UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DROR GRONICH, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. OMEGA HEALHCARE INVESTORS, INC., C. TAYLOR PICKETT, ROBERT O. STEPHENSON, and DANIEL J. BOOTH, Defendants.	No. 1:17-cv-08983-NRB
STEVE KLEIN, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. OMEGA HEALHCARE INVESTORS, INC., C. TAYLOR PICKETT, ROBERT O. STEPHENSON, and DANIEL J. BOOTH, Defendants.	No. 1:17-cv-09024-NRB

GLENN FAUSZ'S RESPONSE TO ALL COMPETING LEAD PLAINTIFF MOTIONS

Glenn Fausz ("Fausz") respectfully submits this memorandum in response to the competing motions seeking appointment as lead plaintiff and approval of class counsel.[1]

PRELIMINARY STATEMENT

After reviewing the competing motions, Fausz recognizes that he does not possess the largest financial interest in the litigation and therefore is not entitled to invoke the "most adequate plaintiff" presumption established by Congress when it enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA").[2] *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii).

That said, Fausz notes that ***two*** lead plaintiff motions were filed on his behalf. One was filed by the undersigned counsel solely on Fausz's behalf. ECF Nos. 22. The other was filed by Pomerantz LLP ("Pomerantz") and Glancy Prongay & Murray LLP ("Glancy") on Fausz's behalf in his capacity as a member of the so-called "Omega Healtchare Investor Group" ("OHIG").[3] *See* ECF No. 19. Tellingly, despite the fact that OHIG purported to possess a larger financial interest in the litigation than The Hannah Rosa Trust ("HRT"),[4] OHIG nonetheless withdrew its motion on January 25, 2018, endorsing HRT in the process. ECF No. 25.

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[1] Unless stated otherwise, all ECF references are to the *Gronich* docket, all defined terms mean the same as they did in Fausz's opening brief, *see* ECF No. 23, all citations and quotations are omitted, and all emphases are added.

[2] This response has no effect on, and is without prejudice to, Fausz's rights as a member of the proposed class, including his right to share in any recovery from the resolution of this litigation through settlement, judgment, or otherwise. Should the Court determine that any of the other movants with larger financial interests in the outcome of this litigation are unable to serve as lead plaintiff, Fausz is willing and able to assume the role of lead plaintiff on behalf of the purported class.

[3] On OHIG's brief in support of its motion, Pomerantz is listed as "Proposed Lead Counsel" and Glancy is listed as "additional counsel." ECF No. 20 at 11. There is no mention of any other "additional counsel." *Id.*

[4] *Compare* ECF No. 20 at 7 (OHIG asserted $306,966 in losses), *with* ECF No. 13 at 7 (HRT asserted $141,389.69 in losses).

Fausz files this response to clarify the record and to protect the class from additional potential harm. In short, Pomerantz and Glancy filed OHIG's motion in bad faith:

- Fausz never selected Pomerantz or Glancy as his lawyers (Fausz Decl. at ¶7);[5]
- Fausz never retained Pomerantz or Glancy as his lawyers (*Id.* at ¶6);
- Fausz did not know Pomerantz and Glancy were filing a lead plaintiff motion on his behalf, let alone as part of any group (*Id.* at ¶8);
- Fausz had never heard of the "Omega Heathcare Investor Group" prior to being informed of OHIG's motion by his undersigned counsel (*Id*. at ¶9);
- Fausz had never heard of OHIG's members prior to being informed of their identity by his undersigned counsel (*Id.*);
- Fausz mistakenly retained both his undersigned counsel and the Law Offices of Howard G. Smith ("Smith") unbeknownst to his undersigned counsel (*Id.* at ¶¶1, 5);
- Pomerantz and Glancy intentionally hid from this Court and other movants the involvement of Smith in OHIG's motion by redacting Smith's firm name from the PSLRA certification they submitted on Fausz's behalf (*compare* ECF No. 21-2 at 14 with Fausz Decl., Ex. B);
- Fausz's "Representation Agreement" with Smith contains the following clause, "By your signature below, you are acknowledging that ***you have agreed to be represented by the Law Offices of Howard G. Smith and such other co-counsel as it deems appropriate to associate with in an action against*** . . . " (Fausz Decl., Ex. A); and
- Smith, Pomerantz, and Glancy routinely use this clause to cobble together groups of unrelated plaintiffs to file lead plaintiff motions on behalf of clients who never provided ***informed*** consent because these firms hid their true intentions and involvement at the outset of the retention (*see* Gonnello Decl., Ex. 1 (excerpted deposition testimony of J. Michael Cunniff from *In re Akorn, Inc. Sec. Litig.*, 1:15-cv-01944 (N.D. Ill.), wherein Cunniff testified that he retained Smith but not Pomerantz and Glancy)).

[5] Citations to the "Fausz Decl." are to the Declaration of Glenn Fausz filed contemporaneously herewith. Citations to the "Gonnello Decl." are to the Declaration of Richard W. Gonnello filed contemporaneously herewith.

Thus, to protect the class from additional lawyer-driven chicanery, Fausz respectfully requests that Pomerantz, Glancy, Smith, and any other undisclosed law firms who were involved with OHIG's motion be precluded by the Court from sharing in any attorney's fees that may be awarded in this case in the event that these firms and HRT's counsel, Brower Piven, P.C. ("Brower"), have an undisclosed fee sharing agreement that arose in connection with OHIG's withdrawal.

ARGUMENT

Under the PSLRA, the role of the lead plaintiff is to empower investors so that they—***not their lawyers***—exercise primary control over private securities litigation. *Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 82 n.13 (2d Cir. 2004).

Based on the facts described above, it is clear that the motion submitted by Pomerantz and Glancy on OHIG's behalf was entirely lawyer-driven. In their hunt to cobble together plaintiffs so that at least one of these firms could be appointed lead counsel, Pomerantz, Glancy, and Smith poached Fausz's statutory right to "***select and retain***" proposed counsel for the class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v) ("The most adequate plaintiff shall, subject to the approval of the court, ***select and retain*** counsel to represent the class."). In so doing, Pomerantz and Glancy improperly "interpose[d] themselves as representatives of a class." *In re NTL, Inc. Sec. Litig.*, No. 02 Civ. 3013(LAK)(AJP), 2007 U.S. Dist. LEXIS 8772, at *10-11 (S.D.N.Y. Feb. 8, 2007); *see also In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 311 (S.D.N.Y. 2001) (finding that when "the named plaintiffs exercise no meaningful oversight over their counsel, the class action becomes little more than a lawyer's playground").

For that matter, the manner in which OHIG was formed by its lawyers is even more egregious than the kinds of "makeshift" groups of unrelated investors that courts in this District routinely disallow when determining which movant possesses the "largest financial interest."

See Teran v. Subaye, No. 11 Civ. 2614 (NRB), 2011 U.S. Dist. LEXIS 105774, at *13-14 (S.D.N.Y. Sept. 16, 2011) (Buchwald, J.); *see also Xianglin Shi v. SINA Corp.*, No. 05 Civ. 2154 (NRB), 2005 U.S. Dist. LEXIS 13176, at *11, *15 (S.D.N.Y. July 1, 2005) (Buchwald, J.) (rejecting group and noting that "allowing an aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff").

Notwithstanding, counsel's gambit could easily have succeeded under different circumstances. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iv) (discovery of lead plaintiff movants is only permitted if "the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class").

And ruses of this nature could easily result in negative consequences for the putative class when they ultimately surfaces during discovery. Namely, defendants could use the information as a threat to reduce the settlement value of the case or to defeat class certification. *See In re Baan Co. Sec. Litig.*, 271 F. Supp. 2d 3, 13-14 (D.D.C. 2002) (finding the lead plaintiff inadequate and denying class certification when, among other things, he was not aware of the co-lead counsel structure set up by his attorneys); *see also Gordon v. Sonar Capital Mgmt. LLC,* 92 F. Supp. 3d 193, 199 (S.D.N.Y. 2015) (finding plaintiff inadequate to represent the class in part because he failed to disclose an attorney fee-sharing agreement during the lead plaintiff appointment stage); *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 155 (S.D.N.Y. 2010) (finding the lead plaintiff inadequate and denying class certification when he was represented by an undisclosed attorney who had not been approved by the court); *see also Chana Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 160 (S.D.N.Y. 2010) ("[I]n considering whether the proposed class counsels are adequate, the Court may consider the honesty and integrity of the

putative class counsel[.]"); 15 U.S.C. §78u-4(a)(3)(B)(v) (lead plaintiff shall "***subject to the approval of the court***, select and retain counsel to represent the class").

In light of the above, Fausz respectfully requests that Pomerantz, Glancy, Smith, and any other undisclosed law firms who were involved with OHIG's motion be precluded from sharing in any attorney's fees awarded in this case. Although Fausz is unsure what, if any agreements, HRT or its counsel, Brower, have with Pomerantz, Glancy, or Smith, it is entirely plausible that a fee-sharing agreement exists for the following reasons:

- Brower is a small firm with only five attorneys (*See* Gonnello Decl., Ex. 2 (a copy of the "Attorneys" page of Brower's firm website));
- While withdrawing its motion, OHIG expressly threw its support behind HRT (ECF No. 25 at 2); and
- Fee sharing agreements of this nature have been known to occur (Gonnello Decl., Ex. 3 (declaration submitted by Pomerantz in *DeSmet v. Intercept Pharmaceuticals, Inc.*, *et al*., No. 1:17-cv-07371-LAK (S.D.N.Y.) wherein Pomerantz admitted to entering an agreement with a firm in exchange for that firm's withdrawal of its client's lead plaintiff motion)).

If the PSLRA's goal of ending lawyer-driven litigation is to have any hope of succeeding, OHIG's attorneys should not be permitted to profit from their bad behavior, particularly where the worst of this behavior is outsourced by the firms listed on the papers to a tiny firm whose identity and role is intentionaly concealed from the Court and other movants.

Dated: January 30, 2018

Respectfully submitted,

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