

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSHUA ZHANG, *individually and on behalf*
of all others similarly situated,

Plaintiff,

-against-

MEMORANDUM AND ORDER
22 CV 7966 (PKC) (CLP)

GAOTU TECHEDU INC. F/K/A GSX
TECHEDU INC., XIANGDONG CHEN
and NAN SHEN,

Defendants.

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POLLAK, United States Magistrate Judge:

On December 30, 2022, plaintiff Joshua Zhang (“Zhang” or “plaintiff”) commenced this action individually and on behalf of others similarly situated against Gaotu Techedu Inc., f/k/a GSX Techedu Inc. (“Gaotu” or the “Company”), Xiangdong Chen (“Chen”), and Nan Shen (“Shen”) (collectively, “defendants”), alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), as amended by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. §§ 78(j)(b) and 78(t)(a), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. (ECF No. 1).

On February 28, 2023, TCP Diversified Technology Fund (“TCP”) filed a motion for appointment as Lead Plaintiff and to approve Levi & Korsinsky, LLP as Lead Counsel. (ECF No. 5). On that same day, February 28, 2023, Kishorkumar Barbaria (“Barbaria”), Jun Ye (“Ye”), and Jeff Breitinger (“Breitinger”) also filed separate motions for appointment as Lead Plaintiff, seeking approval of their respective counsel as Lead Counsel. (ECF Nos. 8, 11, 13).

Thereafter, on March 14, 2023, Barbaria withdrew his application, citing the requirement under the PSLRA that the person or group of persons with the largest financial interest in the

relief sought by the Class be presumed the most adequate lead plaintiff. (ECF No. 15). Also, on March 14, 2023, Breitinger filed a Notice of Non-Opposition to Competing Motions for Appointment as Lead Plaintiff and Approval of Lead Counsel, in recognition of the greater financial interests held by the other movants for Lead Plaintiff. (ECF No. 14). Ye filed a similar Notice of Non-Opposition to the appointment of TCP as Lead Plaintiff, noting that if TCP's motion were denied, Ye should be appointed Lead Plaintiff over the other movants because he possessed a greater financial interest than Barbaria and Breitinger. (ECF No. 17).

Accordingly, at this time, the Court having considered TCP's motion, and the other applicants having either withdrawn or indicated their non-opposition to TCP's appointment, the Court grants TCP's motion for the reasons set forth below.

FACTUAL BACKGROUND

On December 30, 2022, plaintiff commenced this securities class action against Gaotu, a company incorporated in the Cayman Islands, with its headquarters located in Beijing. (Compl.¹ ¶ 7). Gaotu, whose American Depository Shares ("ADSs") were listed on the New York Stock Exchange ("NYSE") under ticker symbol GSX until June 4, 2021 and GOTU thereafter, is alleged to be a technology-driven education company, that provides online K-12 after-school tutoring services for children in China. (Id.) Defendant Chen is alleged to be the Chairman of the Board and Chief Executive Officer of Gaotu and defendant Shen is alleged to be the Company's Chief Financial Officer (together, the "individual defendants"). (Id. ¶¶ 8, 9).

On March 5, 2021, it is alleged that the Company held a call to discuss its fourth quarter 2020 earnings (the "Q4 2020 Earnings Call"), in which defendants Chen and Shen made certain statements and representations in response to questions about revenue growth targets and the

¹ Citations to "Compl." refer to plaintiff's Complaint, dated December 30, 2022. (ECF No. 1).

potential for new regulations on after-school tutoring. (Id. ¶¶ 15, 16). Thereafter, on May 26, 2021, the Company held a call to discuss its Q1 2021 earnings, during which plaintiff alleges that defendants denied that the new regulations would have an impact on GSX's operations. (Id. ¶ 18).

The Complaint alleges that the representations made by defendants during these March 5, and May 26, 2021 calls were materially false and misleading because they misrepresented and failed to disclose adverse facts pertaining to the Company's operations, business and prospects, and that defendants knew or recklessly disregarded these facts. (Id. ¶ 19). Among other things, the Complaint alleges that defendants failed to disclose that China was barring tutoring for profit in core school subjects and that foreign investment would be restricted in this sector; they also failed to disclose the impact this would have on the profitability and value of the Company. (Id.)

On July 23, 2021, Reuters reported that China was barring tutoring for profit in core subjects and restricting foreign investment. (Id. ¶ 20). The report further stated that “[t]he move threatens to decimate China's \$120 billion private tutoring industry and triggered a heavy selloff in shares of tutoring firms traded in Hong Kong and New York. . . .” (Id.) Based on this announcement, the price of Gaotu's ADSs fell 63.3% to close at \$3.52 per ADS on July 23, 2021. (Id. ¶ 21).

Plaintiff Zhang commenced the first-filed action on December 30, 2022, alleging that as a result of the wrongful acts and omissions of the defendants and the precipitous decline in the market value of Gaotu ADSs, plaintiff and the members of a proposed Class, consisting of all persons who acquired Gaotu ADSs publicly traded on the NYSE between March 5, 2021 and July 23, 2021 (the “Class Period”), suffered damages. (Id. ¶ 1, 35–42, 44–47). Zhang's counsel published a notice on *Business Wire* that same day, announcing the filing of the securities class

action. (Mem.² at 3). Thereafter, TCP filed the instant motion for appointment as Lead Plaintiff on February 28, 2023.

DISCUSSION

1. Legal Standard

“Congress enacted the PSLRA in order to increase the likelihood 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 plaintiff’s counsel.” Vladimir v. Bioenvision, Inc., No. 07 CV 6416, 2007 WL 4526532, at *3 (S.D.N.Y. Dec. 21, 2007) (internal quotations omitted) (quoting In re Bausch & Lomb Inc. Sec. Litig., 244 F.R.D. 169, 171 (W.D.N.Y. 2007), opinion modified on denial of reconsideration, No. 06 CV 6294, 2007 WL 3197318 (W.D.N.Y. Oct. 26, 2007)). Consequently, the PSLRA amended the Exchange Act by setting forth new procedures that govern securities class actions. Weltz v. Lee, 199 F.R.D. 129, 131 (S.D.N.Y. 2001).

The PSLRA provides that, within 20 days of the filing of the complaint, the plaintiff must issue a notice “in a widely circulated national business-oriented publication or wire service” that advises members of the proposed class “of the pendency of the action, the claims asserted therein, and the purported class period.” 15 U.S.C. § 78u-4(a)(3)(A)(i). The notice must also inform members of the class that they can file a motion to serve as lead plaintiff no later than 60 days after the date on which the notice is published. Id.

The PSLRA also governs the appointment of lead plaintiff and lead counsel. It provides that “the court . . . shall appoint as lead plaintiff the member or members of the purported

² Citations to “Mem.” refer to TCP’s memorandum of law for appointment as lead plaintiff and approval of lead plaintiff’s selection of counsel, filed on February 28, 2023. (ECF No. 5).

plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the “most adequate plaintiff”)” 15 U.S.C. § 78u-4(a)(3)(B)(i); see also Schulman v. Lumenis, Ltd., No. 02 CV 1989, 2003 WL 21415287, at *3 (S.D.N.Y. June 18, 2003).

The PSLRA creates a rebuttable presumption that the “most adequate plaintiff” is the individual who: “(aa) has either filed the complaint or made a motion in response to a notice . . . ; (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). This presumption may be rebutted only if a member of the class presents evidence that this 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).

The only Rule 23 requirements that must be met in PSLRA cases are typicality and adequacy. Reitan v. China Mobile Games & Entm’t Grp., Ltd., 68 F. Supp. 3d 390, 395 (S.D.N.Y. 2014). In a motion such as this, the plaintiff “need only make a ‘preliminary showing’” that the adequacy and typicality requirements have been met. Schulman v. Lumenis, Ltd., 2003 WL 21415287, at *5 (quoting In re Olsten Corp. Sec. Litig., 3 F. Supp. 2d 286, 296 (E.D.N.Y. 1998), opinion adhered to on reconsideration sub nom. In re Olsten Corp., 181 F.R.D. 218 (E.D.N.Y. 1998)); see also id. (noting that “[a]ny preliminary class certification findings of adequacy and typicality made at this time, do not preclude any party from contesting the ultimate class certification”).

Finally, with respect to the selection of the lead counsel, the PSLRA provides that “[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).

2. Analysis

a. Timing Requirements of the PSLRA

In this case, the Complaint was filed on December 30, 2022; on the same day, the Rosen Law Firm, counsel to plaintiff Zhang, caused notice to be published over the *Business Wire*. (Mem. at 3; Apton Decl.³ Ex. C). Courts have found the *Business Wire* to be a suitable publication for notice. See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. LaBranche & Co., 229 F.R.D. 395, 403 (S.D.N.Y. 2004). Thus, the notice requirement of the PSLRA is satisfied.

Moreover, within sixty days “after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.” 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). In this case, notice was published on December 30, 2022. TCP filed its motion for appointment of counsel on February 28, 2023, as did Barbaria, Ye, and Breitingner. Sixty days after the December 30, 2022 notice was February 28, 2023. Therefore, given that TCP filed its motion on February 28, 2023, the motion is timely.

b. Financial Interest

As stated above, the movant TCP must demonstrate that it has the largest financial interest in order to be presumed the most adequate plaintiff. Although the PSLRA does not define the term “largest financial interest,” courts in this Circuit consider the following factors:

- (1) the total number of shares purchased (or sold) during the class

³ Citations to “Apton Decl.” refer to the Declaration of Adam M. Apton in Support of TCP Diversified Technology Fund’s Motion for Appointment as Lead Plaintiff and Approval of Selection of Counsel, dated February 28, 2023. (ECF No. 7).

period; (2) the number of net shares purchased (or sold) during the class period (*i.e.*, the difference between the number of shares purchased (or sold) and the number of shares sold (or purchased)); (3) the total net funds expended during the class period (*i.e.*, the difference between the amount spent to purchase shares and the amount received for the sale of shares during the class period); and (4) the approximate loss suffered during the class period.

See, e.g., Vladimir v. Bioenvision, Inc., No. 07 CV 6416, 2007 WL 4526532, at *4 (S.D.N.Y.

Dec. 21, 2007). Courts have found that the fourth factor – amount of loss – is the most important factor. See id. at *5.

In this case, TCP provided its Loss Chart, which indicates that it lost \$570,096.12 between May 18, 2021 and May 21, 2021. (Apton Decl., Ex. B). TCP states that it is not aware of any other movant that has suffered greater losses. (Mem. at 5). Indeed, in a subsequent Memorandum of Law submitted in further support of its motion, TCP notes that of the other movants seeking appointment as Lead Plaintiff, Ye has the next highest claimed losses of \$210,574.45, which is significantly less than the losses allegedly suffered by TCP. (Opp.⁴ at 5). Therefore, the Court finds that TCP has satisfied this requirement.

c. Typicality

A plaintiff’s claims are typical of those of the proposed class when they arise “‘from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.’” Reitan v. China Mobile Games & Entm’t Grp., Ltd., 68 F. Supp. 3d at 400 (quoting Canson v. WebMD Health Corp., No. 11 CV 5382, 2011 WL 5331712, at *4 (S.D.N.Y. Nov. 7, 2011)).

Here, TCP’s claims arise from the same course of events from which the claims of the

⁴ Citations to “Opp.” refer to TCP Diversified Technology Fund’s Memorandum of Law In Further Support of Its Motion For Appointment As Lead Plaintiff and Approval of Selection of Counsel and Opposition to Competing Lead Plaintiff Motions, dated March 14, 2023. (ECF No. 16).

other Class members arise, in that TCP acquired Gaotu ADSs during the Class period based on artificially inflated prices due to the misrepresentations and omissions of the defendants. (Mem. at 6–7; Opp. at 5–6). TCP’s claims are based on the same legal theory that defendants violated the federal securities laws, which is the same theory alleged on behalf of the members of the class. (Opp. at 6). Thus, TCP has satisfied the typicality requirement.

d. Adequacy

The adequacy requirement of Rule 23 is satisfied when ““(1) class counsel is qualified, experienced and generally able to conduct the litigation; (2) the class members’ interests are not antagonistic to one another; and (3) the class has a sufficient interest in the outcome of the case to ensure vigorous adequacy.”” In re Sequans Commc’ns S.A. Sec. Litig., 289 F. Supp. 3d 416, 423 (E.D.N.Y. 2018) (quoting In re Symbol Techs. Sec. Litig., No. 05 CV 3923, 2006 WL 1102619, at *3 (E.D.N.Y. Apr. 26, 2006)).

Here, TCP has a significant interest in the outcome of the litigation, given the financial loss it suffered. (Mem. at 5; Opp. at 4–5). In support of its motion, TCP has provided a declaration demonstrating that Vincent Smith, the Chief Investment Officer of TCP’s investment advisor, Temescal Canyon Partners LP, is a sophisticated investor, with a bachelor’s degree in finance and over 36 years investing in the stock market, demonstrating TCP’s ability and intention to prosecute the action vigorously on behalf of the Class. (Mem. at 7; Apton Decl., Ex. D ¶ 2). Moreover, TCP represents that it is unaware of any conflict between its claims and those of the Class. (Mem. at 7). Thus, TCP has made a preliminary showing that it is an adequate representative of the Class.

With respect to counsel, Levi & Korsinsky, counsel for TCP (the “Firm”), has demonstrated that it has the resources and expertise to efficiently prosecute the action and the

Firm has submitted a resume (Apton Decl., Ex. E), setting forth biographies of its attorneys and detailing its work on securities cases in this Circuit and around the country. (Mem. at 8).

Among other things, the Firm has been appointed as lead counsel in similar securities class actions in this Circuit and across the country. See, e.g., White v. Nano-X Imaging LTD., No. 20 CV 4355, 2022 WL 3973838, at *7 (E.D.N.Y. Aug. 10, 2022) (collecting cases), report and recommendation adopted, 2022 WL 3867750 (E.D.N.Y. Aug. 30, 2022); In re Coinbase Global Sec. Litig., No. 21 CV 5634, ECF No. 87 (N.D. Cal. Nov. 5, 2021). Based on the legal experience of the attorneys, particularly their extensive experience in similar cases, the Court concludes that the adequacy requirement has been met.

e. The Presumption Has Not Been Rebutted

In this case, TCP submitted a declaration in which it represents that it is willing to serve as a representative in this matter, and agrees not to accept any payment for serving as a representative, beyond its pro rata share of any recovery. (See Certification⁵ ¶ 7). Moreover, the other parties seeking appointment as Lead Plaintiff have either withdrawn or indicated they have no opposition to the appointment of TCP. (ECF Nos. 14, 15, 17). Therefore, the Court finds that TCP is presumptively the most adequate plaintiff, and this presumption in favor of appointing TCP has not been rebutted. The Court therefore appoints TCP to serve as Lead Plaintiff.

f. Appointment of Lead Counsel

Plaintiff has also moved for the approval of the Firm to serve as Lead Counsel. As “[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), the Court sees no reason to interfere in

⁵ Citations to “Certification” refer to the Certification of Plaintiff Pursuant to Federal Securities Law, dated March 10, 2023 and signed by Vince Smith on behalf of TCP. (ECF No. 16-1)

TCP's selection of counsel here. The Court has reviewed the biographies of the attorneys at the firm and surveyed its work in other securities cases. Thus, the Court grants Lead Plaintiff's motion to appoint Levi & Korsinsky as Lead Counsel in this case.

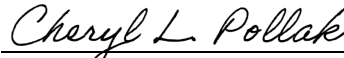
CONCLUSION

In light of the foregoing, the Court appoints TCP as Lead Plaintiff of the class. The Court further approves Lead Plaintiff's selection of Levi & Korsinsky as Lead Counsel. The parties are Ordered to submit a joint status report by **August 30, 2023**.

The Clerk is directed to send copies of this Order to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED.

Dated: Brooklyn, New York
August 15, 2023



Cheryl L. Pollak
United States Magistrate Judge
Eastern District of New York