

Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION —S.D.N.Y.: Court rejects both lead plaintiffs on behalf of Sigma investors, (Mar. 23, 2015)

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By Anne Sherry, J.D.

Denying class certification, a district court found that neither lead plaintiff in an insider-trading action was an adequate representative. One plaintiff's personal attorney had a previously undisclosed fee-sharing arrangement with the lead counsel in the case, while the other plaintiff was subject to a unique defense (*Gordon v. Sonar Capital Management LLC*, March 20, 2015, Rakoff, J.).

The plaintiffs alleged that the defendants—Sonar Capital Management, LLC, its CEO, and three hedge funds it managed—engaged in a scheme to trade on inside information received from an employee of Sigma Designs, Inc. The plaintiffs moved for certification of a class of sellers of Sigma stock, to be represented by both lead plaintiffs, and a class of buyers of Sigma stock, to be represented by lead plaintiff Jeffrey Tauber.

Relationship to counsel. Federal Rule of Civil Procedure 23(a) permits class certification only if, among other factors, “the representative parties will fairly and adequately protect the interests of the class.” The defendants asserted that lead plaintiff Sidney Gordon was inadequate due to his relationship with his attorneys. Gordon revealed for the first time at his January 2015 deposition that he had from the outset consulted with his family attorney and cousin by marriage about the case and that this attorney had reached a fee-sharing arrangement with lead counsel. The court’s *in camera* review of email communications, along with the testimony in the case, revealed “troubling inconsistencies.”

At the very least, the court found, the family attorney’s “murky role” in the case created the appearance of impropriety. Furthermore, Gordon himself had difficulty recalling key facts regarding the action and had to rely on counsel to make decisions affecting the interests of class members. This lack of independent judgment, along with his relationship with counsel having a financial interest in the outcome, rendered him inadequate to serve as class representative.

Unique defense. The defendants also objected to Tauber as a class representative, on the basis that he is subject to the unique defense that he suffered no economic loss. This issue goes not only to adequacy, but also to typicality and commonality, the court noted. According to this argument, Tauber’s purchases and sales throughout the class periods mean that, on net, his gains and avoided losses exceeded any losses he suffered during those periods.

The court found that Tauber is subject to the defense that he suffered no loss, an issue that could become the focus of the litigation. While the netting question would be of secondary importance for most class members, it would be paramount for Tauber as it would not just establish liability but mean the difference between a substantial recovery and none at all.

Denial of class certification. The court concluded that neither Gordon nor Tauber were appropriate choices as representative plaintiff. Nonetheless, its denial of class certification was without prejudice in order to give plaintiffs’ counsel an opportunity to find an adequate alternate representative.

The case is No. 11-cv-9665.

Attorneys: Brian C. Kerr (Brower Piven PC) for Sidney Gordon. Mark Joseph Hyland (Seward & Kissel LLP) for Sonar Capital Management LLC, Sonar Partners, LP, Sonar Institutional Fund, LP and Sonar Overseas Fund, LTD.

Companies: Sonar Capital Management LLC; Sonar Partners, LP; Sonar Institutional Fund, LP; Sonar Overseas Fund, LTD

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