UNITED STATE DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-10874-RWZ

IN RE STONE & WEBSTER, INC.
SECURITIES LITIGATION

MEMORANDUM OF DECISION AND ORDER

September 7, 2007

ZOBEL, D.J.

I. Background

Plaintiffs, purchasers of shares of Stone & Webster, Inc. ("S&W"), bring this suit against former executives of S&W and PriceWaterhouseCoopers ("PwC"), S&W's former auditor. They allege that S&W, an engineering firm: (1) "deliberately underbid on more than a billion dollars of contracts ... so as to overstate earnings;" (2) "fraudulently concealed its loss on a huge contract in Indonesia with Trans Pacific Petrochemical Indotama ("TPPI") ... and thus reported unreceived revenues;" and (3) "made public statements, which concealed and misrepresented its shortage of liquid reserves and its impending bankruptcy." In re Stone & Webster, Inc., Sec. Litig., 414 F.3d 187, 192 (1st Cir. 2005). (See also Docket # 39, Amended Complaint ¶¶ 52-159.[1]) In addition to S&W, plaintiffs named as defendants: (1) H. Kerner Smith, S&W's former

[1] Citations are to the Consolidated and Amended Class Action Complaint (hereinafter "Amended Complaint" or "Am. Compl.") filed on January 4, 2001 (Docket # 39), as the motion for leave to file a Second Amended Complaint (Docket # 172) was denied as untimely (Docket # 194). The Second Amended Complaint (Docket # 227) was allowed only insofar as it added new plaintiffs. (Docket # 194.)

chairman, president, and CEO; (2) Thomas Langford, S&W's executive vice president and CFO; and (3) PwC, S&W's former auditor. They sued all defendants under § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, as well as § 18 of the Exchange Act, 15 U.S.C. § 78r. They sued individual defendants Smith and Langford also under § 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), as persons in control of S&W.

Plaintiffs now seek to certify a class of purchasers of S&W stock. For the reasons discussed below, their motion for class certification is allowed in part and denied in part.

II. Procedural History

This securities fraud class action was filed in May 2000. Plaintiffs RAM Trust Services, Inc. ("RAM Trust"), and Lens Investment Management, LLC ("Lens Investment") (collectively, "plaintiffs") were designated lead plaintiffs under the Private Securities Litigation Reform Act of 1995, Pub. L. 104-57, 109 Stat. 737 ("PSLRA"), codified at 15 U.S.C. §§ 78u-4 et seq., and Judge Lindsay, to whom the case was originally assigned, allowed them to file an amended complaint, which they filed on January 4, 2001. (Docket # 39.)

A. Prior Motions and Rulings

Defendants filed motions to dismiss and, in March 2003, Judge Lindsay granted PwC's motion in its entirety and granted most of Smith and Langford's motion. In re Stone & Webster, Inc., Sec. Litig., 253 F. Supp. 2d 102, 136 (D. Mass. 2003). His decision was based primarily on plaintiffs' failure to meet the pleading requirements of

the PSLRA and Fed. R. Civ. P. 9(b). Id. Plaintiffs then sought leave to amend the First Amended Complaint, which Judge Lindsay denied on the basis of undue delay.[2] In re Stone & Webster, Inc., Sec. Litig., 217 F.R.D. 96 (D. Mass. 2003). He also ultimately decided the remaining claims against Smith and Langford in defendants' favor in an order entered September 23, 2003. (See Electronic Order of 9/23/03 Granting Defendants' Motion for Summary Judgment.)

B. First Circuit Appeal

Plaintiffs appealed all three rulings to the First Circuit, which on December 16, 2005, affirmed in part, vacated in part, and remanded in part the decision of the district court. In re Stone & Webster, Inc., Sec. Litig., 414 F.3d 187 (1st Cir. 2005). Specifically, the court:

(1) affirmed the dismissal of the § 10(b) claims against Smith and Langford based upon the allegedly underbid contracts, id. at 201;

(2) affirmed the dismissal of the §§ 10(b), 18 and 20(a) claims against Smith and Langford based upon inclusion of underbid contracts in S&W's "backlog," id. at 202;

(3) affirmed the dismissal of the § 10(b) claims against Smith and Langford based on the TPPI deal, id. at 206;

(4) affirmed the dismissal of the § 10(b) claims against PwC based upon its audit opinions, id. at 215;

(5) vacated the dismissal of the §§ 18 and 20(a) claims and remanded the claims against Smith and Langford and PwC based on the allegedly underbid contracts, id. at 202;

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[2] With respect to Judge Lindsay's denial of plaintiffs' motion for leave to amend, the First Circuit "found no abuse of discretion," though it noted in dicta that plaintiffs could, on remand, reassert the motion. Id.

(6) vacated the dismissal of the §§ 18 and 20(a) claims and remanded the claims against Smith and Langford and PwC based upon the TPPI deal, id. at 206;

(7) vacated the dismissal of all § 10(b) claims and remanded the claims "against Smith and Langford for false statements as early as January 1999 and thereafter relating to the Company's liquidity and financial condition," id. at 211; and

(8) vacated and remanded the § 18 claim against PwC, id. at 215.

Next, defendants sought rehearing and rehearing en banc, which the First Circuit denied in a written opinion. See In re Stone & Webster, Inc., Sec. Litig., 424 F.3d 24 (1st Cir. 2005).

C. Remand

Accordingly, on remand, the following claims remain:

(1) Section 10(b) claims against individual defendants Smith and Langford based on alleged false statements "relating to [S&W's] liquidity and financial condition," id. at 211;

(2) Section 18 claims against Smith and Langford and against PwC based on the allegedly underbid contracts and the TPPI deal, id. at 202, 206 and 215; and

(3) Section 20(a) claims against Smith and Langford based on the allegedly underbid contracts and the TPPI deal, id. at 202, 206.

D. Second Motion for Leave to Amend Complaint and Defendants' Motion to Strike

After remand, plaintiffs refiled a Motion for Leave to File a Second Consolidated and Amended Class Action Complaint ("Second Amended Complaint") (Docket # 172), which this court denied, except "to the extent that it s[ought] to add plaintiffs who purchased S&W stock between July 26, 1999 and October 27, 1999." (Docket # 194.)

Plaintiffs filed this Second Amended Complaint on November 6, 2006, adding as plaintiffs John P.M. Higgins (President of RAM Trust and former President and CEO of Lens Investment) and Robert A.G. Monks (Director of RAM Trust and the founder of Lens Investment) as plaintiffs. (Docket # 227.) Defendants Smith and Langford now move to strike that portion of the Second Amended Complaint. (Docket # 231.)

III. Motion for Class Certification

Plaintiffs seek to certify a class consisting of "all persons or entities which purchased S&W securities between and including January 22, 1998 and May 8, 2000" (hereinafter the "Class") with a subclass consisting of "all persons or entities which purchased S&W securities between and including January 1, 1999 and May 8, 2000" (hereinafter the "10b-5 subclass").[3] (Docket # 195-1, Pls.' Mot. for Class Cert. at 1.)

In their first Motion for Class Certification (Docket # 195-1), plaintiffs had sought to have lead plaintiffs Lens Investment, RAM Trust, Gilbert H. Van Note, Jr., Robert M. White (as Trustee for the Robert M. White Trust) and Kevin C. Frye, all of whom certified they purchased shares of S&W during the class period, selected as class representatives. In their Amended Motion for Class Certification, they wish to add Higgins and Monks, and to drop Lens Investment, Van Note and White (in his individual

[3] Plaintiffs filed a Motion for Class Certification (Docket # 195-1) and Memorandum in Support (Docket # 195-2) on July 7, 2006. Thereafter they filed an Amended Motion for Class Certification (Docket # 203) in which they also rely on the July 7, 2006 Memorandum in Support of Plaintiffs' Motion for Class Certification (Docket # 195-2).

capacity) as proposed class representatives.[4] (See Docket # 203, Pls.' Amended Mot. for Class Cert. at 1.) In addition, Monks was the founder of Lens Investment, and Higgins was the CEO and President of Lens. Both Higgins and Monks were allegedly "involved in RAM's decisions to invest in Stone & Webster." (Docket # 238-1, Pls.' Resp. to Defs.' Mot. to Strike at 3.) RAM Trust was the investment adviser that managed the Lens Investment funds.

Accordingly, plaintiffs now propose that: (1) RAM Trust; (2) Higgins; (3) Monks; and (4) Frye be named class representatives.

A. Legal Standard

To certify a class under Fed. R. Civ. P. 23(a), a court must find that: (1) "the class is so numerous that joinder is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class; and (4) the representatives will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

In addition, the requirements of Rule 23(b) be must be met, namely that "(1) proceeding without class certification may create incompatible standards of conduct for defendants or adverse precedent for subsequent plaintiffs, (2) defendants acted in a manner that affected the class as a whole, thereby making appropriate the application of a remedy as to the entire class, or (3) that common questions predominate over

[4] Plaintiffs state that they no longer seek to have Lens Investment serve as class representative because Lens Investment is "no longer an active investment entity." (Docket # 238-1, Pls.' Resp. to Defs.' Mot. to Strike in Part Pls.' Second Amended Complaint at 4.)

individual issues, and class certification offers a superior method for addressing these common questions." In re Transkaryotic Therapies, Inc. Sec. Litig., No. 03-cv-10165-RWZ, 2005 WL 3178162, at *1 (D. Mass. Nov. 28, 2005); see also Fed. R. Civ. P. 23(b)(3).

B. The Parties' Contentions

Defendants do not contest plaintiffs' arguments in support of numerosity or commonality. Rather, the main points of contention here are the requirements of typicality, adequacy and the 23(b) factors of predominance and superiority.

1. Typicality

In general, a party does not satisfy the "typicality" requirement "where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." Swack v. Credit Suisse First Boston, 230 F.R.D. 250, 260 (D. Mass. 2005). Here, defendants contend that proposed plaintiffs are subject to unique defenses because: (1) RAM Trust never purchased a single share of S&W stock and therefore lacks standing; and (2) Higgins and Monks did not rely on S&W's public statements and thus are subject to unique defenses.

2. Adequacy

Next, defendants assert that proposed class representative Frye does not "fairly and adequately represent" the class as required by Rule 23(a)(4) because he has demonstrated insufficient interest in the class action.

3. Rule 23(b)

Finally, defendants contend that the proposed Section 18 class does not

comport with Rule 23(b)(3), since Section 18 requires individual plaintiffs to demonstrate actual reliance. Accordingly, common questions of law or fact will not predominate over individual issues of reliance, and thus Rule 23(b)(3) is not satisfied.[5]

C. Discussion

1. Class Certification With Respect to Section 18 Claims

In order to prevail on a claim under Section 18,[6] a plaintiff must establish that: "(1) a false or misleading statement was contained in a document filed pursuant to the Exchange Act (or any rule or regulation thereunder); (2) defendant[s] made or caused to be made the false or misleading statement; (3) plaintiff[s] relied on the false statement; and (4) the reliance caused loss to the plaintiff[s]." In re Adelphia

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[5] With respect to the Section 18 claims, defendants contend that Judge Lindsay expressly held that such claims "require[] reliance," and that his ruling has become the "law of the case." (Docket # 218, Defs.' Mem. of Law in Opp. to Pls.' Am. Mot. for Class Cert. at 9.) However, Judge Lindsay did not reach the precise question sub judice here. Rather, he concluded: "Although I need not address the issue here, I note that th[e] reliance requirement raises questions regarding the appropriateness of maintaining section 18 claims in a class action." In re Stone & Webster, 253 F. Supp. 2d at 135 n.13. Since I decline to certify a class with respect to the Section 18 claims because there is no presumption of actual reliance, see infra at Section III.C.1, I do not reach defendants' argument that the question is governed by the "law of the case."

[6] Section 18 of the Exchange Act provides, in pertinent part:

> Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder . . . which statement was at the time in light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement . . . .

15 U.S.C. § 78r(a) (emphasis added).

Communications Corp. Sec. Litig., 03 Civ. 5750, 2006 WL 2463355, at *8 (S.D.N.Y. Aug. 23, 2006).

In the Section 10(b)[7] context, the law concerning reliance has evolved to relieve plaintiffs of the necessity to prove individual reliance on defendants' misrepresentations, although they must still prove individual reliance on the integrity of the market price established in an efficient market. See Basic, Inc. v. Levinson, 485 U.S. 224, 242 (1988).

In the Section 18 context, both the language of the statute and its legislative history dictate a different result. First, the statute explicitly requires proof of actual reliance. See, e.g., Lindner Dividend Fund, Inc. v. Ernst & Young, 880 F. Supp. 49, 56 (D. Mass. 1995) ("Section 18 requires that a plaintiff establish knowledge of and reliance upon the alleged misstatements contained in any document filed with the SEC . . . . A plaintiff must specifically allege that he actually read a copy of the document filed with the SEC, or relevant parts of the document reported in some other source,

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[7] Section 10(b) of the Exchange Act provides, in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

and was induced to act upon specific misrepresentations in the document.").[8]

Second, where actual reliance (individual reliance) must be proven, no class may be certified. See In re Polymedica Corp. Sec. Litig., No. 00-12426-WGY, 2006 WL 2776669, at *1-2 (D. Mass. Sept. 28, 2006); In re Xcelera.com Sec. Litig., No. 00-cv-11649-RWZ, slip op. at 2 (D. Mass. Sept. 30, 2004) (unpublished slip opinion), aff'd, 430 F.3d 503, 517-18 (1st Cir. 2005).

As a consequence, the cases also broadly agree that no class may be certified under Section 18 because that statute requires proof of actual reliance.[9] See, e.g., In

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[8] See also In re Suprema Specialties, Inc. Sec. Litig., 438 F. 3d 256, 283 (3d Cir. 2006) (noting that courts require proof of individual reliance under § 18); Howard v. Everex Sys., 228 F.3d 1057, 1063 (9th Cir. 2000) (same); Heit v. Weitzen, 402 F.2d 909, 916 (2d Cir. 1968) (same). In addition, courts have recognized that the actual reliance requirement comports with the legislative history of Section 18. See, e.g., In re Genentech, Inc. Sec. Litig., No. C-88-4038-DLJ, 1989 WL 106834, at *5 (N.D. Cal. Jul. 7, 1989) (rejecting the argument that reliance may be presumed under Section 18 as under Section 10; reasoning that "The reliance requirement in section 18(a) ... was imposed by Congress.").

[9] Defendants cite several cases that hold otherwise. See In re MDC Holdings Sec. Litig., 754 F. Supp. 785 (S.D. Cal. 1990) (certifying Section 18 claim, noting "the issue is whether the individual questions concerning reliance would predominate over the common questions of the suit."); Simpson v. Speciality Retail Concepts, Inc., 149 F.R.D. 94, 102 (M.D.N.C. 1993) (certifying Section 18 class; "individual questions of reliance do not predominate over issues common to the claims"); State of Wisconsin Invest. Bd. v. Ruttenberg, No. CV-99-BU-3097-S, Mem. of Opinion, slip op. at 17-18 (N.D. Ala. July 3, 2001) ("This Court will follow Simpson and In re MDC Holdings . . . . This Court, after the principal common practice issues are resolved, can hold mini-trials on the issue of individual reliance with respect to each shareholder."). I am persuaded that these cases are no longer good law. Neither In re MDC Holdings not Simpson addressed Basic's holding. In addition, the Fourth Circuit has since recognized the principle established by Basic, thereby casting Simpson's authority in doubt. See Gariety v. Grant Thornton, LLP, 368 F.3d 356, 363 (4th Cir. 2004). Finally, Ruttenberg expressly followed Simpson and In re MDC Holdings, both of which are compromised authorities, as discussed above.

re Safety-Kleen Corp. Bondholders Litig., No. 00-1145-17, 2004 WL 3115870, at *10 (D.S.C. Nov. 1, 2004) (decertifying Section 18 class; "Plaintiffs' Section 18 claims against [defendants] require individualized determinations of reliance . . . . Plaintiffs have not demonstrated that there is any commonality in their reliance."); In re American Continental Corp./Lincoln Savings and Loan Sec. Litig., 794 F. Supp. 1424, 1438 (D. Ariz. 1992) (declining to certify Section 18 class, holding that "the requisite Section 18 reliance cannot be proven on a class basis"); Beebe v. Pacific Realty Trust, 99 F.R.D. 60, 70 (D. Or. 1983) (declining to certify Section 18 class, concluding: "as to proof of individual reliance, plaintiff does not meet the commonality requirement" and noting that, because of such requirement, [Section] 18(a) is "largely an ineffective remedy" in class action litigation); Elster v. Alexander, 76 F.R.D. 440, 442 (N.D. Ga. 1977) (declining to certify Section 18 class; "[to] test a claim under section 18(a), this Court will be confronted with questions of individual reliance . . . . Therefore, the Court concludes that claims under [Sections] 14(a) and 18(a), like common law claims, are inappropriate for treatment as class actions because they present substantial and predominate individual questions.").

Accordingly, the motion to certify a class to pursue Section 18 claims is denied.

2. Class Certification With Respect to Section 10(b) and 20(a) Claims

a. The Parties' Contentions

Defendants' objection to the certification of a class with respect to the Section 10(b) and 20(a) claims is limited to an objection to the proposed class representatives.

As noted above, in June 2005, Judge Lindsay designated plaintiffs RAM Trust

and Lens Investment as "lead plaintiffs" under the PSLRA. In their Amended Motion for Class Certification, plaintiffs no longer seek to include Lens Investment, Van Note and White as class representatives. Rather, they propose two alternate individuals: (1) Higgins and (2) Monks. Frye, also named in the original motion, remains a proposed class representative.

Defendants argue that the proposed class representatives do not satisfy the requirements of Rule 23(a)(3)-(4) and the certification requirement of the PSLRA. With respect to the addition of the proposed class representatives, defendants argue, first, that as a general matter, plaintiffs should not be allowed to substitute as class representatives new plaintiffs, who are not presently named plaintiffs in this case, particularly when none of the original plaintiffs qualified in the first instance as "lead plaintiffs." Second, they assert that none of the proposed class representatives meet the requirements of Fed. R. Civ. P. 23(a)(3) and (4). Specifically, (1) RAM Trust is disqualified because (a) it never purchased S&W stock (its certification to the contrary notwithstanding) and therefore lacks standing; and (b) it is therefore also subject to unique defenses; (2) Higgins and Monks (a) were not initially named "lead plaintiffs;" (b) did not file the requisite PSLRA certification; and (c) are subject to unique defenses; and (3) Frye will not "fairly and adequately" represent the class because he lacks sufficient knowledge of and interest in the case.

b. Proposed Class Representatives

I. RAM Trust

Plaintiffs do not contest that lead plaintiff, RAM Trust, an investment adviser, did

not itself purchase a single share of S&W stock during the proposed class period.[10] Defendants are correct; courts have held that individuals lack standing to bring a class action if they did not themselves purchase stock. See In re Eaton Vance Corp., Sec. Litig., 219 F.R.D. 38, 40-41 (D. Mass. 2003) (declining to certify class of plaintiffs suing mutual fund defendants where plaintiffs, individual investors, had not purchased shares in such funds; holding that plaintiffs could not demonstrate a personal injury and thus lacked standing).

Courts are split, however, on whether an investment adviser has standing to bring a class action. Some courts have declined to certify a class brought by investment adviser plaintiffs because such entities do not themselves buy or sell stock and thus lack standing unless the investment adviser has the power to act as attorney-in-fact for clients' funds. See, e.g., In re Cardinal Health, Inc. Sec. Litig., 226 F.R.D. 298, 311 (S.D. Ohio 2005) (noting split of authority; holding that investment adviser lacked standing absent appointment as attorney-in-fact); Olsen v. New York Community Bancorp, Inc., 233 F.R.D. 101, 107 (E.D.N.Y. 2005) (citing Weinberg v. Atlas Air Worldwide Holdings, Inc., 216 F.R.D. 248, 255 (S.D.N.Y. 2003)) ("when the investment advisor is also the attorney-in-fact for its clients with unrestricted decision making authority, then investment advisor is considered the 'purchaser' under the federal securities laws with standing to sue in its own name"); In re The Goodyear Tire &

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[10] Defendants contend that both RAM and Lens were investment advisers who advised Higgins and Monk to purchase shares of S&W, which they did. Lens Investment is no longer in business. Thus, plaintiffs have named the president of RAM, along with RAM, as proposed class representatives.

Rubber Co. Sec. Litig., 5:03-cv-2166, 2004 WL 3314943, at *5 (N.D. Ohio May 12, 2004) (concluding that plaintiff had standing to bring class action where court found that plaintiff investment advisor had attorney-in-fact authority); Smith v. Suprema Specialties, Inc., 206 F. Supp. 2d 627, 634-35 (D. N.J. 2002) (holding that investment adviser lacked standing absent appointment as attorney-in-fact); In re Turckell Iletisim Hizmetler, A.S. Sec. Litig., 209 F.R.D. 353, 357-58 (S.D.N.Y. 2002) (same).

Other courts have held that attorney-in-fact authority is not required; rather, investment managers have standing where they have unrestricted decisionmaking authority over their portfolio holdings. See, e.g., In re Rent-Way Sec. Litig., 218 F.R.D. 101, 106-109 (W.D. Pa. 2003) (clarifying earlier decision EZRA Charitable Trust v. Rent-Way, Inc., 136 F. Supp. 2d 435, 441 (W.D. Pa. 2001)) (holding that specific attorney-in-fact authority was not necessary; rather, the "undisputed authority [the investment adviser] possessed under the agreement" was dispositive); see also In re UnumProvident Corp. Sec. Litig., 2003 U.S. Dist. LEXIS 24633, at *28 (E.D. Tenn. Nov. 6, 2003) ("[a]n investment adviser qualifies as a 'purchaser' under the federal securities laws, and may sue in its own name, if it has been delegated the authority to make investment decisions on behalf of its client;" but also noting that plaintiff had attorney-in-fact authority); In re Northwestern Corp. Sec. Litig., 299 F. Supp.2d 997, 1007 (D. S.D. 2003) (investment adviser has standing so long as he or she has been delegated investment discretion).

I find the precedent holding that an investment adviser must have attorney-in-fact authority to be more persuasive. While an investment adviser with investment

discretion may be deemed to be the "purchaser" of securities within the meaning of the Securities Act, without attorney-in-fact authority, the investment adviser does not have clear authority to bring a suit on behalf of its clients. See Smith v. Supreme Specialties, Inc., 206 F. Supp.2d 627, 634 (D. N.J. 2002) ("[investment manager] may not bring the action on behalf of its clients because it . . . has not submitted any evidence that it received permission to move on its clients' behalf"). Rather, "[t]he clients' mere grant of authority to an investment manager to invest on its behalf does not confer authority to initiate suit on its behalf." Id. at 634-35.

Here, RAM Trust does not have attorney-in-fact authority and does not, therefore, have standing.

ii. Higgins and Monks

Next, defendants object to Higgins and Monks on the grounds that they: (1) are not parties to the instant litigation and thus not eligible to serve as class representatives; (2) have not complied with the statutorily-mandated filing of a sworn certification with the complaint; (3) are not eligible because they were not named as "lead plaintiffs;" and (4) are subject to "unique defenses."

The first three objections are unpersuasive. Higgins and Monks were properly added as parties by the filing of the Second Amended Complaint. They have filed the requisite certification required by the PSLRA (albeit not with the original complaint) and plaintiffs may substitute added plaintiffs for initial lead plaintiffs.

A difficulty arises with defendants' fourth objection. Both Higgins and Monks are "shareholder activists" and, as such, subject to unique defenses. Specifically,

defendants aver, Higgins and Monks purchased shares of S&W to "engag[e] in activist strategies [and] overcome existing corporate governance problems to enhance shareholder value." (Docket # 218, Defs.' Mem. of Law in Opp. to Pls.' Am. Mot. for Class Cert. at 26.) In particular, defendants argue that Higgins and Monks purchased shares of S&W on the theory that the company was poorly managed and that the stock price would likely decline; therefore, they could not have relied on any alleged misstatements. They point to, inter alia, the following facts: (1) Higgins and Monks "had numerous communications with S&W directors and management" (id.); (2) Monks had two friends, "Ciluffo and Merrill, [who] were [S&W] directors, whom he regarded as sources of inside information" (id.); and (3) Monks "published several books . . . which undermine any suggestion by plaintiffs' counsel that Monks, Higgins, or RAM relied on any alleged misstatements by Defendants." Id. at 19.

While their status as "shareholder activists," does not, ipso facto, disqualify Higgins and Monks from serving as class representatives, in this case, the record suggests that they may be subject to unique defenses and therefore do not satisfy the "typicality" requirement. Accordingly, I decline to name them class representatives.

iii. Frye

As to Frye, defendants deem him unable to meet the Rule 23(a)(4) "adequacy" requirement[11] because, according to defendants, he has "demonstrated that he is unwilling to take any action to monitor and control the course of this litigation." (Docket

[11] The PSLRA also requires adequacy: "the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that – (cc) otherwise satisfies the requirements of Rule 23 []."

218, Defs.' Smith and Langford's Mem. of Law in Opp. to Pls.' Amended Mot. for Class Cert. at 28.) In particular, defendants point to the following evidence of Frye's disinterest obtained from his deposition testimony: (1) he "has had no communication with his counsel since 2000 other than to receive written updates from them and to prepare for his deposition;" (2) he has "no understanding as to the terms of the fee arrangement in the case;" (3) he did not "review the First Amended and Consolidated Complaint filed in 2001 until a few months ago;" (4) he "was unaware that Milberg Weiss filed a motion proposing that he be appointed lead plaintiff;" (5) he did "not recall authorizing [Milberg Weiss] to file a stipulation agreeing that Lens and Ram would be appointed lead plaintiffs;" and (6) he "did not know who his [specific] attorneys were at Milberg Weiss" and did not realize that an attorney at the firm who had represented Frye had been criminally indicted. Id. at 28-29.

In general, "inquiries into the adequacy of representation should focus on the named plaintiff's ability to prosecute the action vigorously through qualified counsel and their lack of conflicting interest with unnamed class members." Weiss v. Zayre Corp., No. 86-cv-2919-2-RWZ, 1988 WL 20928, at *1-2 (D. Mass. Feb. 29, 1988) (citing In re Elscint Ltd. Sec. Litig., 674 F. Supp. 374 (D. Mass. June 22, 1987)). Nothing alleged, however, has persuaded me that Frye is not interested in the litigation or that his attorneys have "unfettered discretion." Beck v. Status Game Corp., 89-cv-2923, 1995 WL 422067, at *6 (S.D.N.Y. Jul. 14, 1995).

Here, Frye knew that his attorneys had filed a motion to dismiss, that an appeal was pending, and that he had received numerous communications from counsel. (See

Docket # 229, Decl. of Stanley Liebesman, Esq. in Supp. of Pls.' Am. Mot. to Certify Class, Ex. E at 154-55; see also Docket # 219, Aff. of Jason D. Frank, Esq. in Supp. of Defs.' Mem. of Law in Opp. to Pls.' Am. Mot. for Class Cert., Ex. 4 at 137, 153.) Moreover, Frye testified that he agreed to be a lead plaintiff. (See Frank Aff., id. at 137.) Unlike the plaintiff in In re Sepracor, Inc., 233 F.R.D. 52, 55 (D. Mass. 2005), Frye could articulate the basic claims in the case. Moreover, "[i]n complex actions such as this one, named plaintiffs are not required to have expert knowledge of all details of the case, . . . and a great deal of reliance on the expertise of counsel is to be expected." In re Transkaryotic Therapies, Inc. Sec. Litig., No. 03-cv-10165-RWZ, 2005 WL 3178162, at *4 (D. Mass. Nov. 28, 2005).

In addition, counsel appears to be experienced securities counsel, not subject to any potential conflict of interest between plaintiff and other class members. Accordingly, I find that Frye satisfies the requirements of Rule 23(a)(4).

IV. Conclusion

Therefore, plaintiffs' Motion for Class Certification (Docket # 195-1) is ALLOWED to the extent that it seeks to certify a Section 20(a) Class and Section 10(b) subclass.[12] The motion is DENIED to the extent that it seeks to certify a Section 18 class. Plaintiff Frye is designated as the class representative. Plaintiffs' Amended Motion for Class Certification (Docket # 203) adding Messrs. Higgins and Monks as proposed class representatives is DENIED. Finally, defendants' motion to strike part of the Second Amended Complaint (Docket # 231) is DENIED as moot.

September 7, 2007
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

[12] By order of even date, this court dismissed plaintiffs' Sections 18 and 20(a) claims predicated upon allegations of TPPI fraud and denied the motion to dismiss with respect to plaintiffs' Section 20(a) claims with respect to underbidding. See In re Stone & Webster, Inc. Sec. Litig., Civ. No. 00-10874-RWZ (D. Mass. Sept. 7, 2007) (Order on Motion for Judgment on the Pleadings).