

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE AMERICAN BUSINESS
FINANCIAL SERVICES, INC.
NOTEHOLDERS LITIGATION

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CIVIL ACTION
NO. 05-232

O'Neill, J.

March 29, 2005

MEMORANDUM

These consolidated class actions are brought on behalf of investors who purchased the notes of American Business Financial Services, Inc. (ABFS), a mortgage lender that funded its operations by selling notes and other debt to investors, during the class period. The investors allege that from January 27, 2000 through January 21, 2005, ABFS misrepresented its business operations and financial performance and failed to disclose significant problems that ultimately led ABFS to default on its notes. The investors have set forth claims for violations of Sections 11, 12(a)(2) and 15 of the Securities Act of 1933, as amended, 15 U.S.C. §§ 77k, 771(a)(2) and 77o, alleging that ABFS' registration statements and prospectuses contained untrue statements and omissions of material fact.

Now before me are three competing motions for appointment of lead plaintiffs and approval of their selection of lead counsel. The Malack Group comprised of John A. Malack, Michael R. Rosati, Virgil Magnon, Sabina Langdon and S.S. Rajaram, M.D. (Hayward Pediatrics, Inc.) alleges it suffered approximately \$4,411,940 in financial losses during the class period and proposes the appointment of Berger & Montague, P.C. as lead counsel for the class. The Hadulla Group comprised of Roshen Hadulla, Theodore Ho, Donald S. Lovett, Thomas G.

Malat, and Howard Mossman alleges it suffered approximately \$1,153,554.50 in financial losses during the class period and proposes the appointment of Shepherd Finkelman Miller & Shah, LLC and Wites & Kapetan, P.A. as co-lead counsel for the class. The Horowitz Group comprised of Jonathan B. Horowitz, Arnold Kusler, Dunnley Mattke, Robert Novachich and Marshall Sektor alleges it suffered approximately \$3,647,036.82 in financial losses during the class period and proposes the appointment of Squitieri & Fearon, LLP as lead counsel for the class.

Under the Private Securities Litigation Reform Act of 1995 (PSLRA), courts “shall 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 court shall adopt a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that . . . in the determination of the court, has the largest financial interest in the relief sought by the class and . . . 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). The Malack Group is the presumptive lead plaintiff in this case. It has filed a motion to be appointed lead plaintiff, has the largest collective financial interest of all those bringing actions, and has made a prima facie showing that it can satisfy the typicality and adequacy requirements of Rule 23. In re Cendant Corp. Litig., 264 F.3d 201, 263 (3d Cir. 2001), cert denied 525 U.S. 929 (2002) (“The initial inquiry . . . should be confined to determining whether the movant has made a *prima facie* showing of typicality and adequacy.”).

The Rule 23 typicality requirement requires that the injuries of the movant with the largest financial losses should not be markedly different from those of the other moving parties

and that the movant's claims be based on the same legal issues as the claims of other class members. See In re Cendant, 264 F.3d at 265. The Malack Group alleges injuries and makes claims which are typical of other plaintiffs in the class. Like all other class members, they claim they purchased or otherwise acquired ABFS investment notes during the class period and that they suffered losses as a result of defendant's alleged issuance of registration statements and prospectuses containing false and misleading statements and material omissions concerning ABFS' operations and financial results.

In assessing whether the movant satisfies Rule 23's adequacy requirement, courts should consider whether it "has the ability and incentive to represent the claims of the class vigorously, [whether it] has obtained adequate counsel, and [whether] there is [a] conflict between [the movant's] claims and those asserted on behalf of the class."

Id., quoting Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988). With the largest financial interest in the outcome of the litigation, the Malack Group clearly has an incentive to represent the claims of the class with vigor. The Malack Group has also selected and retained competent and experienced counsel to represent themselves and the class and there is no apparent conflict between their claims and the claims asserted on behalf of the class.

The other plaintiffs groups have not established that the Malack Group will not do a fair and adequate job of representing the interests of the class.

Once the presumptively most adequate plaintiff is established, a member of the purported plaintiff class may rebut the presumption only upon proof that such plaintiff 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.

In Re Cell Pathways, Inc. Sec. Litig. II, 203 F.R.D. 189, 190 (E.D. Pa. 2001), citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

Under the PSLRA, “the most adequate lead 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). Both the Conference Committee Report and the Senate Report establish “that the court should not interfere with lead plaintiff’s choice of counsel, unless such intervention is necessary to ‘protect the interest of the plaintiff class.’” Janovici v. DVI, Inc., Fed. Sec. L. Rep. (CCH) P92, 2003 U.S. Dist. LEXIS 22315 at *42 (E.D. Pa. Nov. 25, 2003), quoting Smith v. Suprema Specialties, Inc., 206 F. Supp. 2d 627, 641 (D.N.J. 2002), quoting H.R. Conf. Rep. No. 104-369, at 35 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 734; S.Rep. No. 104-98 at 11-12 (1995) reprinted in 1995 U.S.C.C.A.N. 679, 690). Such intervention is not necessary here.

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ORDER

AND NOW, this 29th day of March 2005, after considering the motion of plaintiffs John A. Malack, Michael R. Rosati, Virgil Magnon, Sabina Langdon and S.S. Rajaram, M.D. (Hayward Pediatrics, Inc.) (the Malack Group) to be appointed lead plaintiffs and for approval of lead plaintiff's selection of lead counsel; the motion of plaintiffs Roshen Hadulla, Theodore Ho, Donald S. Lovett, Thomas G. Malat and Howard Mossman (the Hadulla Group) for appointment as lead plaintiff and for approval of lead plaintiff's selection of lead counsel; and the motion of Jonathan B. Horowitz, Arnold Kusler, Dunnley Mattke, Robert Novachich and Marshall Sektor (the Horowitz Group) for appointment as lead plaintiff and for approval of lead plaintiff's selection of lead counsel, and all responses thereto, it is hereby ORDERED as follows:

1. The motion of plaintiffs John A. Malack, Michael R. Rosati, Virgil Magnon, Sabina Langdon and S.S. Rajaram, M.D. (Hayward Pediatrics, Inc.) for appointment as lead plaintiff, and for approval of lead plaintiff's selection of lead counsel is GRANTED.
2. The Malack Group's selection of Berger and Montague, P.C. as lead counsel is approved.

3. The motions of plaintiffs Roshen Hadulla, Theodore Ho, Donald S. Lovett, Thomas G. Malat and Howard Mossman (the Hadulla Group) and Jonathan B. Horowitz, Arnold Kusler, Dunnley Mattke, Robert Novachich and Marshall Sektor (the Horowitz Group) for appointment as lead plaintiff and for approval of lead plaintiff's selection of lead counsel are DENIED.

s/Thomas N. O'Neill, Jr.

THOMAS N. O'NEILL, JR., J.