UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

-against-

PFIZER, INC; HENRY A. McKINNELL; JEFFREY B. KINDLER; FRANK D'AMELIO; DAVID L. SHEDLARZ; ALAN G. LEVIN; IAN C. READ,

Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

10 Civ. 3864 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Oklahoma Firefighters Pension and Retirement System and Union Asset Management Holding AG, who together moved for appointment as lead plaintiff in this putative securities class action lawsuit, seek reconsideration of my decision denying their motion and granting Stichting Philips Pensioenfonds' competing motion for appointment as lead plaintiff. Because I see no reason to appoint co-lead plaintiffs in this matter, I deny Oklahoma Firefighters and Union's motion for reconsideration.

This securities litigation was initiated by Plaintiff Mary K. Jones, who, acting individually and on behalf of all others similarly situated, filed a complaint alleging that Defendants Pfizer, Inc. and several of its current and former corporate executives had violated §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. The amended complaint alleges that the price of Pfizer's common stock was artificially inflated during the proposed class period, from January 19, 2006, to January 23, 2009, as a result of Pfizer's alleged failure to disclose to investors that it was illegally promoting the

use of its prescription drugs—for conditions and at dosages other than those approved by the FDA—and paying illegal kickbacks to healthcare providers to induce them to prescribe Pfizer drugs. The amended complaint further alleges that Pfizer's conduct misled investors and caused the submission of millions of dollars of false or fraudulent claims to federal health care programs, exposing Pfizer to significant legal liability. On January 26, 2009, Pfizer announced publicly that it would pay $2.3 billion to resolve ongoing investigations into the improper promotion of its prescription drugs. The amended complaint alleges that, as a result of Pfizer's public announcement, the price of Pfizer's common stock fell from $17.45 at the close of trading on Friday, January 23, 2009, to $15.65 on Monday, January 26, 2009.

After Jones filed suit, Oklahoma Firefighters and Union, acting as a group, and Philips Pensioenfonds each timely moved for appointment as lead plaintiff of the purported plaintiff class pursuant to 15 U.S.C. § 78u-4(3)(B)(i). In addition, each movant asked the court to approve its choice of counsel as lead counsel pursuant to 15 U.S.C. § 78u-4(3)(B)(v). After the competing motions were fully briefed, I heard oral argument and ultimately decided to grant Philips Pensionfonds' motion and deny Oklahoma Firefighters and Union's competing motion. Oklahoma Firefighters and Union now seek reconsideration of my decision.

Motions for reconsideration are generally not granted unless "the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). A motion for reconsideration "is generally not favored," Marrero Pichardo v. Ashcroft, 374 F.3d 46, 55 (2d Cir. 2004), and it is not an opportunity to reargue that which the court has already decided. Shrader, 70 F.3d at 257.

The Private Securities Litigation Reform Act of 1995 ("PSLRA") requires a court to appoint "as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B)(i). The statute then establishes a rebuttable presumption that the "most adequate plaintiff" is "the person or group of persons" who has timely moved for appointment as lead plaintiff; who has, in the court's view, demonstrated "the largest financial interest in the relief sought by the class"; and who "otherwise satisfies the requirements" set forth in Federal Rule of Civil Procedure 23(a). Id. § 78u-4(a)(3)(B)(iii)(I)(aa)–(cc). In moving for reconsideration, the group comprised of Oklahoma Firefighters and Union contends that it is entitled to share the presumption of most adequate plaintiff with Philips Pensioenfonds, and that it is therefore entitled to be appointed co-lead plaintiff.

Oklahoma Firefighters and Union rely extensively on Cavanaugh v. U.S. Dist. Court for the N. Dist. of Cal. (In re Cavanaugh), 306 F.3d 726 (9th Cir. 2002). There, the Ninth Circuit described the process of appointing a lead plaintiff as a "sequential" one, directing district courts to first

> compare the financial stakes of the various plaintiffs and determine which one has the most to gain from the lawsuit. [The district court] must then focus its attention on that plaintiff and determine, based on the information he has provided in his pleadings and declarations, whether he satisfies the requirements of Rule 23(a), in particular those of "typicality" and "adequacy." If the plaintiff with the largest financial stake in the controversy provides information that satisfies these requirements, he becomes the presumptively most adequate plaintiff.

In re Cavanaugh, 306 F.3d at 729–31. The Ninth Circuit emphasized "that the only basis on which a court may compare plaintiffs competing to serve as lead is the size of their financial stake in the controversy." Id. at 732. Accordingly, after a court "determines which plaintiff has

the biggest stake, the court must appoint that plaintiff as lead, unless it finds that he does not satisfy the typicality or adequacy requirements." Id. The court's belief that "another plaintiff may be 'more typical' or 'more adequate' is of no consequence." Id.

Several district courts within this circuit have adopted the Ninth Circuit's sequential approach. See, e.g., Jolly Roger Offshore Fund Ltd. v. BKF Capital Group, Inc., No. 07 Civ. 3923 (RWS), 2007 U.S. Dist. LEXIS 60437, at *8 (S.D.N.Y. 2007); Sofran v. LaBranche & Co., 220 F.R.D. 398, 402 (S.D.N.Y. 2004). I employ that approach here, for purposes of the instant motion for reconsideration and because it does not change the result I would reach, but without indicating that I would favor such a formalistic approach to choosing the most appropriate lead plaintiff and lead counsel in another context.

In comparing competing movants' financial stakes in the litigation, district courts in this circuit typically consider a number of different factors, including the total and the net number of shares each movant purchased during the proposed class period. See In re Veeco Instruments Inc. Sec. Litig., 233 F.R.D. 330, 332 (S.D.N.Y. 2005). However, most courts "place the most emphasis on . . . the approximate loss suffered by" each movant. Kaplan v. Gelfond, 240 F.R.D. 88, 93 (S.D.N.Y. 2007). In this case, the parties had no shortage of proposed methodologies for computing the competing movants' approximate losses. Yet, under each proposed methodology, the difference between the loss suffered by Oklahoma Firefighters and Union, on the one hand, and the loss suffered by Philips Pensioenfonds, on the other hand, is not material. Because the competing movants have, in the court's view, approximately the same financial interest in the litigation, each has demonstrated the "largest financial interest in the relief sought by the class."

Each movant has also made the preliminary showings of "typicality" and "adequacy of representation" that Rule 23(a) requires. See Glauser v. EVCI Career Colleges Holding Corp., 236 F.R.D. 184, 188 (S.D.N.Y. 2006). Each purchased Pfizer stock on a United States stock exchange during the class period at prices allegedly artificially inflated by Pfizer's misrepresentations and omissions, and each claims to have suffered damages when the truth was revealed and Pfizer's stock price fell. See id. at 188–89. At this early stage in the litigation, neither movant appears to have any interests that are antagonistic to those of the other class members. Moreover, each has chosen counsel who are highly qualified and competent to litigate the merits of this case. See id. at 189. Each movant is therefore entitled to the presumption of most adequate plaintiff.

The PSLRA does provide a basis for rebutting this presumption, but "only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff" either "will not fairly and adequately protect the interests of the class" or "is subject to unique defenses that render such plaintiff incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa)–(bb). Although each movant has advanced arguments to rebut the other's lead-plaintiff presumption, I am not satisfied that the proof shows that either movant will not fairly and adequately protect the class or will be rendered incapable of doing so by a unique defense.

As the court in Dolan v. Axis Capital Holdings Ltd., Nos. 04 Civ. 8564 (RJH), 04 Civ. 8810 (RJH), 2005 U.S. Dist. LEXIS 6538, at *13 (S.D.N.Y. Apr. 13, 2005), remarked after finding that two competing movants shared the presumption of most adequate plaintiff, "[t]his leaves the question of structure." Having found that two competing movants' financial losses were roughly equal and that each had made prima facie showings of typicality and adequacy of

representation, the Dolan court noted that it was faced with the choice of "either adopt[ing] a co-lead plaintiff structure, or choos[ing] either [movant] as lead plaintiff." Id. at *13–14. The Dolan court chose a co-lead plaintiff structure because neither movant was an institutional investor and neither had "a particularly large financial interest in the case." Id. at *14–15. In other words, from the Dolan court's perspective, the use of "a single-plaintiff structure" raised too many concerns in the context of that case. Id. at *14.

I am not inclined, however, to appoint co-lead plaintiffs here. Unlike in Dolan, the movants in this case are large institutional investors with substantial resources and each has a significant financial interest in the outcome of this litigation. Moreover, I am concerned that appointing co-lead plaintiffs "would only serve to fracture the leadership and drive up attorneys fees" and other litigation expenses. See Glauser, 236 F.R.D. at 189. Under the PSLRA, "[t]here is no presumption . . . that co-lead plaintiffs are better than one lead plaintiff." In re Fuwei Films Sec. Litig., 247 F.R.D. 432, 439 (S.D.N.Y. 2008). Oklahoma Firefighters and Union have offered no convincing reason why appointing co-lead plaintiffs would best serve the interests of the proposed plaintiff class. See In re McDermott Int'l, Inc. Sec. Litig., No. 08 Civ. 9943 (DC), 2009 U.S. Dist. LEXIS 21539, at *14–15 (S.D.N.Y. March 6, 2009).

Accordingly, I turn to practical considerations to inform my choice between the two competing movants. Union's Article III standing to sue depends upon the nature of the legal relationship between individual investors and investment fund management companies, and the validity of the investment fund management companies' assignment of their claims to Union, a holding company, under both German and Luxembourgian law. See W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP, 549 F.3d 100, 107–10 (2d Cir. 2008); In re Vivendi Universal, 605 F. Supp. 2d 570, 577–80 (S.D.N.Y. 2009). Because Philips Pensioenfonds' standing

depends upon its own alleged "injury-in-fact," rather than "a prudential exception to the 'injury-in-fact' requirement" and a subsequent assignment of claims, see W.R. Huff, 549 F.3d at 107–10, Philips Pensioenfonds is the "more typical" movant. I therefore reaffirm my decision appointing Philips Pensioenfonds the sole lead plaintiff in this case.

Oklahoma Firefighters and Union maintain that a court's belief that "another [movant] may be 'more typical' or 'more adequate' is of no consequence" when appointing a lead plaintiff. In re Cavanaugh, 306 F.3d at 732. Although that may be true at an earlier stage in the selection process—when the court must decide which competing movant is entitled to the presumption of most adequate plaintiff—at this stage in the process, after the court has found that two competing movants share the lead-plaintiff presumption, the court's belief that one movant is "more typical" than the other provides a principled basis for choosing between them. Cf. Dolan, 2005 U.S. Dist. Dist. LEXIS 6538, at *14 (finding no principled reason to choose between competing movants).

For the reasons stated, Oklahoma Firefighters and Union's motion for reconsideration is denied.

The Clerk shall mark the motion (Doc. No. 40) terminated.

SO ORDERED.

Dated: December 9, 2010
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge