

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ROBERT CIARCIELLO, individually)
and on behalf of all others similarly)
situated,)
)
Plaintiff,)
)
v.) 1:23-CV-32
)
BIOVENTUS INC., et al.,)
)
)
Defendants.)

ORDER

The plaintiff Robert Ciarciello filed this securities fraud class action against the defendants, alleging that the defendants made materially false and misleading statements in various documents related to an initial public offering of stock in defendant Bioventus Inc. Several potential class members filed competing motions to be appointed as the lead plaintiff. Because the Wayne County Employees' Retirement System (WCERS) has the largest financial interest in this securities litigation and satisfies the typicality and adequacy requirements of Rule 23, it is the most adequate plaintiff and will be appointed lead plaintiff. Because counsel from Bleichmar Fonti & Auld LLP selected by WCERS are competent, qualified, and experienced in securities litigation and class actions, the Court will approve WCERS' selection of lead counsel.

I. Appointment of Lead Plaintiff

The Private Securities Litigation Reform Act of 1995 governs securities class actions and imposes procedural requirements for the appointment of lead plaintiff. *See*

15 U.S.C. § 78u-4(a)(3). Under the statute, the Court must appoint as lead plaintiff the plaintiff whom the Court “determines to be most capable of adequately representing the interests of class members . . . in accordance with” a number of provisions. 15 U.S.C. § 78u-4(a)(3)(B)(i). Among these are certain notice and filing requirements, 15 U.S.C. § 78u-4(a)(3)(A), and a presumption in favor of a plaintiff who satisfies those requirements, has the largest financial interest in the relief sought by the class, and satisfies the requirements of Federal Rule of Civil Procedure 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I); *see also Fisher v. Fennec Pharm., Inc.*, No. 22-CV-115, 2022 WL 1462822, at *1 (M.D.N.C. May 9, 2022).

The Court finds the following:

1. The PSLRA requires that, within 20 days after filing suit, a plaintiff must publish a notice advising potential class members “of the pendency of the action, the claims asserted therein, and the purported class period.” 15 U.S.C. § 78u-4(a)(3)(A)(i).
2. Mr. Ciarcello filed suit on January 12, 2023. Doc. 1. The same day, Mr. Ciarcello’s counsel published a notice via PRNewswire informing class members of their right to file motions for appointment as lead plaintiff, Doc. 13 at ¶ 3, Doc. 13-1, satisfying the requirement of § 78u-4(a)(3)(A)(i). *See Halman Aldubi Provident & Pension Funds Ltd. v. Teva Pharm. Indus. Ltd.*, 529 F. Supp. 3d 385, 392 (E.D. Pa. 2021) (stating that PRNewswire is “a nationally circulated business-oriented publication” for the purposes of § 78u-4(a)(3)(A)(i)).

3. The PSLRA allows any member of the putative class to file a motion to serve as lead plaintiff no later than 60 days after the notice is published. 15 U.S.C. § 78u-4(a)(3)(A)(i)(II).
4. On March 13, 2023, 60 days after the notice was published, Yitzhak Zilberman filed a motion to serve as lead plaintiff, Doc. 7; Gregory and Cynthia Stillman filed a motion to serve as lead plaintiffs, Doc. 11; Victor Carlomagno filed a motion to serve as lead plaintiff, Doc. 16; and WCERS filed a motion to serve as lead plaintiff. Doc. 19.
5. Mr. Carlomagno withdrew his motion on April 3, 2023. Doc. 41. On that same day, Mr. and Ms. Stillman filed a notice of non-opposition to WCERS' motion. Doc. 40. The next day, Mr. Zilberman filed a notice of non-opposition to WCERS' motion. Doc. 43.
6. The PSLRA provides that not more than 90 days after notice is published, the Court will consider the pending motions and appoint a lead plaintiff it “determines to be most capable of adequately representing the interests of class members.” 15 U.S.C. § 78u-4(a)(3)(B)(i).
7. Not more than 90 days have passed since the notice was published.
8. Under the PSLRA, the Court must presume that the most adequate lead plaintiff is the person or group of persons that (a) has filed the complaint or made a motion in response to the notice, (b) has the largest financial interest in the relief sought by the class, and (c) otherwise satisfies the requirements of Federal Rule of Civil Procedure 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

9. As to the first requirement, WCERS timely moved to serve as lead plaintiff.

See Doc. 19.

10. As to the second requirement, WCERS “has the largest financial interest in the relief sought by the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb); *see* Doc. 21-1 at 4; Doc. 21-3. WCERS has provided evidence that it suffered losses of approximately \$721,000 on its investments in Bioventus securities during the class period. *See* Doc. 21-1; Doc. 21-3; *see also* Doc. 20 at 12. There is no evidence that anyone else has a larger financial interest in the relief sought. No other movant disputes that WCERS has the largest financial interest. *See* Doc. 40 at 2 (Stillman notice of non-opposition to WCERS’ motion, stating that WCERS “possesses the largest financial interest in the relief sought by the class (\$721,000), and is presumptively the most adequate plaintiff”); Doc. 43 at 2 (Mr. Zilberman’s notice acknowledging that he “does not have the ‘largest financial interest’ in this litigation”).

11. As to the third requirement, “a presumptive lead plaintiff need make only a *prima facie* showing that it can satisfy the typicality and adequacy requirements of Rule 23 to be appointed.” *Fisher*, 2022 WL 1462822, at *2 (cleaned up). “The typicality requirement of the rule requires that a lead plaintiff suffer the same injuries as the class as a result of the defendant’s conduct and has claims based on the same legal issues.” *Id.* (cleaned up). “Adequate representation requires a finding that the purported class representative and its attorney are capable of pursuing the litigation and that

neither has a conflict of interest with other class members.” *Id.* (ultimately citing *Sosna v. Iowa*, 419 U.S. 393, 403 (1975)).

12. As to typicality, WCERS purchased Bioventus securities during the class period, *see* Doc. 21-1 at 4, Doc. 1 at ¶ 1, and claims it did so based on the same allegedly misleading statements and omission of material facts the complaint highlights. Doc. 20 at 13.

13. As to adequacy, WCERS has certified that it is willing to participate in this litigation and will represent the class’s interests actively and zealously. *See generally* Doc. 21-1. The Court is unaware of any conflicts of interest or antagonism between WCERS and the rest of the class. As discussed below, WCERS has retained experienced, able counsel.

14. Once the requirements for application of the presumption are met, the presumption may be rebutted only upon proof that the presumptively most adequate 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.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

15. No class member has submitted any evidence to rebut the presumption.

WCERS satisfies the requirements of the statute. The Court will appoint it as lead plaintiff.

II. Appointment of Lead Counsel

Under the PSLRA, “[t]he most adequate 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).

“Although deference should be given to the lead plaintiff’s selection of counsel, approval of lead counsel is a matter within the court’s discretion.” *Vaitkuviene v. Syneos Health, Inc.*, No. 18-CV-29, 2018 WL 3460409, at *2 (E.D.N.C. May 29, 2018). In deciding whether to approve a movant’s selection, courts consider the quality and cost of counsel, the “work counsel has done in identifying or investigating potential claims in the actions, counsel’s experience in handling class actions and other complex litigation and claims of the types asserted in the present action, counsel’s knowledge of the applicable law, and the resources counsel will commit to representing the class.” *In re Cree, Inc., Sec. Litig.*, 219 F.R.D. 369, 373 (M.D.N.C. 2003); *see also* Fed. R. Civ. P. 23(g).

The Court finds the following:

1. WCERS has selected Bleichmar Fonti & Auld LLP as Lead Counsel. Doc. 19. Bleichmar’s attorneys are not members of the bar of this Court and must appear by special appearance, *see* LR 83.1(c)–(d); WCERS has selected Gagan Gupta of Tin Fulton Walker & Owen PLLC, a well-known North Carolina law firm with a positive reputation, to serve as local counsel. *See* Doc. 22.
2. Bleichmar is experienced in the area of securities fraud and class actions. *See generally* Doc. 21-4. According to its firm resume, *id.*, Bleichmar has global experience in securities fraud class actions and has represented lead plaintiffs in over a dozen of such cases in the last decade. The specific lawyers who have entered appearances, Docs. 37–39, have substantial experience in securities and class action litigation. *See* Doc. 21-4 at 20–21 (Javier Bleichmar), 26–27 (Nancy A. Kulesa), 31–32 (Ross Shikowitz).

3. The firm is qualified, experienced, and capable of effectively prosecuting this action on behalf of plaintiff Mr. Ciarciello, lead plaintiff WCERS, and the putative class.
4. No one has filed any objection to movant WCERS' proposed appointment of lead counsel.

The Court, in its discretion and subject to review when any motion for class certification is filed, finds WCERS' selection of counsel to be reasonable and finds that Bleichmar Fonti & Auld LLP is capable of handling the litigation and representing the class, with the assistance and oversight of lawyers at Tin Fulton Walker & Owen, PLLC, who pursuant to LR 83.1(d)(2) also remain responsible for the conduct of the litigation.

III. Conclusion

Because all requirements have been met and the Court sees no reason to deny WCERS' motion, the Court will grant WCERS' request to serve as lead plaintiff and will approve its choice of counsel.

It is **ORDERED** that the movant Yitzhak Zilberman's motion for appointment as lead plaintiff and for approval of lead counsel, Doc. 7, is **DENIED**. The movants Gregory and Cynthia Stillman's motion for appointment as lead plaintiffs and for approval of lead counsel, Doc. 11, is **DENIED**.

It is further **ORDERED** that the motion of Wayne County Employees' Retirement System for appointment as lead plaintiff and for approval of lead counsel, Doc. 19, is **GRANTED** as follows:

1. Movant Wayne County Employees' Retirement System is appointed as Lead Plaintiff for the class in this action.
2. Bleichmar Fonti & Auld LLP in association with Tin Fulton Walker & Owen PLLC as required by LR 83.1(d)(2) shall serve as Lead Counsel.
3. Lead Counsel shall have the following responsibilities and duties, to be carried out either personally or through counsel whom Lead Counsel shall designate:
(1) to coordinate the briefing and argument of motions; (2) to coordinate the conduct of discovery proceedings; (3) to coordinate the examination of witnesses in depositions; (4) to coordinate the selection of counsel to act as a spokesperson at pretrial conferences; (5) to call meetings of the plaintiffs' counsel as they deem necessary and appropriate from time to time; (6) to coordinate all settlement negotiations with counsel for defendants; (7) to coordinate and direct the pretrial discovery proceedings and the preparation for trial and the trial of this matter and to delegate work responsibilities to selected counsel as may be required; and (8) to supervise any other matters concerning the prosecution, resolution, or settlement of the action.
4. No motion, request for discovery, or other pretrial proceedings shall be initiated or filed by any plaintiffs without the approval of Lead Counsel so as to prevent duplicative pleadings or discovery by the plaintiffs. No settlement negotiations shall be conducted without the approval of Lead Counsel.
5. Lead Counsel shall have the responsibility of receiving and disseminating Court orders and notices.

6. Lead Counsel shall be the contact between plaintiffs' counsel and shall direct and coordinate the activities of plaintiffs' counsel.
7. Defendants shall effect service of papers on plaintiffs by serving a copy of same on Lead Counsel by overnight mail service, electronic or hand delivery. Plaintiffs shall effect service of papers on defendants by serving a copy of the same on defendants' counsel by overnight mail service, electronic or hand delivery.
8. During the pendency of this litigation, or until further order of this Court, the parties shall take reasonable steps to preserve all documents within their possession, custody, or control, including computer-generated and stored information, and materials such as computerized data and electronic mail, containing information which is relevant, or which may lead to the discovery of information relevant, to the subject matter of the pending litigation.

This the 12th day of April, 2023.



UNITED STATES DISTRICT JUDGE