded that this provision should not be strictly applied to institutional investors. “[A]s many courts have noted, the provision of the PSLRA restricting the use of professional plaintiffs was largely directed at private individuals, and courts have routinely waived the restriction in the case of qualified institutional investors.” *Iron Workers Local No. 25 Pension Fund v. Credit-based Asset Servicing & Securitization, LLC*, 616 F. Supp. 2d 461, (S.D.N.Y. 2009) (footnote omitted) (collecting cases). See also *In re Herley Indus. Inc. Sec.*

Litig., No. 06-2596, 2010 WL 176869, at *4 n.4 (E.D. Pa. Jan. 15, 2010) (stating that “applying [the professional plaintiff] provision harshly against institutional investors would run counter to the purposes of the PSLRA [because] [i]n drafting the PSLRA, Congress sought to encourage greater involvement of institutional investors in securities class actions”).

Defendants also argue that instead of appointing all three Pension Fund movants as the lead plaintiff, the Court should pick only one, as the Pension Plans have not justified why more than one movant is necessary. Although some courts have declined to appoint groups of class members as lead plaintiffs, Defendants cite no reason why allowing the Pension Funds group to serve as lead plaintiff would be contrary to the purposes of the PSLRA, especially when the PSLRA recognizes that a “group of persons” may be the most adequate plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii). Moreover, many courts have approved groups of institutional investors as a lead plaintiff. *See, e.g., City of Monroe Emps. Ret. Sys. v. Hartford Fin. Servs. Group, Inc.*, 269 F.R.D. 291, 294 (S.D.N.Y. 2010) (stating that “the only grouping at issue here is the pairing of . . . two institutional investors of the type that the drafters of the PSLRA sought to encourage be appointed as lead counsel”); *Gen. Ret. Sys. of the City of Detroit v. Wells Fargo Mortg. Backed Secs. 2006-AR18 Trust*, Nos. C 09-1376 SI, C 09-1620 SI, 2009 WL 2137094, at *8 (N.D. Cal. July 16, 1999) (granting motion by group of public employee retirement funds to serve as lead counsel). Finally, given the amounts of the losses claimed by Alaska Electrical Pension Fund and State-Boston Retirement System, either of which alone would be greater than the loss claimed by the Laborers Fund, there is no issue in this case regarding the propriety of aggregating funds by a proposed lead plaintiff group for purposes of claiming the largest financial loss. Therefore,

IT IS HEREBY ORDERED that the Motion Of The Pension Funds For Appointment As Lead Plaintiffs And Approval Of Selection Of Lead Counsel (docket no. 17) is **GRANTED**.

IT IS FURTHER ORDERED that the Pension Funds are hereby appointed Lead Plaintiffs for the Class pursuant to Section 21D of the Securities Exchange Act of 1934, and Samuel H. Rudman and David A. Rosenfeld of Robbins Geller Rudman & Dowd LLP and Christopher J. Keller and Alan I. Ellman of Labaton Sucharow LLP are hereby appointed Lead Counsel.

IT IS FURTHER ORDERED that the Motion Of The New Jersey Building Laborers Pension And Annuity Funds For Appointment As Lead Plaintiff And Approval Of Selection Of Lead Counsel (docket no. 20) is **DENIED**.

IT IS FURTHER ORDERED that pursuant to the parties' stipulation entered on March 1, 2010, the Pension Funds shall serve and file a Consolidated Amended Complaint within **sixty (60) days** of this Order, and Defendants shall answer or move to dismiss the Consolidated Amended Complaint within **sixty (60) days** of service of the Consolidated Amended Complaint.

Dated: January 3, 2011

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE