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

JOHNATHAN HIRTENSTEIN and DONALD B. HALLOWES, Plaintiffs, v. CEMPRA, INC.; PRABHAVATHI B. FERNANDES; and MARK W. HAHN, Defendants.	)	1:16cv1303
SHERI PASQUAL, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. CEMPRA, INC.; PRABHAVATHI FERNANDES; MARK W. HAHN; and DAVID W. OLDACH, Defendants.	)	1:16cv1356
DONALD B. HALLOWES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. CEMPRA, INC.; PRABHAVATHI FERNANDES; MARK W. HAHN, and DAVID W. OLDACH, Defendants.	)	1:16cv1451

ORDER CONSOLIDATING CASES, APPOINTING LEAD PLAINTIFF, AND APPROVING SELECTION OF LEAD COUNSEL

Before the court are three securities class actions involving allegations that Defendant Cempra, Inc., and its officers and directors failed to disclose that its pharmaceutical product candidate, solithromycin, may cause liver damage. There are four competing motions to serve as lead Plaintiff in the lawsuit, all accompanied by requests to approve lead counsel. (Doc. 7;[1] Doc. 13; Doc. 16; Doc. 18.[2]) Each movant also asks the court to consolidate the three cases. For the reasons set forth below, the cases will be consolidated, and Charles Craig Janies, Robert F. Colwell Jr., and Jennifer Colwell will be appointed lead Plaintiffs. This group's selection of lead counsel will be approved.

I. BACKGROUND

Plaintiffs allege that Defendant Cempra, Inc. defrauded investors by misrepresenting solithromycin's impact on patients' livers. (See generally Doc. 1.) They bring this action on behalf of investors who acquired Cempra securities between July 7, 2015, and December 29, 2016 (the "Class Period"),[3] seeking remedies under

[1] Except where otherwise noted, all docket citations are to the record in Hirtenstein v. Cempra, 1:16CV1303.

[2] A fifth candidate for lead Plaintiff indicated it will not oppose the appointment of another lead Plaintiff. (Doc. 21 at 2.)

[3] The complaints in the three actions propose varying class periods. The court accepts the class period proposed in the Hallowes case, 16CV1451,

the Securities Exchange Act of 1934. Three groups of investors and one institutional investor filed competing motions to serve as lead Plaintiff and sought approval of their proposed lead counsel. The first group, which this Order will refer to as the "Gluck Group," comprises Robert Gluck, Louis Pohoryles, Gordon F. Lentz, David Rash, and Gleyndon E. Kern, Jr. (Doc. 7.) The second group (the "Hallowes Group") comprises Donald B. Hallowes, the City of Omaha Police and Fire Retirement Systems, Danny Lu, and Robert Pavleszek. (Doc. 13.) The third group (the "Janies Group") comprises Charles Craig Janies, Robert F. Colwell Jr., and Jennifer Colwell. (Doc. 18.) The final movant is Yelin Lapidot Mutual Funds. (Doc. 16.) Every movant has also moved to consolidate the actions under Federal Rule of Civil Procedure 42(a). Their requests to consolidate these cases are unopposed.

II. ANALYSIS AND FINDINGS

a. Motions to Consolidate

The Private Securities Litigation Reform Act of 1995 ("PSLRA") provides that "[i]f more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the

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because all of the proposed lead Plaintiffs used this period to calculate their monetary losses under the Private Securities Litigation Reform Act of 1995. (Doc. 8 at 5; Doc. 14 at 1 & n.2; Doc. 17 at 3; Doc. 19 at 3; see also 16CV1451 Doc. 1 at 2.)

court shall not [appoint a lead Plaintiff] until after the decision on the motion to consolidate is rendered." 15 U.S.C. § 78u-4(a)(3)(B)(ii). Rule 42(a) provides that consolidation is appropriate when the cases in question "involve a common question of law or fact." "[C]ourts have taken the view that considerations of judicial economy favor consolidation," Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990) (collecting cases), especially with regard to securities cases involving the same allegations of fraud or misrepresentation, see, e.g., Mitchell v. Complete Mgmt., Inc., No. 99 CIV. 1454, 1999 WL 728678, at *1 (S.D.N.Y. Sept. 17, 1999).

Here, the three cases presented for consolidation involve many of the same factual allegations regarding Cempra's misrepresentations and failures to disclose information about solithromycin's performance. The individual Defendants in each case are officers or directors of Cempra, and Cempra's liability in each case will be determined under the same law, that is, the Securities Exchange Act of 1934. Consolidation is therefore appropriate under Rule 42(a).

b. Motions to Serve as Lead Plaintiff and to Approve Lead Counsel

The PSLRA provides that in a securities class action, "the court . . . shall appoint as lead plaintiff the member or members of the purported plaintiff class that 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 requirements, id. § 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. Because the Janies Group satisfies these requirements, the court will appoint it lead Plaintiff.

The court finds the following:

1. The PSLRA requires the plaintiff who files the action to publish notice to the class within twenty days of filing the action informing class members of their right to file motions for appointment as lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(A). "If more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published . . . ." Id. § 78u-4(a)(3)(A)(ii).

2. Plaintiff Johnathan Hirtenstein filed this action on November 4, 2016. (Doc. 1.) On the same day, Hirtenstein's counsel published a notice via GlobeNewsWire informing class members of their right to file motions for appointment as lead Plaintiff (Doc. 8-2), satisfying the requirements of 15 U.S.C.

§ 78u-4(a)(3)(A). See Simmons v. Spencer, No. 13 CIV. 8216 RWS, 2014 WL 1678987, at *2 (S.D.N.Y. Apr. 25, 2014) (stating that GlobeNewsWire is "a widely circulated national business-oriented publication or wire service" for § 78u-4(a)(3)(A)'s purposes).

3. The PSLRA allows any member of the putative class to file a motion to serve as lead plaintiff no later than sixty days after the notice is published. 15 U.S.C. § 78u-4(a)(3)(A)(i)(II).

4. On January 3, 2017, sixty days after notice was published, the four aforementioned movants filed competing motions to serve as lead Plaintiff. (Doc. 7; Doc. 13; Doc. 16; Doc. 18.)

5. The PSLRA provides that no more than ninety 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). More than ninety days have passed since the notice was published.

6. In determining which person or group is most capable of leading the class, the court must presume that the most adequate plaintiff is the person or group who (a) has filed the complaint or made a motion in response to the notice; (b) has the largest financial interest in the relief sought; and (c) otherwise satisfies the requirements of Federal Rule of Civil Procedure 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

7. As to the first requirement, all four movants timely moved to serve as lead Plaintiff.

8. As to the second requirement, the Janies Group alleges losses of $1,386,836.74.[4] (Doc. 39-1 at 2; Doc. 20-3.[5]) Mr. Janies

[4] This figure is calculated using the "last-in, first-out" ("LIFO") accounting method, as movant Yelin Lapidot requests. (Doc. 24 at 8, n.5.) See also In re eSpeed, Inc. Sec. Litig., 232 F.R.D. 95, 101 (S.D.N.Y. 2005) (noting that "courts have preferred LIFO and have 'generally rejected [the "first-in, first-out" ("FIFO") method] as an appropriate means of calculating losses in securities fraud cases'" (citation omitted)). In any event, the Janies Group has suffered the largest losses of any movant under either method.

For the first time in its response brief, the Gluck Group asks the court to adopt an altogether different method for calculating losses. Exemplified by Espinoza v. Whiting, 8 F. Supp. 3d 1142, 1144 (E.D. Mo. 2014), aff'd sub nom. Podraza v. Whiting, 790 F.3d 828 (8th Cir. 2015), this method considers only the decline in stock price as a result of a corrective disclosure and the total shares each movant held during the relevant time. It does not evaluate the losses the movants actually suffered because it disregards the purchase price paid for those shares. Id.

The court rejects the Gluck Group's request to "change[] [its] method of valuation upon realizing [its] defeat" under normal valuation methods. In re Ribozyme Pharm., Inc. Sec. Litig., 192 F.R.D. 656, 661 (D. Colo. 2000). The Espinoza method has a host of critics. See, e.g., Sallustro v. CannaVest Corp., 93 F. Supp. 3d 265, 276 (S.D.N.Y. 2015) ("Espinoza itself has never been cited or relied on by another court. Moreover, application of Chesner's proposed new loss model leads to absurd results . . . ." (citation omitted)); Sallustro v. CannaVest Corp., 93 F. Supp. 3d 265, 276 (S.D.N.Y. 2015) (criticizing the method as "inconsistent with the [PSLRA] and with" Supreme Court precedent).

[5] Yelin Lapidot correctly notes that Mr. Janies's personal declaration contains a typographical error that makes it seem like his losses are overrepresented on the Janies Group's loss chart. (Doc. 24 at 8-9.) In particular, Janies labeled dates affiliated with certain securities as "date sold" when he should have labeled them "date acquired." (Doc. 20-2 at 5-6.) The Janies Group admits the error but correctly points out that it did not affect the calculations on the loss chart it filed as a group. (Doc. 38 at 4 & n.3.)

Yelin Lapidot urges the court not to allow the Janies Group to correct this error. (Doc. 24 at 8-9 n.6 (citing In re Telxon Corp. Sec. Litig., 67 F. Supp. 2d 803, 818–19 (N.D. Ohio 1999)).) While it is true

alone alleges losses of $1,017,494. (Doc. 39-1 at 2; Doc. 20-3.) The Gluck Group alleges losses of $1,359,649 (Doc. 8-4 at 3), the Hallowes Group alleges losses of $1,163,350.75 (Doc. 15-2 at 3), and Yelin Lapidot alleges losses of $794,296.00 (Doc. 17-4 at 2).

The Hallowes Group and Yelin Lapidot urge the court not to allow the Janies Group to aggregate its members' losses, claiming that the group was "cobbled together by their assorted counsel for the sole purpose of inflating their financial interest in this matter." (Doc. 24 at 2; see also Doc. 25 at 7-11; Doc. 24 at 4-6.) As an initial matter, even if the court were to disaggregate the losses of all the groups, Mr. Janies would still be the lead Plaintiff because he has suffered more losses than any other individual or institution before the court.

Regardless, although courts disfavor the aggregation of groups comprising "disparate and apparently unrelated plaintiffs," Bhojwani v. Pistiolis, No. 06 CIV. 13761 CM NKF, 2007 WL 9228588,

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that the PSLRA does not contemplate parties' filing supplements to highlight previously overlooked losses, id. at 819, the Janies Group has made no attempt to supplement its filings. Rather, its motion relies entirely on the calculations made on the Group's loss chart (Doc. 20-3), which was filed alongside the original motion.

Finally, though the error in Mr. Janies's personal declaration did not affect the Janies Group's loss calculations, the parties are cautioned that exhibits to sworn declarations should be treated carefully and that even typographical errors can have detrimental effects in securities litigation. See Bhojwani v. Pistiolis, No. 06 CIV. 13761 CM NKF, 2007 WL 9228588, at *3 (S.D.N.Y. July 31, 2007) (expressing concern with a calculation error as reflecting "a certain carelessness about detail that undermines the adequacy of" a proposed lead plaintiff).

at *1 (S.D.N.Y. July 31, 2007) (citation omitted), "courts have routinely approved of group appointments, especially where the groups are small and include individuals who independently possess largest financial interests in the outcome of the litigation," Klugmann v. Am. Capital Ltd., No. CIV. PJM 09-5, 2009 WL 2499521, at *4 (D. Md. Aug. 13, 2009). Given that Mr. Janies has suffered the largest loss of any individual movant, the court finds that the Janies Group was not cobbled together "solely for the purpose of aggregating the largest losses." Id.

9. 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. 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. 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." In re Cree, Inc., Sec. Litig., 219 F.R.D. 369, 372 (M.D.N.C. 2003) (citing Sosna v. Iowa, 419 U.S. 393, 403 (1975)); see also In re Cendant Corp. Litig., 264 F.3d 201, 263 (3d Cir. 2001); Weiss v. York Hosp., 745 F.2d 786, 810 n. 36 (3d Cir. 1984).

10. As to typicality, the members of the Janies Group

purchased Cempra securities during the class period and claim that they did so based on the same allegedly misleading statements the complaint highlights. (See generally Doc. 20-2.)

11. As to adequacy, the Janies Group's members and their attorneys are willing and able to pursue the litigation. (Id.) Each member has certified that he or she is willing to participate in this litigation and will represent the class's interests actively and zealously. (See generally id.) The court is unaware of any conflicts of interest or antagonism among the Janies Group's members or between the members and the rest of the class. As discussed below, the group has retained experienced, able counsel.

12. The court is aware of no evidence that might rebut the presumption raised by the foregoing. See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). As noted above, "courts have routinely approved of group appointments, especially where the groups are small and include individuals who independently possess largest financial interests in the outcome of the litigation." Klugmann, 2009 WL 2499521, at *4. As noted, the Janies Group was not cobbled together "solely for the purpose of aggregating the largest losses." Id. Similarly, while the court has considered the Hallowes Group's argument that groups that include institutional investors can improve a case's "diversity of representation," Johnson v. Pozen Inc., No. 1:07CV599, 2008 WL 474334, at *3 (M.D.N.C. Feb. 15, 2008) (see also Doc. 34 at 4), it is by no means

required that the lead plaintiff group include more than one kind of investor. See, e.g., Weltz v. Lee, 199 F.R.D. 129, 135 (S.D.N.Y. 2001) (appointing a group of individual investors as lead plaintiffs).

13. "The 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). The Janies Group has selected the law firms of Robbins Geller Rudman & Dowd, LLP and Johnson & Weaver LLP to serve as co-lead counsel. (Doc. 18 at 3.) Both firms are experienced in the area of securities actions. (See generally Doc. 20-5; Doc. 20-6; Doc. 20-7.)

III. CONCLUSION

Having found the foregoing, the court will grant the Janies Group's request to serve as lead Plaintiff and will approve its choice of counsel. The court will leave it to the Janies Group and its lawyers to monitor the costs of litigating this action. Counsel are cautioned, however, that should they succeed, their fees "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6). "Therefore, there shall be no duplicative services rendered or concomitant increase in attorney's fees arising out of the use of more than one law firm to represent the class members." Johnson, 2008 WL 474334, at *3.

IT IS THEREFORE ORDERED that the above-captioned cases are

CONSOLIDATED under the first-filed action, Hirtenstein v. Cempra, Inc. et al., 1:16CV1303.

IT IS FURTHER ORDERED that the Janies Group's motion for appointment as lead Plaintiff (Doc. 18) is GRANTED and that Charles Craig Janies, Robert F. Colwell Jr., and Jennifer Colwell are hereby appointed lead Plaintiffs for the proposed class.

IT IS FURTHER ORDERED that the Janies Group's selection of the law firms of Robbins Geller Rudman & Dowd, LLP and Johnson & Weaver LLP is APPROVED.

/s/ Thomas D. Schroeder
United States District Judge

July 5, 2017