UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ST. CLAIR COUNTY EMPLOYEES' RETIREMENT SYTEM, Plaintiff, v. ACADIA HEALTHCARE CO., INC., et al., Defendants.	Case No. 3:18-cv-00988 Judge Eli J. Richardson Magistrate Judge Newbern

MEMORANDUM AND ORDER

Before the Court are competing motions for appointment of a lead plaintiff and lead counsel in this securities class action lawsuit (Doc. Nos. 23, 24), which have been referred to the Magistrate Judge for disposition (Doc. No. 27). These motions were filed by two groups of putative class members: (1) Amalgamated Bank,[1] Plymouth County Retirement Association, and Boston Retirement System (the Institutional Funds) (Doc. No. 23-1, PageID# 91), and (2) the New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund and the Chicago Laborers' Pension Fund (the Pension Funds) (Doc. No. 25, PageID# 194). Each filed a response in opposition to the other's motion (Doc. Nos. 28, 29) and a reply (Doc. Nos. 30, 31). For the reasons that follow, the Pension Funds' motion (Doc. No. 24) is GRANTED and the Institutional Funds' motion (Doc. No. 23) is DENIED. The Pension Funds shall serve as the lead plaintiff in

[1] Amalgamated Bank serves as trustee of LongView Largecap 1000 Growth Index Fund, LongView Broad Market 3000 Index Fund, LongView Largecap 1000 Value Index Fund, and LongView Midcap 400 Index Fund. (Doc. No. 23-1, PageID# 91.)

this action. The law firm of Robbins Geller Rudman & Dowd LLP (Robbins Geller) shall serve as lead counsel for the class.

I. Background

On October 25, 2017, the stock of Defendant Acadia Healthcare Company, Inc. (Acadia), which operates healthcare facilities throughout the United States and the United Kingdom, dropped precipitously from a per-share value of $44.12 to $33.00.[2] (Doc. No. 1, PageID# 2, 3, ¶¶ 2, 5.) The plummet followed a press release announcing that, contrary to Acadia's positive projections for 2017, its operations in the United Kingdom had suffered from a tightening labor market and rising costs. (*Id*. at PageID# 2, 12, ¶¶ 3, 41.) By the time of the collapse in Acadia's share value, its chief executive officer and president, Defendants Joey A. Jacobs and Brent Turner, had sold 706,000 shares of Acadia stock for over $35 million. (*Id.* at PageID# 3, 4, ¶¶ 3, 11, 12.)

Plaintiff St. Clair County Employees' Retirement System (St. Clair), a pension plan for employees of St. Clair County, Michigan (Doc. No. 2, PageID# 28), filed this lawsuit on October 1, 2018, on behalf of anyone who purchased Acadia securities between February 23, 2017, and October 24, 2017 (*Id.* at PageID# 2). St. Clair is represented by Robbins Geller. St. Clair alleges that Acadia, Jacobs, Turner, and Acadia Chief Financial Officer David Duckworth violated the Securities and Exchange Act of 1934 by making false and misleading statements during the class period to lure investors and artificially drive up share prices. (*Id.* at PageID# 12, 14, 17, 18, ¶¶ 39, 40, 48.)

Consistent with the requirements of the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u-4(a)(3)(A)(i), St. Clair published a notice of filing in Business Wire on October 2, 2018, informing potential class members that they could move within sixty days to

[2] These facts are as stated in the complaint and the lead plaintiff motions.

serve as lead plaintiff. (Doc. No. 23-3, PageID# 102; Doc. No. 26-1, PageID# 259.) On December 3, 2018, the Institutional Funds and the Pension Funds did so. (Doc. Nos. 23–26.) The Institutional Funds state that, during the class period, they collectively purchased 58,477 Acadia shares at a loss of $777,278.38, and that they are unaware of any plaintiff or movant with a larger financial interest in the litigation. (Doc. No. 23-1, PageID# 95.) The Institutional Funds argue that they are therefore entitled to appointment as lead plaintiffs and ask that the Court approve their selection of the Wolf Haldenstein law firm as lead counsel.[3] (*Id.* at PageID# 94–5, 97.) The Pension Funds state that they purchased 54,738 Acadia shares at a loss of $856,000.00 and argue that they should be appointed lead plaintiff as the entity with the largest financial interest in the litigation. They ask the Court to approve their selection of Robbins Geller as lead counsel.[4] (Doc. No. 25, PageID# 197–98.)

Because these motions were filed concurrently, it appears that neither group knew the other would also seek the lead plaintiff role. The Institutional Funds now concede that the Pension Funds have alleged a larger overall monetary loss, but argue that other measures of financial interest in the lawsuit—such as the number of shares purchased, the net number of shares purchased, and the net funds expended—weigh in favor of their appointment. (Doc. No. 28, PageID# 367–73; Doc.

[3] Occasionally in their briefing, the Institutional Funds request appointment as "co-lead plaintiffs." (Doc. No. 23-1, PageID# 90, 98; Doc. No. 28, PageID# 364, 375; Doc. No. 31, PageID# 592, 597.) To the extent the Institutional Funds intended to move for appointment as co-lead plaintiffs, that motion is denied. They have offered no authority to support that outcome and it appears to the Court, for the reasons discussed below, that the Pension Funds will adequately represent the interests of the class. *See Farrah v. Provectus Biopharmaceuticals, Inc.*, 68 F. Supp. 3d 800, 806–07 (E.D. Tenn. 2014) (denying movant's request to be appointed co-lead plaintiff where movant had failed to demonstrate the need for an additional plaintiff and opining that a co-plaintiff arrangement "could work against a cohesive litigation strategy and prove inefficient").

[4] The Pension Funds request for oral argument on the movants' competing motions (Doc. No. 24, PageID# 187) is denied. The motions can be decided on the briefs alone.

No. 31, PageID# 594–96.) The Pension Funds respond that other measures of financial interest are not relevant to the lead plaintiff determination where one movant clearly has suffered the larger loss. (Doc. No. 29, PageID# 416; Doc. No. 30, PageID# 444–47.)

II. Legal Standard

The PSLRA lays out "a clear path that the district court must follow in selecting the lead plaintiff." *In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002) (finding that "Talmudic scholars" are not needed to construe the statute). First, the Court must verify that the original plaintiff published a notice describing the claims asserted in the lawsuit and the alleged class period in a "widely circulated national business-oriented publication or wire service" within twenty days of the lawsuit's filing. 15 U.S.C. § 78u-4(a)(3)(A)(i). The notice must also advise potential class members that they have sixty days from the notice date to move to be appointed lead plaintiff. *Id.* § 78-4(a)(3)(A)(i)(II). The PSLRA's notice requirements were added to eliminate the first-to-the-courthouse method of identifying the lead plaintiff and to ensure that "the district court will have the full roster of contenders" before deciding which one to appoint. *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1807 (2018); *see also In re Cavanaugh*, 306 F.3d at 729 (explaining that, before the PSLRA was enacted, "the first plaintiff to file suit was usually appointed as class representative").

If more than one motion is timely filed, the Court must determine which member (or group of members) of the purported class appears to be the "most adequate plaintiff" to represent the interests of the class. 15 U.S.C. § 78u-4(a)(3)(B)(i). There is a rebuttable presumption that the movant with the "largest financial interest in the relief sought by the class" is the most adequate plaintiff, so long as that movant also makes a prima facie showing that it satisfies the typicality and adequacy requirements of Federal Rule of Civil Procedure 23. *Id.* § 78u-4(a)(3)(B)(iii)(I); *In*

re Regions Morgan Keegan Closed-End Fund Litig., No. 07-02830, 2010 WL 5173851, at *5 (W.D. Tenn. Dec. 15, 2010) (explaining that, although the text of the PSLRA implies that the rebuttable presumption is only triggered if there is full compliance with Rule 23, at the appointment of lead plaintiff stage, only adequacy and typicality are relevant) (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 263 (3d Cir. 2001)); *Ohio Pub. Emps. Ret. Sys. v. Fannie Mae*, 357 F. Supp. 2d 1027, 1034 (S.D. Ohio 2005) ("[o]nly two of the four [Rule 23] prerequisites, typicality and adequacy, directly address the personal characteristics of class representatives").

Once the presumption has been triggered, any member of the purported class can rebut it by showing that the presumptive lead plaintiff will not fairly and adequately protect the interests of the class or is subject to "unique defenses" that would make its adequate representation of the class impossible. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). If the presumption is not rebutted, the movant with the largest financial interest will be appointed lead plaintiff and its choice of counsel will be honored unless the Court finds that counsel to be unqualified, inexperienced, or otherwise incapable of adequately conducting the litigation. *See id.* § 78u-4(a)(3)(B)(v); *Norfolk Cty. Ret. Sys. v. Cmty. Health Sys., Inc.*, No. 3:11-CV-0433, 2011 WL 6202585, at *8 (M.D. Tenn. Nov. 28, 2011).

III. Analysis

All of the PSLRA's procedural requirements have been satisfied in this case. The action was filed on October 1, 2018. (Doc. No. 1.) The next day, St. Clair published a notice of the suit's filing in Business Wire, a "widely circulated national business-oriented publication." 15 U.S.C. § 78u-4(a)(3)(A)(i); (Doc. No. 23-3, PageID# 102; Doc. No. 26-1, PageID# 259). The notice summarized the complaint's allegations, provided the dates of the proposed class period, and notified potential class members of their right to move, within sixty days of the notice's

publication, to be appointed lead plaintiff.[5] 15 U.S.C. § 78u-4(a)(3)(A)(i); (Doc. No. 23-3, PageID# 102; Doc. No. 26-1, PageID# 259). The Institutional Funds and the Pensions Funds timely filed their motions on December 3, 2018.[6] (Doc. Nos. 23, 24.)

Although the procedural aspects of the PSLRA's test are easily determined, the question of which movant has the "larger financial interest" in the litigation is less straightforward. The PSLRA does not define the term. *Garden City Emps.' Ret. Sys. v. Psychiatric Sols., Inc.*, No. 3:09-01211, 2010 WL 1790763, at *3 (M.D. Tenn. Apr. 30, 2010). Accordingly, "the method used and the factors considered in determining each movant's financial interest remain fully within the discretion of the district court." *Id.* at *3 (quoting *Pirelli Armstrong Corp. Retiree Med. Benefits Tr. v. LaBranche & Co.*, 229 F.R.D. 395, 406–07 (S.D.N.Y. 2004)); *see also Pio v. Gen. Motors Co.*, No. CIV. 14-11191, 2014 WL 5421230, at *7 (E.D. Mich. Oct. 24, 2014) (explaining that, "by not specifying a method for determining the largest financial interest and stating instead that the determination is the court's, the PSLRA appears to discourage any [finely calibrated] inquiry and prefer that the court make the determination based on whatever factors seem most appropriate under the facts of the case before it").

Many courts have exercised that discretion by applying what are known as the *Olsten-Lax* factors to guide their decisions. The *Olsten-Lax* factors direct a court to consider for each potential lead plaintiff (1) the number of shares purchased; (2) the number of net shares purchased (the difference between shares purchased and shares sold); (3) the total net funds expended (the

[5] Although St. Clair indicated an interest in being lead plaintiff in its complaint, it did not move for that status.

[6] Sixty days from October 2, 2018, was Saturday, December 1, 2018. The movants therefore timely filed their motions on Monday, December 3, 2018. Fed. R. Civ. P. 6(a)(1)(C).

difference between the amount spent on shares and the amount received from sale of shares); and (4) the approximate losses suffered.[7] *See In re Goodyear Tire & Rubber Co. Sec. Litig.*, No. 5:03 CV 2166, 2004 WL 3314943, at *3 (N.D. Ohio May 12, 2004) (noting that "a host of other district courts" have adopted the *Olsten-Lax* factors); *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 295 (E.D.N.Y. 1998); *Lax v. First Merch. Acceptance Corp.*, No. 97 C 2715, 1997 WL 461036, at *5 (N.D. Ill. Aug. 11, 1997). Here, the Institutional Funds purchased more shares (gross and net) than the Pension Funds and had the higher net expenditure.[8] The Pension Funds had the greater financial loss. Unsurprisingly, the Institutional Funds argue that the first three *Olsten-Lax* factors are the most important; the Pension Funds argue that the fourth factor must control.[9]

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[7] To the extent that the Institutional Funds argue that the Sixth Circuit's decision in *In re Dist. 9, International Association of Machinists and Aerospace Workers Pension Trust*, No. 18-3154, 2018 U.S. App. LEXIS 8715 (6th Cir. Apr. 5, 2018), requires application of these factors, that argument fails. (Doc. No. 28, PageID# 372.) The appellant in that case was an entity that had not been appointed lead plaintiff and sought a writ of mandamus to enforce the PSLRA. *Id.* at *2. The court denied the writ and held that the district court had not abused its discretion in applying the *Olsten-Lax* factors in choosing a lead plaintiff, noting that application of those factors did not contradict "any specific provision of the PSLRA," which "does not set forth a test for determining the financial interest of a potential lead plaintiff." *Id.* at *3–4. The court's decision does not require application of those factors; instead, it emphasizes district courts' discretion in conducting their analyses in the absence of a clear congressional directive.

[8] The breakdown is as follows: (1) the Institutional Funds purchased 58,477 shares and the Pension Funds purchased 54,738; (2) the Institutional Funds made a net purchase of 57,830 shares to the Pension Funds' 54,738; and (3) the Institutional Funds' net expenditure was $2,608,177.00 while that of the Pension Funds' was $2,589,963.00 (Doc. No. 28, PageID# 367). The differences between those categories is slight when compared with the much larger margins in *Pio*, 2014 WL 5421230, at *4, and *Brixmor Prop. Grp., Inc.*, 2016 U.S. Dist. LEXIS 164682, at *5.

[9] As the Pension Funds point out, the Institutional Funds did not make their argument that the first three factors are the most important in their original motion and, instead, framed their financial interest in terms of alleged loss alone. (Doc. No. 23-1, PageID# 95; Doc. No. 30, PageID# 443–44.) That fact undermines the Institutional Funds' later argument that the first three factors must control the Court's analysis. *See Nicolow v. Hewlett Packard Co.*, 2013 WL 792642, at *4 (N.D. Cal. Mar. 4, 2013) (rejecting movant's request that the court focus on net shares purchased, rather than alleged loss, where the movant made no reference to net shares purchased in its original

As the Institutional Funds point out, some courts place greater weight on the first three *Olsten-Lax* factors. *See Westchester Putnam Ctys. Heavy & Highway Laborers Local 60 Benefit Funds v. Brixmor Prop. Grp., Inc.*, No. 16-CV-02400 (AT)(SN), 2016 U.S. Dist. LEXIS 164682, at *4–5 (S.D.N.Y Nov. 29, 2016) (appointing lead plaintiff that the first three factors "overwhelmingly" favored over movant that incurred larger losses under the fourth factor); *Police & Fire Ret. Sys. v. SafeNet, Inc.*, Nos. 06 Civ. 5797 (PAC), 06 Civ. 6194 (PAC), 2007 U.S. Dist. LEXIS 97959, at *5–6 (S.D.N.Y. Feb. 21, 2007) (appointing movant favored by the first three factors after noting that a two-percent difference between competing movants' alleged fourth-factor losses was too slight to be outcome determinative); *In re Goodyear Tire & Rubber Co. Sec. Litig.*, No. 5:03 CV 2166, 2004 WL 3314943, at *4–5 (N.D. Ohio May 12, 2004) (finding that, although one movant had alleged the largest loss, application of the first three factors revealed that loss to be "illusory"). As the Pension Funds counter, other courts find the first three *Olsten-Lax* factors of little relevance and focus on which potential class member has alleged the largest total losses. *See Takara Tr. v. Molex Inc.*, 229 F.R.D. 577, 579 (N.D. Ill. 2005) (explaining that many courts "simply determine which potential lead plaintiff has suffered the greatest losses"); *In re Bally Total Fitness Sec. Litig.*, No. 04C3530, 2005 WL 627960, at *4 (N.D. Ill. Mar. 15, 2005) (collecting cases and stating that it is not clear "what weight [the first three *Olsten-Lax* factors] should be given in relation to the amount of loss, or even why we should consider them at all").

This Court has forged a middle path by acknowledging the potential relevance of the first three *Olsten-Lax* factors, but giving the fourth factor the greatest weight. *See Blitz v. AgFeed Indus., Inc.*,, No. 3:11-0992, 2012 WL 1192814, at *7–8 (M.D. Tenn. Apr. 10, 2012) (collecting

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motion seeking appointment as lead plaintiff and shifted "its argument only after [another movant] came forward with larger [] losses").

cases for the proposition that, of the four factors, alleged loss is the most important and concluding that the presumptive lead plaintiff had the largest financial interest "simply on the basis of the losses stated in [the movants'] initial Motions"); *Norfolk Cty. Ret. Sys. v. Cmty. Health Sys., Inc*., Nos. 3:11–cv–0433, 3:11–cv–0451, 3:11–cv–0601, 2011 WL 6202585, at *7 (M.D. Tenn. Nov. 28) (treating the largest alleged loss as dispositive after concluding that the first three factors "do not necessarily provide an appropriate measurement for identifying the Plaintiff with the largest financial interest"); *Garden City Emps.' Ret. Sys.*, 2010 WL 1790763, at *3–4 (acknowledging all four factors but highlighting the presumptive plaintiff's alleged losses to conclude that there was no need "for an alternate method for determining the largest financial interest"); *In re Am. Serv. Grp., Inc.*, No. 3:06-00323, 2006 WL 2503648, at *3–4 (M.D. Tenn. Aug. 29, 2006) (same).

The Institutional Funds urge the Court to adopt the reasoning of *Pio v. General Motors Company* and conclude that the "first three factors provide the most objective measurement of a movant's stake in the litigation because the fourth factor is heavily dependent on the method applied and numbers chosen to calculate losses." No. CIV. 14-11191, 2014 WL 5421230, at *4 (E.D. Mich. Oct. 24, 2014); (Doc. No. 28, PageID# 367). While that assessment made sense in the context of *Pio*—where the movants had employed different methodologies to calculate their losses, revised those methodologies from brief to brief, and attacked one another's calculations—it is less useful here. *See Pio*, 2014 WL 5421230, at *5–6. As the Institutional Funds point out, "[b]oth movants calculate their losses under the 'last in, first out' (LIFO) method,"[10] and neither movant has criticized the other's application of that method. (Doc. No. 28, PageID# 367 n.1.) The

[10] "[U]nder [the last in, first out approach,] a plaintiff's sales of defendant's share during the class period are matched first against the plaintiff's most recent purchase of defendant's shares and gains or losses from those transactions are considered in damage calculations." *Johnson v. Dana Corp.*, 236 F.R.D. 349, 352 (N.D. Ohio).

Institutional Funds also cite *Pio* to bolster their claim that courts "routinely identify the 'net shares purchased' factor as equating to the largest financial interest." (Doc. No. 28, PageID# 369 (citing *Pio*, 2014 WL 5421230, at *4).) The courts that have done so are not in this circuit. *Pio*, 2014 WL 5421230, at *4 (collecting cases). More importantly, the net-shares-purchased analysis in *Pio* served as a proxy for estimating total loss. *Pio*, 2014 WL 5421230, at *4. A proxy is not necessary where, as here, the parties agree on how loss is calculated under the fourth factor.

The Court thus finds no reason to depart from its prior practice of looking to the fourth *Olsten-Lax* factor as the most important. Using the same method of calculation, the Institutional Funds and Pension Funds have alleged losses of $777,279.00 and $856,984.00, respectively. (Doc. No. 28, PageID# 367.) The Pension Funds therefore have the larger financial interest in this litigation.[11]

The Court's next determination is whether the Pension Funds satisfy the adequacy and typicality factors of Rule 23. Neither movant has argued that the other fails this test, and the Court finds that both would be acceptable representatives of the putative class. Regarding the Pension Funds, the Court finds that their claims arise "from the same event or practice or course of conduct

[11] The Institutional Funds also argue that Amalgamated Bank has the largest individual loss of any single entity in the movant groups and that courts "are loath to appoint groups of movements [sic] as lead plaintiff when doing so would mean the individual movant with the largest financial interest would not serve as lead plaintiff." (Doc. No. 28, PageID# 372 (quoting *Norfolk Cty. Ret. Sys.*, 2011 WL 6202585, at *6).) The court in *Norfolk* did not reach that finding independently, but summarized a proposition on which the movants had agreed. *Norfolk Cty. Ret. Sys.*, 2011 WL 6202585, at *6. The only case that the *Norfolk* court cited to support that proposition is *Goldberger v. PXRE Grp., Ltd.*, in which the court found that one individual movant had a "far greater" interest than any of the individuals making up the disfavored group movant, which was comprised of "disparate and apparently unrelated plaintiffs." No. 06-CV-3410KMK, 2007 WL 980417, at *5 (S.D.N.Y. Mar. 30, 2007); *Norfolk Cty. Ret. Sys.*, 2011 WL 6202585, at *6. That case is readily distinguishable from this one. Amalgamated Bank is not an individual movant and both the Institutional Funds and the Pension Funds are made up of unrelated class members.

that gives rise to the claims of other class members" and involve the same legal theory. *Garden City Emps.' Ret. Sys.*, 2012 WL 1071281, at *37. If appointed lead plaintiff, the Pension Funds will "allege that defendants violated the federal securities laws by disseminating materially false and misleading statements and omissions and that the Pension Funds purchased Acadia securities at prices artificially inflated by defendants' misrepresentations and omissions, like all of the other putative class members." (Doc. No. 25, PageID# 197–98.) The Pension Funds have also shown that they have "common interests with unnamed members of the class" and will "vigorously prosecute the interests of the class through qualified counsel." *Garden City Emps.' Ret. Sys.*, 2012 WL 1071281, at *37. The Pension Funds state that they are "sophisticated institutional investors with prior experience serving as lead plaintiff" and are "not aware of any potential conflicts of interest or any matters that would preclude them from fulfilling their duties as lead plaintiff." (Doc. No. 25, PageID# 198.) The Institutional Funds have made no showing otherwise.

Because the Pension Funds have the largest financial interest and satisfy the requirements of Rule 23, they should be appointed lead plaintiff unless the Institutional Funds show that the Pension Funds will not "fairly and adequately protect the interests of the class" or are "subject to unique defenses that render such plaintiff incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(B)(iii)(II). The Institutional Funds have made no such showing. The Pension Funds shall therefore serve as the lead plaintiff.

The Pension Funds plan to retain Robbins Geller, "a 200-attorney firm with an office in this District[] [that] regularly represents institutional and individual investors in securities litigation within the Sixth Circuit," and the Court sees no reason to disturb that choice.[12] (Doc. No.

[12] The fact that Robbins Geller filed the complaint on behalf of St. Clair further shows that the firm has been committed to this cause from the outset. Its representation of other putative class

25, PageID# 198.) As the Pension Funds note, this Court has previously found Robbins Geller to be "well qualified" for the task of representing a class in a securities action. *Garden City Emps.' Ret. Sys.*, 2010 WL 1790763, at *4; (Doc. No. 25, PageID# 199). The Court therefore approves the Pension Funds' choice of counsel.

IV. Conclusion

For the foregoing reasons, the Institutional Funds' motion for appointment as lead plaintiff and approval of its selection of lead counsel (Doc. No. 23) is DENIED and the Pension Funds' competing motion (Doc. No. 24) is GRANTED. The Pension Funds shall serve as lead plaintiff in this action, represented by Robbins Geller.

It is so ORDERED.

ALISTAIR E. NEWBERN
United States Magistrate Judge

members does not impede its appointment as lead counsel. *See Wolfe v. AspenBio Pharma, Inc.*, 275 F.R.D. 625, 628 n.6 (D. Colo. 2011).