UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.	:	Civil Action No. 1:12-cv-4202-NRB

SCOTT CRIST'S OPPOSITION TO THE BLANCK INVESTOR GROUP'S MOTION FOR APPOINTMENT AS LEAD PLAINTIFF AND FOR APPROVAL OF LEAD COUNSEL

INTRODUCTION

Presently pending before the Court are two competing motions, filed by Scott Crist ("Crist") and the Blanck Investor Group (the "Blanck Group"), seeking appointment as Lead Plaintiff in the above-captioned securities class action (the "Action"). The Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4 *et seq*., sets forth the procedural and substantive requirements that govern the appointment of a Lead Plaintiff under such circumstances. While both parties seeking appointment as Lead Plaintiff timely filed their respective motions, purport to have a large financial interest in the relief sought and meet the typicality requirement, only Crist satisfies the adequacy requirement for serving as a proposed class representative. Conversely, the Blanck Group is inadequate to serve as Lead Plaintiff because it has selected counsel that has engaged in lawyer driven litigation and has failed to demonstrate that it possesses the necessary experience and resources to zealously advocate on behalf of the class. Therefore, for the reasons explained more fully below, Crist respectfully requests that the Court grant his motion to be appointed Lead Plaintiff and approve his selection of Faruqi & Faruqi, LLP (the "Faruqi Firm") as Lead Counsel.

ARGUMENT

I. THE BLANCK GROUP WILL NOT ADEQUATELY REPRESENT THE CLASS

The PSLRA provides that the Court shall presume that the most adequate plaintiff in any private action arising under the PSLRA is the person or group of persons that (1) has timely filed; (2) has the largest financial interest in the relief sought by the class; and (3) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii). However, the PSLRA further provides that the presumption is rebuttable upon proof that the presumed most adequate plaintiff "will not fairly and adequately protect the

interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). Additionally, under Fed. R. Civ. P. 23(g), a court will consider factors such as (1) counsel's experience in handling class actions, other complex litigation and the types of claims asserted in the action; (2) counsel's knowledge of the applicable law; (3) the resources that counsel will commit to representing the class; and (4) any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. Here, the Blanck Group is not appropriate to serve as Lead Plaintiff because it has selected inadequate counsel that (1) has engaged in lawyer-driven litigation; (2) has insufficient resources and limited experience in securities fraud cases; and (3) has padded the firm resume it submitted to the Court.

A. The Blanck Group is Inadequate to Represent the Class Because They Have Selected Counsel That is Engaged in Lawyer-Driven Litigation

Congress enacted the PSLRA, in part, to restrain lawyer-driven securities litigation. *See Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC*, 616 F. Supp. 2d 461, 463 (S.D.N.Y. 2009) (noting that the PSLRA intended to curtail lawsuits initiated and controlled by lawyers seeking potential fees rather than to benefit shareholders). In *In re Doral Fin. Corp. Sec. Litig.*, 414 F. Supp. 2d 398, 401 (S.D.N.Y. 2006), the court held that "[o]ne of the principal legislative purposes of the PSLRA was to prevent lawyer-driven litigation."

The proposed arrangement between the Blanck Group and its selected counsel, Gainey & McKenna, expressly contemplates lawyer-driven litigation and thus is in direct conflict with one of the principal purposes of the PSLRA. Here, the certifications of members of the Blanck Group state that movants retained the firm Gainey & McKenna as well as any "such co-counsel ***it*** deems appropriate to associate with." *See* Declaration of Thomas J. McKenna (McKenna

Decl.), ECF No. 7, Ex. A (emphasis added).[1] Such certifications evidence that the Blanck Group will not adequately supervise or oversee Gainey & McKenna or firms chosen by it. Quite simply, the Blanck Group appears ready to deliver to Gainey & McKenna free reign to choose, at its own discretion, co-counsel with whom to associate, without any review or evaluation. Moreover, this is not merely a speculative concern as Gainey & McKenna has apparently already selected co-counsel that has not been disclosed to the Court – and presumably the Blanck Group itself.

Namely, in each of the two cases in which Gainey & McKenna was recently appointed lead counsel in securities fraud class actions, the Egleston Law Firm, which lists the same address as Gainey & McKenna, was listed as counsel in the initially filed complaint. Ex. A,[2] Initial Class Action Complaint in *Jason v. Junfeng Chen*, No. 12-cv-1041 (S.D.N.Y.), at 24; Ex. B, Initial Class Action Complaint in *Hanson v. Frazer Frost, LLP*, No. at 12-cv-3166 (S.D.N.Y.), at 43-44. However, when it came time for Gainey & McKenna to file motions for appointment as lead counsel, the Egleston Law Firm disappeared from the stage. Ex. C, Lead Plaintiff's Motion For Appointment As Lead Plaintiff in *Jason v. Junfeng Chen*, No. 12-cv-1041 (S.D.N.Y.), at 1-2; Ex. D, Lead Plaintiff's Motion For Appointment As Lead Plaintiff in *Hanson v. Frazer Frost, LLP*, No. at 12-cv-3166 (S.D.N.Y), at 1-2. The same pattern continues in this case. Further, while Gregory Egleston has consistently been listed in filings and press releases as a member of his own firm, the Egleston Law Firm, on June 26, 2012, in the recently filed consolidated and amended complaint in *Hanson v. Frazer Frost, LLP*, No. 12-cv-03166 (S.D.N.Y.), Egleston is listed as "Of Counsel" to Gainey & McKenna. *See* Ex. E, Consolidated

[1] All ECF references are to the *Casper v. Jinan et al.* Docket, 1:12-cv-04202-NRB, unless otherwise noted.

[2] All exhibit references are to the exhibits annexed to the Declaration of Richard W. Gonnello (Gonnello Decl.) submitted herewith, unless otherwise indicated.

Class Action Complaint in *Hanson v. Frazer Frost, LLP*, at 51. While Egleston is listed as "Of Counsel" to Gainey & McKenna in that case, his email address is still the one associated with his eponymous law firm. *Id.* Moreover, as recently as June 4, 2012, Gainey & McKenna and the Egleston Law Firm announced, as separate law firms, the filing of the initial class action complaint in this Action. *See* Ex. F, Gainey & McKenna Press Release; *see also* McKenna Decl., Ex. C. Thus, although the precise relationship between the two firms is difficult to ascertain, the record raises substantial concerns about whether the Blanck Group is even aware of the presence and the involvement of the Egleston Law Firm in this case. As a result, the Blanck Group is inadequate to serve as lead plaintiff because it has selected counsel that had engaged in lawyer-driven litigation.

B. The Blanck Group's Counsel Lacks the Necessary Experience and Resources to Adequately Represent the Class

The Blanck Group has failed to demonstrate that its counsel, Gainey & McKenna, possesses the necessary experience and resources to represent the class adequately. Adequate representation is determined not only by the adequacy and typicality of the plaintiff, but also the adequacy of the counsel retained to represent the plaintiff. *See In re Gen. Elec. Sec. Litig.*, No. 09 Civ. 1951 (DC), 2009 U.S. Dist. LEXIS 69133, at *15 (S.D.N.Y. July 29, 2009) (Plaintiff "satisfies the adequacy requirement because its interests are aligned with those of the putative class, *and it has retained competent and experienced counsel.*") (emphasis added). Adequate representation will be found if able and experienced counsel represents the proposed representative, and the proposed representative has no fundamental conflicts of interest with the interests of the class as a whole. *See Pipefitters Local No. 636 Defined Benefit Plan v. Bank of Am. Corp.*, 275 F.R.D. 187, 190 (S.D.N.Y. 2011) ("In considering the adequacy of a proposed lead plaintiff, a court must consider: (1) whether the lead plaintiff's claims conflict with those of

the class; and (2) *whether class counsel is qualified, experienced, and generally able to conduct the litigation*.") (citation omitted and emphasis added).

Here, the Blanck Group has selected a small firm and has not demonstrated that the firm and its attorneys possess the necessary resources and experience to adequately represent the class. In a recent decision by Judge Lewis A. Kaplan, in a case similar to the one at hand, the court ordered *sua sponte* that the presumptive lead plaintiff (based on the size of his losses),[3] was inadequate to serve as lead plaintiff due to its selection of inexperienced and under-staffed counsel. *See* Ex. G, Lead Plaintiff Order in *Freedman v. Weatherford Int'l Ltd.*, No. 12 Civ. 2121 (S.D.N.Y. July 10, 2012) ("Weatherford Order"). In particular, the court noted that the presumed lead plaintiff selected a small law firm that consisted of five attorneys spread across five offices. *Id.* at 2. Here, the Blanck Group has selected Gainey & McKenna to serve as lead counsel. The Blanck Group has failed to provide any evidence of how many attorneys Gainey & McKenna has and what their respective experience is; and an internet search of the firm did not yield a firm website or other meaningful information, which itself points to a likely lack of staffing and funding. Even smaller than the five-person firm in *Weatherford*, the law firm of Gainey & McKenna appears to be composed of ***two total attorneys who work in two separate offices***. Given the substantial monetary resources needed to fund complex litigation like this case (*e.g.*, costs for travel, depositions, and experts), the Blanck Group has failed to demonstrate that Gainey & McKenna has the resources to prosecute this Action effectively, including through trial and/or appeals. As explained by Judge Kaplan in *Weatherford*, "given the plethora of extremely experienced, well funded, and well staffed law firms engaged in plaintiffs class action

[3] Here, the difference between the movants' financial interest of $51,812.44 is immaterial. Weatherford Order, at 1-2 (concluding that the difference between the two movants' losses was immaterial even though the presumed lead plaintiff had over $165,000 more in losses).

securities work, the fact that he has chosen such a small firm with such limited experience in the field suggests strongly that he would not represent the class adequately." *Id.*

C. Gainey & McKenna Overstates Its Experience and Current Involvement in Class Action Securities Cases

The law firm of Gainey & McKenna is also inadequate to serve as lead counsel because the firm overstates its experience and the role it played in previous cases. In its firm resume, Gainey & McKenna claims involvement in a long list of cases. The firm lists only a handful of securities fraud class action cases in which it was appointed Lead or Co-Lead Counsel. It does, however, list a great number of cases in which it describes its role as "counsel" or "co-counsel." In some – if not all – of these cases, the firm had a very limited role in the proceedings, sometimes doing little more than filing lead plaintiff papers with the court.[4] Thus, the firm's securities fraud litigation experience is rather limited, with the bulk of the firm's experience being in ERISA litigation. *See* McKenna Decl., Ex. D, at 3, 4, 8, 9-13.

Additionally, Gainey & McKenna notes that it was appointed co-lead counsel in *Durgin v. Technical Olympic USA, Inc.*, No. 06-61844-CIV (S.D. Fla.); *Araj v. JML Portfolio Management Ltd.*, No. 09-cv-00903 (M.D. Fla.); and *Labit v. Zagoren*, No. 03-cv-02298 (S.D.N.Y.). *See* McKenna Decl., Ex. D at 2. It fails, however, to disclose the extent of its involvement and the results in those cases. For example, in *Technical Olympic*, after being appointed lead plaintiff and co-lead counsel, Gainey & McKenna's client, Diamondback Capital Management, L.L.C. and Gainey & McKenna withdrew as lead plaintiff and lead counsel on May 22, 2008. Ex. H, Lead Plaintiff Order in *Durgin v. Tousa, Inc.*, No. 06-61844-CIV (S.D. Fla. May 22, 2008). This was done just two days before lead plaintiff had to respond to

[4] *See, e.g., In re China Life Sec. Litig.*, 04-cv-2112 (S.D.N.Y.) (Gainey & McKenna filed papers in an attempt to have client appointed Lead Plaintiff); *Carroll v. Am. Int'l Grp., Inc.*, 08-cv-8659 (S.D.N.Y.) (Gainey & McKenna filed a complaint and papers seeking appointment as lead plaintiff and lead counsel).

defendants' motion to dismiss, which resulted in the court reopening the lead plaintiff process to those who had previously moved for appointment. While the lead plaintiff in *Technical Olympic* claimed it was withdrawing because it believed that continuing to undertake its responsibilities as lead plaintiff could be detrimental to its overall business, defendants suggest that part of the motivation was the fact that the lead plaintiff did not have standing to prosecute the claims therein. *See* Ex. I, Defendants' Response to Lead Plaintiff's Motion to Withdraw As Lead Plaintiff in *Durgin v. Tousa, Inc.*, No. 06-61844-CIV (S.D. Fla. May 11, 2010).

In *Araj*, the court granted plaintiffs leave to file a second amended complaint after it dismissed all claims against defendant JML Portfolio Management and certain counts against another defendant. Nonetheless, the plaintiffs voluntarily dismissed the case with prejudice as to all remaining defendants one day before the second amended complaint was due.[5] *See* Ex. J, Plaintiffs' Motion to Voluntarily Dismiss Action in *Araj v. JML Portfolio Management Ltd.*, 6:09 cv. 00903 (M.D. Fla. May 11, 2010).

Lastly, in *Labit* (subsequently recaptioned *In re Pronetlink Sec. Litig.*), the case settled for $1,225,000. *See* Ex. K, *In re Pronetlink Sec. Litig.* Notice of Settlment, No. 03-CV-2298 (LAP). The class in this case deserves better than the results outlined above. Given all of the aforementioned issues, Gainey & McKenna is inadequately to represent the class.

II. CRIST IS REPRESENTED BY A FIRM WITH A WEALTH OF EXPERIENCE AND THE NECESSARY RESOURCES TO ADEQUATELY REPRESENT THE CLASS

Unlike the Blanck Group, Crist has retained counsel with a wealth of experience and the resources necessary to adequately represent the class. As reflected in the firm's resume, the Faruqi Firm possesses extensive experience litigating complex class actions on behalf of

[5] Although not all cases listed in Gainey & McKenna's resume were reviewed, the small sample selected demonstrates that the firm's resume is misleading with regard to the firm's experience and involvement in listed cases.

plaintiffs, including securities class actions. For example, the Faruqi Firm has previously obtained significant recoveries to injured investors.[6] *See, e.g., In re United Health Grp. Inc. Deriv. Litig.*, No. 27CV06-8065 (Minn. 4th Jud. Dt. 2009) (where the Faruqi Firm, as co-lead counsel, obtained a recovery of $930 million for the benefit of the Company and negotiated important corporate governance reforms designed to make the nominal defendant corporation a model of responsibility and transparency); *In re Purchase Pro Inc. Sec. Litig.*, No. CV-C-01-0483-JLQ (D. Nev. 2001) (where the Faruqi Firm, as co-lead counsel for the class, secured a $24.2 million settlement). The Faruqi Firm is also currently litigating several prominent securities class actions and its attorneys have a wealth of experience in the area. *See, e.g.*, Ex. L, Class Certification Order in *Shapiro v. Matrixx Initiatives, Inc.*, No. CV-09-1479-PHX-ROS (D. Ariz. July 31, 2012) (serving as co-lead counsel for the recently certified class); *see also In re Carbo Ceramics Stock & Options Sec. Litig.*, No. 1:12-cv-01034-LLS (appointed Lead Counsel on behalf of options holders); *In re GLG Life Tech Corp. Sec. Litig.*, No. 11-CV-09150 (BSJ) (GWG) (appointed Lead Counsel); *In re China Organic Sec. Litig.*, No. 1:11-cv-08623-LBS (same); *In re Ebix, Inc. Sec. Litig.*, No. 1:11-CV-02400-RWS (same). The Faruqi Firm has offices in five states, has diversity in its attorneys and personnel, and boasts a large staff of accomplished attorneys with a wealth of experience in complex class action representation.

CONCLUSION

For the reasons set forth herein and in Crist's previously filed papers, Crist respectfully requests that the Court enter the proposed Order submitted herewith (i) appointing Crist as Lead Plaintiff of the Action; (ii) appointing Faruqi & Faruqi as Lead Counsel of the Action; and (iii) granting such other and further relief as the Court may deem just and proper.

[6] A copy of the Faruqi Firm's resume was attached as Exhibit E to the Declaration of Richard W. Gonnello in Support of Scott Crist's Motion for Appointment as Lead Plaintiff and Approval of Lead Counsel, filed on July 24, 2012, ECF No. 11.

Dated: August 10, 2012

Respectfully submitted,

By: */s/ Richard W. Gonnello*

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