

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SHELLEY L. ANDERSON, :
 :
 Plaintiff, :
 :
 -against- :
 FISERV, INC., et al., :
 :
 Defendants. :

09 Civ. 5400 (BSJ) (FM)

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DECISION AND ORDER

ARLENE BERTINI, :
 :
 Plaintiff, :
 :
 -against- :
 FISERV, INC., et al., :
 :
 Defendants. :

09 Civ. 8397 (BSJ) (FM)

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FRANK MAAS, United States Magistrate Judge.

The plaintiffs in these putative class actions (“Plaintiffs”) allege that they were victims of a “Ponzi” scheme that enabled Edward T. Stein (“Stein”) to deplete their pensions and IRA accounts. Rather than suing Stein, they seek to recover damages from defendant Fiserv, Inc., and other related defendants (collectively the “Defendants”) that acted as the custodians of those accounts. In their complaints, the Plaintiffs contend that their losses are due, at least in part, to the Defendants’ breach of their fiduciary duties, negligence and failure to comply with requirements of the Internal Revenue Code. The case comes before the Court now in connection with two cross-motions regarding the appointment of interim class counsel.

Initially, there were three separate suits assigned to Judge Jones arising out of Stein's activities. On September 18, 2009, with the consent of counsel, I entered an order consolidating the Anderson action, which was the first-filed suit, with Sternfeld v. Fiserv, Inc., 09 Civ. 6779, under the lower Anderson docket number. Counsel in all three of the original cases further agree that the Bertini action should be consolidated with what is now known as the Anderson action. Accordingly, I have entered a separate order, bearing today's date, consolidating the Bertini action with the Anderson action.¹

In the first motion before the Court, counsel in the Anderson action – the Law Offices Bernard M. Gross, P.C. (“Gross”) and Kenneth A. Blau, Esq. (“Elan”) – seek to have Shelly L. Anderson appointed as “Lead Plaintiff” and Court approval of her selection of them as “Lead Counsel.” Counsel in the former Sternfeld action – the firms of Lovell Stewart Halebian LLP (“Lovell Stewart”) and Zamansky & Associates LLC (“Zamansky”) – oppose that motion and have filed a cross-motion seeking to have themselves appointed instead as interim class counsel pursuant to Rule 23(g)(2) of the Federal Rules of Civil Procedure.² For the reasons set forth below, the motion by counsel

¹ Courts disagree as to whether a magistrate judge has the authority to enter an order consolidating civil cases for all purposes. Compare Black v. Cockrell, 2003 WL 21757297, at *1 n.1 (N.D. Tex. July 28, 2003) (no authority because order “effectively disposed of the latter-filed action”), with Carcaise v. Cemex, Inc., 217 F. Supp. 2d 603, 604 n.1 (W.D. Pa. 2002) (“magistrate judge has the authority to rule on the request to consolidate as a non-dispositive motion”). See also Rentrop v. Offshore Pipelines, Inc., 1986 WL 11185 (E.D. La. Sept. 30, 1986) (granting motion pursuant to referral under 28 U.S.C. § 636(b)(1)(A) without expressly considering the issue). Here, as was true of the prior consolidation, all counsel have consented. There consequently does not appear to be any need to resolve this issue.

² Counsel in the Bertini action do not seek to be appointed as interim class counsel.

in the Anderson action, (Anderson Docket No. 23), is denied and the cross-motion by counsel in the former Sternfeld action, (Sternfeld Docket No. 4), is granted.³

I. Factual Background

On April 1, 2009, the Securities and Exchange Commission ("SEC") filed a complaint against Stein and several of his companies seeking injunctive and other relief. SEC v. Stein, No. 09 Civ. 3125 (GEL) (S.D.N.Y. 2009). In its complaint, the SEC alleged that Stein had defrauded his investors through a "classic Ponzi scheme." (See Anderson Docket No. 24) (Mem. in Supp. of Mot. for Consolidation and Appointment of Lead Pl. and Co-Lead Counsel ("Anderson Mem.") at 7). That same day, Judge Lynch froze Stein's assets and those of his affiliated companies. See Stein, No. 09 Civ. 3125 (GEL) (S.D.N.Y. Apr. 1, 2009) (consent order granting preliminary injunction and other relief on consent). The United States Attorney's Office for the Eastern District of New York also announced that day that Stein had been charged with wire fraud.⁴

³ Entries on the docket sheet of the Anderson action are cited as "Anderson Docket No. ___." Entries on the docket sheet of the former Sternfeld action are cited as "Sternfeld Docket No. ___." Entries on the docket sheet of the former Bertini action are cited as "Bertini Docket No. ___."

⁴ See Press Release, Investment Advisor Arrested and Charged with Wire Fraud for Stealing Millions of Dollars from a Client (Apr. 1, 2009) (available at <http://www.justice.gov/usao/nye/pr/2009/2009apr01b.html>).

Stein later pleaded guilty to a five-count felony information charging him with wire fraud and four counts of securities fraud. See United States v. Stein, No. 09 Cr. 377 (E.D.N.Y. June 22, 2009) (Tr. at 39). He is scheduled to be sentenced by Judge Jack B. Weinstein on February 8, 2010. Id. (order dated Nov. 18, 2009, granting motion to continue sentencing).

II. Discussion

A. Rule 23

Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”) requires a court to determine at an “early practicable time” whether to certify a class and, if so, to appoint class counsel. Because representation of a putative class prior to the filing of a motion for class certification is sometimes necessary, Rule 23(g)(3) permits a court to appoint interim class counsel. In this case, the two groups of attorneys seeking appointment have not been able to proceed cooperatively. Accordingly, the Court must select between two competing teams of proposed interim class counsel.

In selecting interim class counsel, courts have looked to the criteria for determining the adequacy of class counsel set forth in Rule 23(g)(1)(A):

(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class.

See, e.g., In re Bank of Am. Corp. Secs., Derivative & ERISA Litig., 258 F.R.D. 260, 272 (S.D.N.Y. June 30, 2009); In re Mun. Derivatives Antitrust Litig., 252 F.R.D. 184, 186 (S.D.N.Y. Aug. 1, 2008). Additionally, under Rule 23(g)(1)(B), courts may consider “any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class,” including: “(1) the quality of the pleadings; (2) the vigorousness of the prosecution of the lawsuits; and (3) the capabilities of counsel, as well as whether . . .

their charges will be reasonable.” In re Bank of Am., 258 F.R.D. at 272 (citations and internal quotation marks omitted).

If only one applicant seeks appointment as class counsel, a court must determine whether the applicant is “adequate” under Rule 23(g)(1) and Rule 23(g)(4), which requires that counsel “fairly and adequately represent the interests of the class.” Faced with competing “adequate” applicants, however, “the court must appoint the applicant best able to represent the interests of the class.” Rule 23(g)(2).

B. Evaluation of Rule 23(g) Criteria

Despite their extensive criticisms of their opponents, there is no doubt that either pair of firms requesting appointment as interim class counsel would prove capable of fairly representing the class. That said, I nevertheless find that Lovell Stewart and Zamansky will best be able to represent the interests of the class as interim class counsel. There are several reasons for this determination.

First, while all four firms have experience handling complex litigation, including class actions, it appears from their firm resumes and websites that Lovell Stewart and Zamansky specialize in financial and class action litigation to a greater extent than Gross and Elan, which also tout their capabilities in personal injury suits. Compare Lovell Stewart Halebian Practice Areas, <http://shllp.com/Practice%20Areas.htm/> (last visited Jan. 29, 2010), and Zamansky & Associates Practice Areas, <http://www.zamansky.com/practice-areas.html> (last visited Jan. 29, 2010), with Law Offices Bernard M. Gross Practice Areas, <http://bernardmgross.com/practice/> (last visited Jan 29, 2010), and

Kenneth A. Elan, <http://elanlaw.com/attorneys/kenneth-elan.php> (last visited Jan. 29, 2010).

Additionally, the “types of claims asserted in the action” are primarily common law claims, not securities law claims. In that regard, Lovell Stewart notes that it has successfully defeated motions seeking to characterize claims as subject to dismissal under the Securities Litigation Uniform Standards Act, an issue likely to arise in this case. (Sternfeld Mem. at 10). The resume of its first-named partner, Christopher Lovell, Esq., also indicates that he has “tried more than . . . thirty cases involving claims for financial losses under common law breach of fiduciary duty or negligence.” (See Decl. of Christopher M. McGrath, Esq., dated Aug. 31, 2009, Ex. 1). Zamansky, too, has experience with similar class actions, including several involving the representation of investors defrauded by Ponzi schemes. (Sternfeld Mem. at 10-11).

Although Gross and Elan also have extensive experience (and success) in class actions, their papers suggest a greater focus on securities and derivatives class actions. (See Anderson Docket No. 25) (Decl. of Kenneth A. Elan, dated Aug. 13, 2009, Exs. 1-2). Indeed, their motion papers seek to have Anderson appointed as lead plaintiff. (See Anderson Mem. at 6; Anderson Docket No. 28 (Anderson Reply Mem.)). Unlike Rule 23(g), which focuses on the qualifications of attorneys to be appointed as class counsel, the Private Securities Litigation Reform Act (“PSLRA”) focuses on the selection of a representative lead plaintiff who then selects class counsel with the approval of the Court. See 15 U.S.C. § 78u-4(a)(3)(B)(i). Since all counsel seem to agree that the case

should proceed on state law claims, not securities claims, the Anderson plaintiffs' reliance on PSLRA terminology is puzzling.

Furthermore, Lovell Stewart and Zamansky indicate that they are "prepared to commit whatever resources might be necessary . . . to bring this litigation to the best possible result." (Sternfeld Mem. 13). Gross and Elan are, of course, also likely to commit significant resources to this case if they are chosen as interim class counsel, but their papers do not expressly make that commitment. In that regard, it also bears mention that Lovell Stewart is the largest firm of the four (with eighteen attorneys in two offices) and has advanced as much as \$3 million in past lawsuits. (See Firm Attorneys, <http://lshllp.com/Attorneys.htm> (last visited Jan. 29, 2010); Sternfeld Mem. at 13).

Finally, while both teams of lawyers have done work to identify and investigate the plaintiffs' potential claims, and Gross and Elan may in fact have done more to identify claims at an early stage, Lovell Stewart and Zamansky plainly have conducted their own research in the course of developing the complaint in Sternfeld, which differs from the Anderson complaint.

For these reasons, I conclude that Lovell Stewart and Zamansky are best able to represent the interests of the putative class.

C. Purported Conflict

After the cross-motions were fully briefed, counsel in the Anderson action informed the Court that Lovell Stewart had been appointed as interim lead counsel in Weinstein v. Fiserv, Inc., No. 09 Civ. 752 (D. Colo.), another case involving at least some

of the Defendants. (See Letter to the Court from Deborah R. Gross, Esq., dated Oct. 7, 2009, at 1). Counsel in the Anderson action argued that Lovell Stewart therefore has a conflict because the plaintiffs in both actions would be vying for the same funds. (Id.).

A conflict clearly would exist if there were a risk that the Defendants' assets would not suffice to satisfy the claims of the plaintiffs in both the New York and Colorado suits. See, e.g., Moreno v. Autozone, Inc., 251 F.R.D. 417, 425 (N.D. Cal. 2008) (no conflict absent allegation that assets are insufficient to satisfy both classes); In Re Cardinal Health, Inc. ERISA Litig., 225 F.R.D. 552, 557 (S.D. Ohio 2005) (conflict exists if "the amount sought by each proposed class could exceed the total assets of the Defendants"). Here, however, no such allegation has been made. Moreover, Lovell Stewart has represented that the total amount of the Defendants' "finite" assets is twenty-five (25) times larger than the combined total amount of the claims in the two representations." (See Letter to the Court from Christopher Lovell, Esq., dated Oct. 14, 2009, at 1). There consequently does not appear to be any actual conflict at this time.

I also note that Lovell Stewart is being appointed only as interim class counsel in both the New York and Colorado cases. If a conflict develops as the cases progress, both courts can reconsider their preliminary determinations regarding the suitability of Lovell Stewart to serve as class counsel.

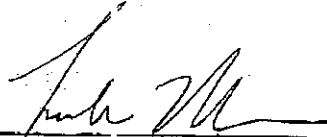
III. Conclusion

For the foregoing reasons, the motion in Anderson, (Anderson Docket No. 23), is denied, the cross-motion in Sternfeld, (Sternfeld Docket No. 4), is granted, and

Lovell Stewart and Zamansky are appointed as interim class co-counsel. In view of that appointment, Lovell Stewart and Zamansky are directed to file a consolidated class action complaint by February 26, 2010.

SO ORDERED.

Dated: New York, New York
January 29, 2010


FRANK MAAS
United States Magistrate Judge

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