

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

In re: CEPHALON SECURITIES :  
LITIGATION : CIVIL ACTION  
: :  
: No. 96-0633  
:

**MEMORANDUM-ORDER**

**GREEN, S.J.**

**August , 1998**

Presently before the court is Plaintiffs' Amended Motion for Class Certification pursuant to Federal Rule of Civil Procedure 23, Defendants' Response thereto and Plaintiffs' Reply. For the reasons set forth below, Plaintiffs' Motion will be granted.

**I. FACTS AND PROCEDURAL BACKGROUND**

This is an open market securities fraud class action brought on behalf of a class (the "Class") consisting of all persons and entities who purchased the publicly traded securities and/or traded options on the securities of Cephalon Inc. at any time from June 12, 1995 through and including June 7, 1996 (the "Class Period"). Plaintiffs allege that Defendants made materially false and misleading statements regarding Cephalon's drug Myotrophin on June 12, 1995, concerning the North American trials of Myotrophin; on October 31, 1995, concerning the European test results; and on January 19, 1996, in response to the FDA's failure to approve a Treatment-IND (to allow physician to prescribe the drug pending FDA approval) for the drug. Plaintiffs allege that these false and misleading statements caused the market price of Cephalon common stock to be artificially inflated during the Class Period and that the Class members relied on the integrity of the market price of the stock in purchasing Cephalon common stock and trading options to purchase or sell Cephalon. Material facts related to the allegedly fraudulent

nature of said statements were disclosed to the market on June 7, 1996 in connection with public proceedings before an FDA Advisory Committee.

Plaintiffs move this court to enter an order certifying the above-captioned matter as a class action and approving Lead Plaintiffs Sands Point Partners, L.P. (“Sands Point”) and Frank Kearney (“Kearney”), and plaintiff Joseph George (“George”) as class representatives. Sands Point is an institutional investment fund that claims a loss of \$80,500 on a purchase of 5,000 shares of Cephalon common stock on January 15, 1996. Sands Point also engaged in other transactions during the Class Period, including the sale of stock options and the short sale of common stock. Kearney was a technical trader who purchased Cephalon common stock three times during the class period on the basis of Cephalon’s large trading volume and the range of movement in the stock price. Plaintiffs filed an Amended Motion for Class Certification to add George as an additional proposed class representative. George purchased common stock of Cephalon during the proposed Class Period and was damaged as a result of the defendants’ alleged misconduct.

## **II. DISCUSSION**

### **A. Requirements for a Class Action**

Rule 23(a) provides four prerequisites to a class action:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition, the court must find that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,

and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Id. at subsection (b)(3).

### **1. Numerosity (Rule 23(a)(1))**

Where the exact size of a class is unknown, a court may accept common sense assumptions in order to support a finding of numerosity. Moskowitz v. Lopp, 128 F.R.D. 624, 628 (1989). In the present case, Plaintiffs allege that during the Class Period there were more than 22 million shares outstanding of Defendant Cephalon’s common stock and the stock had an average daily trading volume of 823,071 shares. Plaintiffs allege that the Class will consist of at least thousands of plaintiffs. Based on these facts, this court concludes, and Defendants do not dispute, that joinder of all members of the Class is impracticable. Thus, the numerosity requirement has been met.

### **2. Commonality (Rule 23(a)(2))**

Commonality requires that the named plaintiffs share at least one question of fact or law with the claims of the prospective class. Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). In the present case, Plaintiffs allege a single course of fraudulent conduct on the part of Defendants wherein Defendants made material misrepresentations and/or omitted material facts regarding the business prospects of Cephalon. This court concludes, and Defendants do not dispute, that common questions exist as to whether Defendants’ conduct was unlawful. Therefore, the commonality requirement has been satisfied.

### **3. Typicality (Rule 23(a)(3))**

Defendants argue that the claims of Sands Point and Kearney are not typical of the Class because Sands Point sold stock options short on the belief that the price of shares would fall or at

least not rise above the premium on its options transactions and Kearney bought common stock without regard to any specific price (only its range). Defendants contend that Sands Point and Kearney do not represent a cross-section of the members of the proposed class -- in particular, the long purchasers -- in terms of their trading or timing of losses. Defendants also argue that Sands Point and Kearney did not rely on the market price of Cephalon stock, thereby, making class certification inappropriate. Furthermore, Defendants argue that Sands Point, as a short seller, is not entitled to the presumption of reliance granted by the fraud-on-the-market theory.

The typicality requirement is intended to assess whether the action can be efficiently maintained as a class and whether the legal theories of the named plaintiffs are aligned with those of the absent class members. Id. at 57. The typicality requirement is satisfied if the plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory. See id. at 58. Even pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories. Id.; see also Zeffiro v. First Pa. Banking and Trust Co., 96 F.R.D. 567, 570 (1983)(where the representative plaintiff and the other members of the class share an interest in prevailing on similar legal claims, particular factual differences, differences in the amount of damages claimed, or even the availability of certain defenses against a class representative may not render his or her claims atypical).

This court concludes that the claims of Sands Point and Kearney are typical of the Class because Sands Point and Kearney were injured from the same allegedly false and misleading statements as the other Class members and they base their claims on the same legal theories as all other members of the Class. Although individual questions of reliance may exist, they do not

render the claims of Sands Point and Kearney atypical. This court will not reach the question of whether Sands Point, as a short seller, is entitled to the presumption of reliance under the fraud on the market theory as this question deals squarely with the issue of reliance and is not appropriate for resolution at the class action stage. Thus, the typicality requirement has been met.

#### **4. Adequacy of Representation (Rule 23(a)(4))**

“Adequate representation depends on two factors: (a) the plaintiff’s attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.” Weiss v. York Hosp., 745 F.2d 786, 811 (3d Cir. 1984). Defendants do not dispute that Plaintiffs’ attorney is qualified, experienced and able to conduct this litigation. Defendants do argue that Kearney is not an adequate representative of the Class because he is unfamiliar with the claims in this litigation. However, the class representative’s complete understanding of the legal basis for the claims is not required by Rule 23. Barnes v. American Tobacco Co., Inc., 176 F.R.D. 479, 485-86 (1997). “[I]t is unrealistic to require a class action representative to have an in- depth grasp of the legal theories of recovery behind his or her claim. It is more important that the representative actively seeks vindication of his or her rights and engages competent counsel to prosecute the claims.” Id. at 486. This court concludes that Kearney has adequate familiarity with the claims of the class based on his personal losses resulting from the defendants’ alleged misconduct.

Defendants contend that the interests of Sands Point and Kearney are antagonistic to those of the class because they sold securities during the Class Period and did not hold any securities at the end of the Class Period. Defendants argue that this conflict of interests is most

apparent on the issue of proving damages because Plaintiffs will have an interest in proving low stock price inflation at the time they sold the securities in order to maximize damages while the buy-and-hold investor will want to prove high stock inflation on those same days.

“The necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate.” Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977). Furthermore, where the plaintiffs allege a prolonged course of conduct, the class period may exceed the purchase and sale dates of the named plaintiffs' securities. In re Regal Communications Corp. Sec. Lit., 1995 WL 550454 at \*5 (E.D. Pa. 1995). Thus, the fact that Sands Point and Kearney sold securities during the class period and did not still hold securities at the end of the Class Period does not preclude class certification, and this court concludes that Plaintiffs do not have interests antagonistic to those of the class.

## **5. Predominance and Superiority (Rule 23(b)(3))**

### **a. Federal Securities Claims**

In determining whether common questions predominate, the court's inquiry is directed primarily toward the issue of liability. Bogosian, 561 F.2d at 456. The Third Circuit has found that although individual issues of reliance may exist, these issues do not necessarily predominate over common issues of fact and law. See Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985); see also Moskowitz, 128 F.R.D. 624 (finding questions of fact relating to what plaintiff relied on in purchasing and selling shares of stock could not be resolved at the class action stage). In this case, although individual questions may exist as to reliance and damages, these individual questions do not predominate over the common questions of whether the defendants made

fraudulent statements or omissions in violation of federal securities laws which caused the price of Cephalon stock to become artificially inflated during the Class Period. Therefore, the predominancy requirement is satisfied.

Class actions are a particularly appropriate and desirable means to resolve claims based on the securities laws. Eisenberg, 766 F.2d at 785. When a court is in doubt as to whether or not to certify a class action, the interests of justice require that the court should err in favor of allowing a class action. Id. Furthermore, “a class action [in a federal securities action] may well be the appropriate means for expeditious litigation of the issues, because a large number of individuals may have been injured, although no one person may have been damaged to a degree which would have induced him to institute litigation solely on his own behalf.” Id. (quoting Green v. Wolf Corp., 406 F.2d 291, 296 (2d Cir. 1968)). In the present case, this court concludes that the class action is superior to other available methods of adjudication for the federal securities claims asserted by the Class.

**b. Negligent Misrepresentation Claim**

Defendants argue that Plaintiffs’ state law claim for negligent misrepresentation in Count III of the Complaint cannot be certified for class treatment because individual issues will predominate. Specifically, Defendants argue that because Pennsylvania courts have not adopted the fraud-on-the-market theory of reliance for negligent misrepresentation claims, each of the plaintiffs will be required to prove direct, individual reliance on the alleged misrepresentations and omissions. Courts in the Third Circuit, however, have certified pendent state claims for negligent misrepresentation in securities fraud cases upon finding that issues of individual reliance do not predominate over common questions regarding the alleged misrepresentation or

omission. See, e.g., Kline v. First Western Government Securities, Inc., 1996 WL 153641 (E.D. Pa. 1996);

In re Regal Communications Corp. Securities Litigation, 1995 WL 550454 (E.D. Pa. 1995); First Eastern Corp. v. Mainwaring, 1993 WL 223607 (E.D. Pa. 1993). This court concludes, as other courts based on similar facts have found, that common questions about the existence of any misrepresentations or omissions, their materiality and defendants' intent predominate over individual issues of reliance. Thus, individual issues of reliance would not preclude class certification on the state law claim. Furthermore, a class action is superior to other methods of adjudication for the pendent state law claim because it eliminates the possibility of duplicative state proceedings. Accordingly, the predominance and superiority requirements are also met with respect to the state law claim for negligent misrepresentation.

## **B. Subclasses**

Defendants propose the creation of subclasses reflecting the three different time periods following the alleged misrepresentations or omissions that took place on June 12, 1995, October 31, 1995 and January 18, 1996. Defendants also propose that subclasses be certified for long sellers, short sellers and option traders during each different time period, thereby yielding a total of nine subclasses. The usual situation in which a court will divide a class into subclasses is when the class is found to have members whose interests are divergent or antagonistic. See 7B Wright and Miller, Federal Practice and Procedure § 1790 (2d ed. 1986). The evidence at this time does not establish that the class members have divergent or antagonistic interests that would necessitate the creation of subclasses at this stage in the litigation. Under Rule 23(c)(1), the court is free to create separate subclasses based on specific issues such as reliance or damages if

necessary as the case develops.

### **C. Joseph George as Class Representative**

Plaintiffs move to designate George as an additional class representative. George filed an initial complaint on March 15, 1996 wherein he alleged that he purchased 200 shares of Cephalon common stock on January 17, 1996 at a price of \$34.00 per share. Plaintiffs originally claimed that George was damaged in the amount of approximately \$2,650. (See Dkt. entry # 7 at 2.) George was subsequently named as a plaintiff in the Consolidated Class Action Complaint dated October 18, 1996. Thereafter, several plaintiffs, not including George, moved for appointment as Lead Plaintiff and discovery was conducted and briefs filed on the issue of Lead Plaintiff and Lead Counsel. On August 27, 1996, the court appointed Sands Point, Kearney and Rose Guida<sup>1</sup> as Lead Plaintiffs. In the present motion, Plaintiffs state that the persons and entities that have been appointed Lead Plaintiffs have designated George as an additional class representative. In their Response, Defendants chose not to address the merits of George's claim to act as a class representative because George has not been named a lead plaintiff.

Pursuant to the Private Securities Litigation Reform Act of 1995 (the "Act"), a member of the purported class may move the court to serve as lead plaintiff of the purported class not later than 60 days after the date on which notice was originally published to the class members. 15 U.S.C. § 78u-4(a)(3)(A)(I)(II). Thereafter, in considering any motions to serve as lead plaintiff, the court shall adopt a presumption that the most adequate plaintiff, or lead plaintiff, is the

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<sup>1</sup> Guida voluntarily dismissed her individual claims and withdrew as a lead plaintiff on March 24, 1998.

person or group of persons that (1) has either filed the complaint or made a motion to serve as lead plaintiff, (2) in the determination of the court, has the largest financial interest; and (3) otherwise satisfies the requirements of Rule 23 of the Federal Rule of Civil Procedure. Id. at § 78u-4(a)(3)(B)(iii)(I). This presumption may be rebutted by a member of the purported plaintiff class upon proof that the presumptively most adequate plaintiff is not, in fact, an adequate representative of the class. See id. at § 78u-4(a)(3)(B)(iii)(II).

This court concludes that George satisfies the requirements to be named and approved as a Lead Plaintiff. Although he did not move for appointment as a lead plaintiff, George was a named plaintiff who filed the consolidated class action complaint. The aggregate total of Sands Point, Kearney and George represent the largest financial interest in the present case. George also meets the requirements of Rule 23 to be certified as a class representative because his claims are typical of the class and he can fairly and adequately protect the interests of the class. The fact that George was not appointed as a lead plaintiff previously does not preclude his present appointment because it is the named Lead Plaintiffs, Sands Point and Kearney, representing the Class, who designated George as an additional representative. Thus, the court can infer that the other members of the plaintiff Class do not oppose the motion. The fact that Defendants did not have an opportunity to oppose the appointment of George as a lead plaintiff also will not preclude his appointment as Defendants do not have standing under the Act to rebut the presumption of the adequacy of a lead plaintiff. Moreover, Plaintiffs' motion to certify George as an additional class representative is unopposed by Defendants. Accordingly, this court will designate George as an additional Lead Plaintiff and certify George as a class representative.

### **III. CONCLUSION**

For the reasons discussed above, the court concludes that Plaintiffs have met the requirements of Fed. R. Civ. P. 23 for class action certification as to their claims under the federal securities laws and the negligent misrepresentation claim. The Class shall consist of all persons and entities who purchased the publicly traded securities and/or traded options on the securities of Cephalon, Inc., at any time from June 12, 1995 through and including June 7, 1996, with Lead Plaintiffs Sands Point Partners, L.P., Frank Kearney and Joseph George as class representatives and Plaintiffs' Lead Counsel as counsel for the Class. Defendants, their subsidiaries and affiliates, and members of the immediate family of each of the individual defendants are excluded from the Class. The Class will not be divided into subclasses at this time, however, the court's decision is made without prejudice to the right of any party to seek hereafter modification of the class as defined herein or the establishment of subclasses as the case develops.

An appropriate Order follows.



BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.