IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Gordon P. Gallagher

Civil Action No. 23-cv-00734-GPG-SKC

MIGUEL JARAMILLO,

Plaintiff,

v.

DISH NETWORK CORPORATION, ET AL.,

Defendants.

ORDER

Before the Court are three competing motions for appointment as lead plaintiff and for approval of counsel (D. 5; D. 6; D. 8) (the Lead Plaintiff Motions) in this putative class action. The Court concludes that Movant Sai Naveen Lingam is most capable of adequately representing the interests of the class, and that his selection of counsel is appropriate. The Court therefore GRANTS his Motion for Appointment as Lead Plaintiff and Approval of Selection of Counsel (D. 5). Movant Gustavo Dominguez's Motion for Appointment as Lead Plaintiff and Approval of Lead Plaintiff's Selection of Counsel (D. 6) and Movant Gregory Steiger's Motion for Appointment as Lead Plaintiff and Approval of Counsel (D. 8) are DENIED.

I. BACKGROUND

The three pending Lead Plaintiff Motions relate to a proposed class action against DISH Network Corporation (Dish) and various Dish executives (D. 1 at 4–5). The Class Action Complaint for Violation of the Federal Securities Laws (the Complaint), brought on behalf of a

proposed class "consisting of all persons and entities other than Defendants that purchased or otherwise acquired Dish securities between February 22, 2021, and February 27, 2023, both dates inclusive," alleges that Dish and its executives made false and/or misleading statements regarding Dish's operational efficiency and the quality of its cybersecurity and information technology infrastructure (*id.* at 2–3). These misstatements were allegedly exposed in February 2023, when Dish announced a "network outage," and filed a Form 8K disclosing a data breach (*id.* at 12–13). Following these disclosures, Dish's stock price fell by 6.48% (*id.* at 13).

Plaintiff Miguel Jaramillo filed the Complaint within one month of Dish's corrective disclosures (D. 1); Movants Lingam, Dominguez, and Steiger now vie to serve as the proposed class's lead plaintiff (D. 5; D. 6; D. 8).

II. LEGAL STANDARD

The Private Securities Litigation Reform Act (PSLRA) specifies the "procedure that governs the appointment of lead plaintiffs in 'each private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.'" *In re Ribozyme Pharm., Inc. Sec. Litig.*, 192 F.R.D. 656, 657 (D. Colo. 2000) (quoting 15 U.S.C. § 78u-4(a)(1)). The PSLRA requires that "[n]ot later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice" advising members of the purported class of "the pendency of the action, the claims asserted therein, and the purported class period," as well as the deadline for moving to serve as lead plaintiff (60 days from the notice's publication). 15 U.S.C. § 78u-4(a)(3)(A)(i). And within 90 days of the notice's publication, "the court shall consider any motion made by a purported class member in response

to the notice . . . and shall appoint as lead plaintiff the member . . . the court determines to be the most capable of adequately representing the interests of the class members."[1] 15 U.S.C. § 78u-4(a)(3)(B)(i).

Under the PSLRA, the "person or group that (1) either filed the complaint or made a motion in response to a notice, (2) has the largest financial interest in the relief sought, and (3) otherwise satisfies the requirements of Fed. R. Civ. P. 23" is presumptively the "most adequate plaintiff." *Medina v. Clovis Oncology, Inc.*, No. 15-cv-02546-RM-MEH, 2016 WL 660133, at *3 (D. Colo. Feb. 18, 2016) (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)). Though the PSLRA nominally requires courts to consider whether Federal Rule of Civil Procedural 23's requirements have been satisfied, only two of Rule 23's four requirements—typicality and adequacy—are relevant in the context of lead plaintiff appointments. *Wolfe v. AspenBio Pharma, Inc.*, 275 F.R.D. 625, 627–28 (D. Colo. 2011). The "most adequate plaintiff" presumption may be rebutted if a member of the purported class proves that the presumptively most adequate plaintiff will not fairly and adequately protect the class's interests or is "is subject to unique defenses that render such plaintiff incapable of adequately representing the class." *In re Ribozyme Pharm., Inc. Sec. Litig.*, 192 F.R.D. at 658 (quoting 15 U.S.C. § 78u–4(a)(3)(B)(iii)).

Once selected, "[t]he 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). "As such,

[1] In this case, the early notice required by the PSLRA was published on March 23, 2023 (D. 5-4). Accordingly, a ruling on the Lead Plaintiff Motions was theoretically required by June 21, 2023. But the Lead Plaintiff Motions were not fully briefed by that date, and this action was not assigned to the undersigned until July 31, 2023 (D. 27). While strict compliance with the PSLRA deadline was not possible under these circumstances, the Court endeavored to rule on the Lead Plaintiff Motions as promptly as possible so that this matter may proceed efficiently.

approval of lead counsel is a matter of within the discretion of the Court." *Medina*, 2016 WL 660133, at *4 (citing *In re Nice Sys. Sec. Litig.*, 188 F.R.D. 206, 221 (D.N.J. 1999)). In exercising this discretion, the Court must determine whether the proposed lead counsel are "qualified, experienced[,] and able to vigorously conduct the proposed litigation." *Armbruster v. Gaia, Inc.*, No. 22-CV-03267-NYW-STV, 2023 WL 2613817, at *4 (D. Colo. Mar. 23, 2023) (quoting *Darwin v. Taylor*, No. 12-cv-01038-CMA-CBS, 2012 WL 5250400, at *8 (D. Colo. Oct. 23, 2012)). The Court will "only disturb the lead plaintiff's choice of counsel if necessary to 'fairly and adequately protect the interests of the class.'" *Id.* (quoting *In re Molson Coors Brewing Co. Sec. Litig.*, No. 19-cv-00455-DME-MEH, 2019 WL 10301639, at *3 (D. Colo. Oct. 3, 2019)).

III. ANALYSIS

The Court first considers whether the PSLRA's early notice requirements have been satisfied. Plaintiff's counsel published notice of this lawsuit in *PR Newsire* on March 23, 2023, the day the Complaint was filed (D. 1; D. 5-4). The notice was therefore timely. *See* 15 U.S.C. § 78u–4(a)(3)(A)(i) (requiring early notice to be published within 20 days after the complaint is filed). As courts have routinely held, *PR Newsire* is a "widely circulated national business-oriented publication or wire service" for purposes of 15 U.S.C. § 78u–4(a)(3)(A)(i). *See, e.g.*, *Sofran v. LaBranche & Co.*, 220 F.R.D. 398, 401 (S.D.N.Y. 2004). The Court has reviewed the notice and concludes that it meets the PSLRA's additional requirements because it advises members of the purported class of (1) the action's pendency, (2) the claims the action asserts, (3) the purported class period, and (4) the 60-day deadline for moving to serve as lead plaintiff (D.

5-4). All three Lead Plaintiff Motions were filed within the 60-day post-notice period and are thus timely (*see* D. 5; D. 6; D. 8).

A. Appointment of Lead Plaintiff

Having concluded that the early notice was adequate and that the Movants timely filed their Lead Plaintiff Motions, the Court turns to the question of which Movant is the most adequate plaintiff. Each Movant contends that he has the largest financial interest in the relief this action seeks and that he has satisfied Federal Rule of Civil Procedure 23's requirements; all therefore lay claim to the most-adequate-plaintiff presumption.

Movant Steiger alleges losses of approximately $150,659 as a result of class-period investments in Dish securities (D. 9-2). On paper, this is the largest claimed loss of any Movant—Movant Dominguez alleges that he lost $66,036.76 (D. 7-3), and Movant Lingam claims he lost $39,350.00 (D. 5-3). But Movant Dominguez argues that Movant Steiger improperly inflated his purported losses by accounting for 18,000 shares of Dish stock he acquired after the end of the class period (D. 16-1 at 4). According to Movant Dominguez, when losses attributable to Movant Steiger's post-period stock purchases are excluded, Movant Steiger sustained only $60,385.97 in losses, such that Movant Dominguez's $66,036.76 loss gives *him* the largest financial interest in this action (*id.*). For his part, Movant Lingam asserts that neither Movant Steiger nor Movant Dominguez suffered *any* compensable losses because their options transactions (specifically, sales of put options) exclude them from the purported class,[2] which consists of "all persons and entities other than Defendants that purchased or otherwise acquired

[2] A put option is "an option to sell something . . . at a fixed price even if the market declines," or, stated differently, the "right to require another to buy." *Option*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also In re Priceline.com Inc.*, 236 F.R.D. 89, 98 (D. Conn. 2006) (explaining put option mechanics).

Dish securities between February 22, 2021 and February 2023, both dates inclusive" (D. 1 at 2; D. 10 at 6–7).

As Movant Steiger's Loss Chart (D. 9-2) illustrates, Movant Steiger does in fact claim losses on 18,000 shares of Dish common stock that he purchased after the class period ended. Movant Steiger urges that the losses related to these purchases are properly included in his loss calculations because he was compelled to purchase these shares under put contracts he sold (and therefore based on investment decisions he made) within the class period (D. 18 at 3, 6–7). And Movants Steiger and Dominguez both dispute Movant Lingam's attempt to narrow the putative class to exclude options sellers, accusing Movant Lingam of engaging in class-harming behavior and distorting the class definition (*id.* at 7; D. 19 at 2). Ultimately, the Court need not decide the scope of Movant Steiger's losses or whether the class excludes options sellers. Even if Movants Steiger or Dominguez could establish that they had the greatest losses, their status as put option sellers (and the fact that they obtained Dish common stock exclusively because the option purchasers exercised these options) raises typicality and adequacy concerns and subjects them to unique defenses that preclude their appointment.

Di Scala v. ProShares Ultra Bloomberg Crude Oil, No. 20 CIV. 5865 (NRB), 2020 WL 7698321 (S.D.N.Y. Dec. 28, 2020) and *Cook v. Allergn PLC*, No. 18 CIV. 12089 (CM), 2019 WL 1510894 (S.D.N.Y. Mar. 21, 2019) are instructive. *Di Scala* involved a putative class composed of "all investors who purchased or otherwise acquired UCO securities." 2020 WL 7698321, at *4. Like Movants Steiger and Dominguez, the lead plaintiff movant with the greatest financial loss wrote put options that ultimately required him to purchase common stock. *Id.* at *3. Though he also made common stock purchases during the class period that were

evidently unconnected with his options transactions, the majority (81%) of his losses related to the put sales and his compelled stock purchases. *Id.* The court held that even if this movant was presumptively most adequate based on his losses, the opposing movants had rebutted the presumption because the presumptive lead plaintiff's "losses overwhelmingly reflect[ed] his sale of put options." *Id.* at *4. In reaching this conclusion, the court noted that "questions ha[d] been raised about whether losses arising from [his] sale of put options would qualify him as a member of a class of 'all investors who purchased or otherwise acquired UCO securities . . . .'" and as to whether, as an options seller, the presumptive lead plaintiff was "motivated by the same market incentives as class members who traded shares on the open market." *Id.* (emphasis in original).

Cook similarly involves a lead plaintiff movant whose losses were largely attributable to options trades (in that case, both puts and calls). 2019 WL 1510894, at *2. Like the *Di Scala* court, the *Cook* court declined to appoint the option-trading movant, reasoning that "he [was] not . . . an investor whose claims will turn out to be typical of the average common stockholder within the meaning of Fed. R. Civ. P.23(a)(3)," and that appointing the options-trading movant as lead plaintiff "would introduce factual issues irrelevant to stockholder class members, like strike price, duration, maturity, volatility, and interest rates, and he could subject the class to unique defenses, causing unnecessary conflict." *Id.* (quoting *In re Elan Corp. Sec. Litig.*, No. 08 Civ. 08761 (AKH), 2009 WL 1321167, at *2 (S.D.N.Y. May 11, 2009)).

Consistent with *Di Scala* and *Cook*, several courts—including at least one in the Tenth Circuit—have declined to appoint movants whose losses generally relate to options (as opposed to common stock) trades. *See Teroganesian v. Sw. Airlines Co.*, No. 4:23-CV-00115, 2023 WL 4565464, at *5 (S.D. Tex. July 15, 2023) (concluding that movant who allegedly "suffered all his

losses in connection with sales of Southwest put options" was atypical); *Patel v. Reata Pharms., Inc.*, 549 F. Supp. 3d 559, 567 (E.D. Tex. 2021) (declining to appoint movant who traded in both options and common stock, but whose losses derived entirely from options trades); *Gelt Trading, Ltd. v. Co-Diagnostics, Inc.*, No. 2:20-cv-00368-JNP-DBP, 2021 WL 913934, at *4–5 (D. Utah Mar. 10, 2021) (determining that movant who traded exclusively in call options was subject to unique defenses that rendered him incapable of adequately representing the proposed class).

As Movants Steiger and Dominguez point out, however, conflicting authority exists on the suitability of options traders as lead plaintiffs. Movants Steiger and Dominguez rely specifically on *Flora v. Hain Celestial Grp., Inc.*, 16-cv-04581-JS-LGD, 2017 U.S. Dist. LEXIS 85517 (E.D.N.Y. June 5, 2017), *Medina,* 2016 WL 660133, *Goldstein v. Puda Coal, Inc.*, 827 F. Supp. 2d 348 (S.D.N.Y. 2011), *Hall v. Medicis Pharm. Corp.*, No. CV08-1821-PHX-GMS, 2009 WL 648626 (D. Ariz. Mar. 11, 2009), *In re Sci.-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315 (N.D. Ga. 2007), *In re Priceline.com Inc.*, 236 F.R.D. 89, *Nursing Home Pension Fund v. Oracle Corp.*, No. C01-00988 MJJ, 2006 WL 8071391 (N.D. Cal. Dec. 20, 2006), *Constance Sczesny Tr. v. KPMG LLP*, 223 F.R.D. 319 (S.D.N.Y. 2004), *In re Adobe Sys., Inc. Sec. Litig.*, 139 F.R.D. 150 (N.D. Cal. 1991), *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359 (D. Del. 1990), and *Moskowitz v. Lopp*, 128 F.R.D. 624 (E.D. Pa. 1989). Notably, every single one of these cases pre-dates *Di Scala* and *Cook*. Further, each of these cases is either distinguishable from the action pending before this Court or does not meaningfully discuss the implications of a movant's option-seller status for typicality, adequacy, or potential exposure to unique defenses. [3]

[3] For instance, in *Goldstein*, 827 F. Supp. 2d at 355, which is the exclusive authority that *Flora*, 2017 U.S. Dist. LEXIS 85517, at *6–7 and *Medina*, 2016 WL 660133, at *3 rely on, an investor in the presumptive lead plaintiff group traded in both put options and common stock. This investor's common stock purchases evidently were not connected with options transactions and accounted for most of its losses. *Goldstein*, 827 F. Supp. 2d at 355; Exhibit

The Court finds the reasoning in *Di Scala* and *Cook* persuasive, and declines to follow the authorities Movants Steiger and Dominguez cite. Parties who exclusively sell put options, or who only acquire common stock involuntarily when put options they have written are exercised—are simply differently situated from parties who engage in—and whose losses predominantly derive from—ordinary common-stock transactions. While put option sellers and common stock purchasers may rely on the same general assumption that the underlying stock price will rise (or at least not decrease), *see In re Sci.-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d at 1330, there are also significant differences that draw into question the adequacy of put sellers as class representatives. For example, put sellers operate on different time horizons than do common stock purchasers. Puts are time-limited; a put seller bets that a company's stock value will not decline to a specified strike price within the life of an option. Common stock purchasers do not operate under the same limitations. The Court agrees with the *Di Scala* and *Cook* courts

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C at 5, *Korach v. Puda Coal, Inc.*, No. 11-cv-02666-DLC-HBP (S.D.N.Y. June 13, 2011), ECF No. 23-3 (loss chart detailing the presumptive lead plaintiff's losses in *Goldstein*). In this respect, *Goldstein* can be reconciled with *Di Scala* and *Cook*. The Court notes that the *Goldstein* court relied (at least in part) on the investor's common-stock trading activity in concluding that the investor group satisfied the typicality inquiry. *See* 827 F. Supp. 2d at 355 ("In contrast to the plaintiffs in the cases cited by [the opposing movants], [the investor] traded in both common stock and options during the class period."). *Nursing Home Pension Fund*, 2006 WL 8071391, at *8 is similar; in that case, the court specifically relied on an option trader's "several ordinary purchases of common stock" in concluding that a proposed class representative was not disqualified.

Hall, 2009 WL 648626, at *2 is inapposite because the lead plaintiff movants opposing the presumptive lead plaintiff conceded that the presumptive lead plaintiff's option-holding status did not subject the presumptive lead plaintiff to unique defenses. *In re Scientific-Atlanta*, *Inc. Securities Litigation*, 571 F. Supp. 2d 2007, *Deutschman*, 132 F.R.D. 359, *Moskowitz*, 128 F.R.D. 624, and *In re Adobe Systems, Inc. Securities Litigation*, 139 F.R.D. 150 all involve class-certification decisions. While the Court accepts that typicality and adequacy are tested (and perhaps tested more rigorously) at the class certification stage, the utility of these cases for the instant analysis is limited because of the differences in procedural posture (these cases do not, for example, evaluate which prospective lead plaintiff is most adequate vis-à-vis others).

In re Priceline.com Inc., 236 F.R.D. 89 can be distinguished from the instant case and from *Di Scala* because it did not involve a challenge to lead-plaintiff status predicated on the class definition. And in *Constance Sczesny Trust*, 223 F.R.D. at 325, the Court did not appoint an option seller as lead plaintiff; it merely concluded that it was unnecessary (at that point in the litigation) to appoint a lead plaintiff for a sub-class of option holders.

that appointing movants whose losses overwhelmingly relate to options trades (and whose option-trading strategies may have been motivated by different market incentives than common stock traders) would introduce factual issues irrelevant to the class as a whole. Because Movant Steiger's and Movant Dominguez's losses both exclusively relate (at some level) to their put sales,[4] the Court declines to appoint either Movant as lead plaintiff.

The Court concludes instead that Movant Lingam is the most capable of adequately representing the class. Though Movant Lingam sustained the third most substantial losses, he—unlike Movants Steiger and Dominguez—is typical because he traded exclusively in Dish common stock. The Court further concludes that Movant Lingam is an adequate lead plaintiff, having retained competent and experienced counsel. The Court acknowledges Movant Dominguez's concerns with Movant Lingam's past employment with Dish (D. 16-1 at 6–7). However, based on Movant Lingam's submissions, which indicate that Movant Lingam's employment duties were unrelated to this case and that Movant Lingam's class period trading occurred over two years after Movant Lingam's employment with Dish ended (D. 17-1; D. 17-2), the Court is not persuaded that Movant Lingam is subject to unique defenses based on his past employment. Based on the foregoing, Movant Lingam's motion to serve as lead plaintiff is GRANTED.

B. Appointment of Lead Counsel

Movant Lingam has also requested that the Court approve his selection of Levi & Korinsky, LLP as Lead Counsel in this case (D. 5 at 10). The Court has reviewed the firm

[4] Movant Dominguez asserts that his losses are entirely attributable to common-stock trades (D. 19 at 9). But his loss chart indicates that these common stock purchases were compelled after puts he sold were exercised (D. 7-3). Accordingly, like the presumptive lead plaintiff in *Di Scala*, the majority of his losses arose from his obligation "to purchase common stock as a result of his writing put options." *See Di Scala*, 2020 WL 7698321, at *3.

résumé filed with Movant Lingam's Lead Plaintiff Motion (D. 5-5), and concludes that Levi & Korinsky, LLP possesses extensive experience in class actions and securities litigation. As such, the Court finds that Levi & Korinsky, LLP is qualified, experienced, and capable of vigorously conducting the proposed litigation, and that Movant Lingam's choice of counsel need not be disturbed. The Court accordingly GRANTS Movant Lingam's request to approve Levi & Korinsky, LLP as lead counsel.

IV. CONCLUSION

Based on the foregoing, IT IS ORDERED that: (1) Movant Lingam's Motion for Appointment as Lead Plaintiff and Approval of Selection of Counsel (D. 5) is GRANTED, (2) Movant Lingam is APPOINTED as lead plaintiff, (3) Levi & Korinsky, LLP is APPOINTED as lead counsel, (4) Movant Dominguez's Motion for Appointment as Lead Plaintiff and Approval of Lead Plaintiff's Selection of Counsel (D. 6) is DENIED, and (5) Movant Steiger's Motion for Appointment as Lead Plaintiff and Approval of Counsel (D. 8) is DENIED.

DATED August 16, 2023.

BY THE COURT:

Gordon P. Gallagher
United States District Judge