UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARC BAIN RASELLA, *individually and on behalf of all others similarly situated*,	:	OPINION AND ORDER
Plaintiff,	:	22 Civ. 3026 (ALC) (GWG)
-v.-	:	
ELON R. MUSK,	:	
Defendant.	:	

GABRIEL W. GORENSTEIN, United States Magistrate Judge

Plaintiff Marc Bain Rasella has sued defendant Elon R. Musk for securities fraud under 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5 in connection with Musk's alleged failure to timely disclose his acquisition of shares in Twitter, Inc. ("Twitter") in early 2022. See Complaint, filed Apr. 12, 2022 (Docket # 1) ("Comp."). Amalgamated Bank, as Trustee for the LongView LargeCap 500 Index VEBA Fund, LongView LargeCap 500 Index Fund, LongView Large Cap 1000 Index Value Fund, and LongView Broad Market 3000 Index Fund ("Amalgamated Bank") and Oklahoma Firefighters Pension and Retirement System ("Oklahoma Firefighters") have each moved for appointment as lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B), and Federal Rule of Civil Procedure 23.[1] For the reasons explained below, Oklahoma Firefighters' motion is granted, and Amalgamated Bank's motion is denied.

[1] See Motion to Appoint Amalgamated Bank to Serve as Lead Plaintiff and Appoint Lead Counsel, filed June 13, 2022 (Docket # 6) ("Amalgamated Bank Mot."); Memorandum of Law in Support, filed June 13, 2022 (Docket # 7) ("Amalgamated Bank Mem."); Memorandum of Law in Opposition, filed June 27, 2022 (Docket # 18) ("Oklahoma Firefighters Opp."); Reply Memorandum of Law, filed July 5, 2022 (Docket # 19) ("Amalgamated Bank Reply").

I. BACKGROUND

A. Plaintiffs' Allegations

Musk "is the founder of Tesla and SpaceX, and according to Forbes, is the richest person in the world." Comp. ¶ 16. In January 2022, Musk began purchasing Twitter shares. Id. ¶ 19. By March 14, Musk had acquired more than 5% of Twitter stock. Id. Thus, 17 C.F.R. § 240.13d-1(a) required Musk to file a "Schedule 13" with the Securities and Exchange Commission ("SEC") by March 24, revealing that his ownership interest exceeded 5%. Id. ¶¶ 19-20. Musk did not file a Schedule 13 until April 4, however, by which point Musk had acquired a 9.1% ownership interest in Twitter. See id. ¶ 21. Once Musk filed the Schedule 13, the price of Twitter shares rose approximately 27%. See id. ¶ 22. By failing to disclose that his ownership interest exceeded 5%, Musk was able to acquire Twitter shares at artificially low prices between March 24 and April 4. See id. ¶ 24. Rasella and other putative class members sold Twitter shares during this period and therefore "missed the resulting share price increase," instead selling at artificially low prices. Id. ¶ 23. According to plaintiff, Musk's conduct violated Section 10(b) of the Exchange Act of 1934, 15 U.S.C. § 78j(b) and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. See id. ¶ 41.

B. Procedural History

Rasella filed the complaint in this action on April 12, 2022. See Comp. On June 13, 2022, Oklahoma Firefighters, Amalgamated Bank, and an individual named Partha Pratim Palit

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Oklahoma Firefighters' Motion for Appointment as Lead Plaintiff and Approval of its Selection of Lead Counsel, filed June 13, 2022 (Docket # 8) ("Oklahoma Firefighters Mot."); Memorandum of Law in Support, filed June 13, 2022 (Docket # 9) ("Oklahoma Firefighters Mem."); Declaration of Avi Josefson in Support, filed June 13, 2022 (Docket # 10) ("Josefson Decl."); Proposed Order, filed June 13, 2022 (Docket # 11); Response in Opposition, filed June 27, 2022 (Docket # 17) ("Amalgamated Bank Opp."); Reply Memorandum of Law, filed July 5, 2022 (Docket # 20) ("Oklahoma Firefighters Reply").

moved for appointment as lead plaintiff. See Amalgamated Bank Mot.; Oklahoma Firefighters Mot.; Motion to Appoint Partha Pratim Palit to Serve as Lead Plaintiff, filed June 13, 2022 (Docket # 12). Palit subsequently filed a notice of non-opposition to the competing motions. See Notice of Non-Opposition, filed June 24, 2022 (Docket # 16).

II. DISCUSSION

A. Governing Law

The PSLRA directs a court to "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." 15 U.S.C. § 78u-4(a)(3)(B)(i). One of the key presumptions in the statute is that the most adequate plaintiff is the person who "has the largest financial interest in the relief sought by the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

Congress enacted the PSLRA in 1995

> in response to perceived abuses in securities fraud class actions. The purpose behind the PSLRA was to prevent "lawyer-driven" litigation, and to ensure that "parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiffs' counsel."

Weltz v. Lee, 199 F.R.D. 129, 131 (S.D.N.Y. 2001) (quoting In re Oxford Health Plans, Inc., Sec. Litig., 182 F.R.D. 42, 43-44 (S.D.N.Y. 1998)).

As one court has explained,

> The theory of these provisions was that if an investor with a large financial stake in the litigation was made lead plaintiff, such a plaintiff . . . would be motivated to act like a "real" client, carefully choosing counsel and monitoring counsel's performance to make sure that adequate representation was delivered at a reasonable price.

In re Razorfish, Inc. Sec. Litig., 143 F. Supp. 2d 304, 307 (S.D.N.Y. 2001). See also Barnet v. Elan Corp., 236 F.R.D. 158, 161 (S.D.N.Y. 2005) ("In other words, by enacting the PSLRA,

Congress sought to encourage class members with the largest purported losses to act as lead plaintiffs in private securities litigation."). "In accordance with this policy, the PSLRA provides for extensive judicial involvement in the process of selecting a lead plaintiff and lead counsel in a securities class action. The [PSLRA] carefully sets forth the procedure for doing so and the criteria to be applied." Peters v. Jinkosolar Holding Co., 2012 WL 946875, at *4 (S.D.N.Y. Mar. 19, 2012).

First, "within twenty days of filing a putative class action, the plaintiff must publish 'in a widely circulated national business-oriented publication or wire service,' a notice to the class, informing the members of the class of the pendency of the action, and their right to file a motion for appointment as lead plaintiff." Id. (quoting 15 U.S.C. § 78u-4(a)(3)(A)(i)). Next, "within sixty days of publication of the notice, any member or members may apply to the court to be appointed as lead plaintiff(s)." Id. (citing 15 U.S.C. § 78u-4(a)(3)(A)(i)). Finally, "within ninety days of the publication of the notice, the Court shall consider any motion made by a purported class member in response to the notice." Id. (citing 15 U.S.C. § 78u-4(a)(3)(B)(i)).

As noted above, the PSLRA directs courts "to appoint as lead plaintiff the member or members of the purported class that is or are the 'most capable of adequately representing the interests of class members,' referred to in the statute as the 'most adequate plaintiff.'" Id. (quoting 15 U.S.C. § 78u-4(a)(3)(B)(i)). The PSLRA creates a "presumption" that the "most adequate plaintiff" is the "person or group of persons" that (1) "has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i)"; (2) "in the determination of the court, has the largest financial interest in the relief sought by the class"; and (3) "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

While the PSLRA does not specify how the "largest financial interest in the relief sought by the class" is to be measured, 15 U.S.C. § 78u-4(a)(3(B)(iii)(I)(bb), "[f]inancial loss . . . is the most important" consideration. Varghese v. China Shenghuo Pharm. Holdings, Inc., 589 F. Supp. 2d 388, 395 (S.D.N.Y. 2008) (citations omitted); accord Crass v. Yalla Grp. Ltd., 2021 WL 5181008, at *5 (S.D.N.Y. Nov. 8, 2021). Where the alleged harm arises from a fraudulently induced sale of shares, the following factors are pertinent to determining loss:

> (1) the total number of shares [sold] during the class period;
>
> (2) the net shares [sold] during the class period (in other words, the difference between the number of shares [sold] and the number of shares [purchased] during the class period;
>
> (3) the net funds [obtained] during the class period (in other words, the difference between the . . . amount received for the sale of shares during the class period [and the amount spent to purchase shares during the class period]); and
>
> (4) the approximate losses suffered.

Kaplan v. Gelfond, 240 F.R.D. 88, 93 (S.D.N.Y. 2007) (citations omitted).[2]

Additionally, the PSLRA requires that the lead plaintiff satisfy the requirements of Fed. R. Civ. P. 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). Under Rule 23,

> [o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> > (1) the class is so numerous that joinder of all members is impracticable;
> >
> > (2) there are questions of law or fact common to the class;
> >
> > (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

[2] Because the four-factor test assumes the harm to plaintiffs arose from a fraudulently induced purchase of shares, see id., we have adjusted the language in the first three factors to reflect the harm alleged in this case: the sale of shares at artificially low prices, see Comp. ¶¶ 19-24.

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