

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| KEVIN MONTOYA, Individually and On       | : | CIVIL ACTION |
| Behalf of All Others Similarly Situated, | : |              |
| Plaintiff,                               | : | No. 06-2596  |
| v.                                       | : |              |
|  | : |              |
| HERLEY INDUSTRIES INC., et al.           | : |              |
| Defendants                               | : |              |
|  | : |              |

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**MEMORANDUM**

**Juan R. Sánchez, J.**

**November 14, 2006**

Before the court are three motions for appointment of lead plaintiff and approval of lead counsel in this consolidated putative class action securities litigation against Herley Industries, Inc. Motions have been filed by: (1) Galleon Management, L.P.; (2) Norfolk County Retirement System; and (3) Operating Engineers Construction Industry and Miscellaneous Pension Fund. Applying the detailed procedures set forth in the Private Securities Litigation Reform Act of 1995, I find Galleon Management is the presumptive lead plaintiff and no member of the purported plaintiff class has introduced sufficient proof to rebut this presumption.

**FACTS**

The above-captioned cases were filed on behalf of investors who purchased securities of Herley Industries, Inc. between October 1, 2001 and June 14, 2006, inclusively. The claims arise out of alleged violations of the federal securities laws, including Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. The Plaintiffs claim that during the previously mentioned dates the Defendants caused Herley's stock price to be artificially inflated by making false and misleading

statements to the investing public and by failing to disclose material facts. This alleged fraud is a cause of action under the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. §§ 78j(b) and 78t.

## **DISCUSSION**

The PSLRA sets forth a detailed procedure for appointment by the Court of “the most adequate plaintiff” as lead plaintiff, who may then, subject to the Court's approval, select and retain lead counsel to represent the class. *See* 15 U.S.C. §§ 78u-4(a)(3)(B)(ii) and (v). The PSLRA presumes the most adequate plaintiff in any private action arising under this chapter is the person who:

- (aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(I);
- (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
- (cc) 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).

To rebut the presumption, a member of the purported plaintiff class must prove the presumptive plaintiff:

- (aa) will not fairly and adequately protect the interests of the class; or
- (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). “[O]nce the presumption is triggered, the question is not whether another movant might do a better job of protecting the interests of the class than the presumptive lead plaintiff; instead, the question is whether anyone can prove that the presumptive lead plaintiff will not do a ‘fair and adequate’ job.” *Cendant Corp. Litigation*, 264 F.3d 201, 268 (3rd Cir. 2001)

(internal citations and punctuation omitted).

Based on the submissions of the parties, I find Galleon Management, L.P. has the largest financial interest in the relief sought by the class and otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. Galleon is therefore the presumptive lead plaintiff. Norfolk County Retirement System attempts to rebut this presumption, arguing Galleon is subject to a unique defense because Galleon engaged in short sales of approximately 150,000 shares during the class period. Norfolk asserts an investor who engages in short sales during the relevant period cannot maintain a claim based on the “fraud on the market” theory. Norfolk Mem. Fur. Supp. Mot. 10. This argument ignores case law holding an investor who engaged in short sales to hedge against a decline in its investment may benefit from the fraud on the market presumption. *Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid Corp.*, 315 F.Supp. 2d 666, 676 (E.D. Pa. 2004). Here, Galleon engaged in short sales as part of a broader investment strategy in which Galleon sold Herley stock short to hedge against a possible decline in the stock price. Galleon is therefore not vulnerable to a unique defense based on their short sales of Herley stock.

Norfolk further alleges short sales by Galleon during the class period suggest a violation of Rule 105 of Regulation M.<sup>1</sup> This allegation is purely speculative. Not only is Norfolk unable to prove a violation by Galleon they are unable to show why the Securities and Exchange Commission (SEC) failed to pursue this alleged violation. The PSLRA is clear a member of the purported plaintiff class must present “proof” the presumptively most adequate plaintiff will not fairly and adequately protect the class or is subject to unique defenses. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

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<sup>1</sup> Rule 105 of Regulation M prohibits an investor from purchasing shares in a public offering in order to cover short sales made within five days prior to the pricing of that offering. 17 C.F.R. § 242.105(a)(1).

“Speculative assertions . . . are therefore insufficient to rebut the lead plaintiff presumption in this case.” *Armour v. Network Associates, Inc.*, 171 F.Supp. 2d 1044 (N.D. Ca. 2001) (citing *Gluck v. Cellstar Corp.*, 976 F.Supp. 542, 547-48 (N.D. Tx. 1997)).<sup>2</sup>

Based on civil SEC charges, Norfolk argues Galleon should be found inadequate because it committed fraud and therefore lacks credibility. This allegation is based on civil charges which were settled without any judicial finding of wrongdoing. While trustworthiness and honesty are relevant factors in assessing a candidate’s ability to serve as an adequate fiduciary for a class, *see Savino v. Computer Credit, Inc.*, 164 F.3d 81, 87 (2d Cir. 1998), the Galleon settlement did not include a finding of fraud. “[E]ven if the violations in question had been proven, they do not appear to represent the degree of serious misconduct that would require the [presumptive lead plaintiff’s] candidacy to be rejected at this stage . . . in the absence of any specific connection between the types of violations claimed and the . . . fraud alleged here.” *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. La Branche & Co.*, 229 F.R.D. 395, 416 (S.D.N.Y. 2004) (finding courts generally reject the presumption where the proposed lead plaintiff is suspected of violating the precise laws he wished to invoke) (citations omitted).

Finally, Norfolk claims Galleon has not demonstrated its authority to pursue legal claims on behalf of its investment clients. While an investment advisor must demonstrate “attorney-in-fact” authority to recover for the investment losses of its clients before it can be appointed lead plaintiff,

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<sup>2</sup> Norfolk asks the court for permission to pursue discovery to prove Galleon’s short sales violated Rule 105. In the Third Circuit, discovery is limited to special circumstances where a member of the plaintiff class first “demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class,” *In re Cedant Corp. Litigation*, 264 F.3d 201, 269-270, n.48 (3<sup>rd</sup> Cir. 2001). I find Norfolk failed to demonstrate a reasonable basis for finding Galleon is incapable of adequately representing the class and therefore deny this request.

*see Weinberg v. Atlas Worldwide Holdings, Inc.*, 216 F.R.D. 248, 255 (S.D.N.Y. 2003), courts have held that affidavit evidence is adequate to support the conclusion the proposed plaintiff is serving as attorney in fact for its investors and has authority to make decisions and act on their behalf, *see Molson Coors Brewing Co. Securities Litigation*, 233 F.R.D. 147, 152 (D. Del. 20005). The test “is whether plaintiff has ‘such right as to afford defendant the protection of *res judicata* when the suit is terminated.’” *Ezra Charitable Trust v. Rent-Way, Inc.*, 136 F.Supp. 2d 435, 443 (W.D. Pa. 2001). I find Gallon is an asset manager who was a purchaser under the federal securities laws and therefore has standing to sue in its own name. *See Id.* at 442-443 (finding an investment advising firm to be a purchaser of securities pursuant to the Securities Act of 1933, § 12(2)).

The final issue before me is the appointment of lead counsel. The Third Circuit has observed, “the power to ‘select and retain’ lead counsel belongs, at least in the first instance, to the lead plaintiff, and the court’s role is confined to deciding whether to ‘approve’ that choice.” *Cendant*, 264 F.3d at 273 (citing 15 U.S.C. § 78u-4(a)(3)(B)(v))(internal punctuation omitted). I will therefore appoint Galleon Management as lead plaintiff and will approve Kirby McNerney & Squire, LLP as its choice of lead counsel and Stanley P. Kops as liaison counsel.

An appropriate order follows.