Is any lead plaintiff better than no lead plaintiff? Some courts say no

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Over the past month, federal judges in two separate cases rejected motions to lead securities class actions brought by the only investor-candidates seeking the job. In both instances, the court found that the investor-candidate was unfit to serve as a lead plaintiff, even though no one else was seeking the role.

The court's decisions denying the investor-candidates' motions to serve as lead plaintiff effectively dismissed the class actions altogether, unless another investor is now permitted to step forward and apply. These two decisions highlight the real risk to investors with significant losses who try to ride other investors' coattails rather than apply themselves to serve as lead plaintiff in securities class actions.

In mid-September, a federal court in the Eastern District of New York took the unusual step of denying a motion to serve as lead plaintiff filed by the only investor who applied for the role.

Each year, there are approximately 250 to 350 securities class actions filed in the United States, according to Stanford Law School's Securities Class Action Clearinghouse. Those cases typically assert claims against public companies and their executives for misrepresenting some aspect of the company's business to its investors. As class actions, the cases seek to have an investor or small group of investors represent a class of all investors that transacted in the corporate defendant's securities during a specified period. The selection of that class representative — known in this context as the "lead plaintiff" — is left to the court.

In the mid-90s, Congress passed the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). Among other things, the PSLRA established a unique and systematic process for determining which investor or investors will be chosen to lead securities class actions. Congress' stated purpose in passing the law was to place securities class actions — in which millions or billions of dollars are often at stake — in the hands of investors who are incentivized to vigorously prosecute the claims and sophisticated enough to oversee the lawyers representing the class.

Under the PSLRA, any member of the putative class may file a motion seeking appointment as lead plaintiff within 60 days after the publication of notice that the first action has been filed. The PSLRA establishes a strong presumption in favor of the investor that has the "largest financial interest" in the relief sought by the class, which courts generally interpret to mean the investor with the largest loss. That investor must also make a preliminary showing that its claims are typical of other class members' claims and that it can fairly and adequately represent the interests of the class.

Although the PSLRA's lead plaintiff appointment process is fairly straightforward, lead plaintiff applications are frequently hotly contested, with multiple investors or investor groups competing to lead the litigation. Yet other times, there is only a single investor that steps forward to represent the class.

Historically, courts almost always grant motions of the lead plaintiff candidates when no one else applies. Indeed, the lack of competing movants does not necessarily reflect the strength of the claims and could be the result of a variety of factors. Many successful securities class actions were overseen by a lead plaintiff that was the only investor to seek that role.

In mid-September, a federal court in the Eastern District of New York took the unusual step of denying a motion to serve as lead plaintiff filed by the only investor who applied for the role. In that case, an individual investor sought to lead a securities class action against Credit Suisse Group AG. The case, *Carlos de March Bosch v. Credit Suisse Group AG,* concerned allegations that Credit Suisse improperly lent money to Russian oligarchs subject to U.S. and international sanctions.

That investor, Yansi Jimenez, claimed to have lost $621 on investments in Credit Suisse shares. As the only member of the putative class to file a motion to lead the case, Jimenez had, by default, the "largest financial interest" of any movant. The court nevertheless denied the motion to serve as lead plaintiff, finding that "Jimenez's extremely modest stake (at most, $621) is unlikely to provide the kind of incentive for close supervision of counsel that the PSLRA contemplates."

The court's concern was exacerbated by the fact that Jimenez produced her retainer agreement with counsel, at the court's request, and it was dated on the same day that the court requested it, which indicated that Jimenez had not contemplated the terms by which to retain counsel until prompted by the court.

In response, Jimenez's counsel argued, among other things, that the putative class would be prejudiced by the denial of Jimenez's motion, which would likely lead to the case's dismissal. The court rejected that notion and found that the class would be prejudiced by proceeding with a lead plaintiff "who fails to satisfy Rule 23's adequacy requirement, thereby causing further delays in the future."

These recent cases highlight the risk that the court finds that the investors who do apply are unfit for the role, leaving the suit without any leadership at all.

Just a few weeks later, a different judge in a different case in the Eastern District of New York rejected the lone lead plaintiff candidate. That case, *Mingxue Guo v. Tyson Foods, Inc.,* concerned alleged misrepresentations by Tyson Foods, Inc. concerning its ability to operate its meat-packing plants safely during the pandemic. The motion was filed by two investors — Chen Porat and Keagan Marcus — who suffered a combined loss of just $320 on their investments in Tyson stock.

Relying, in part, on the court's decision in *Credit Suisse*, the *Tyson Foods* court held that "[b]ased on these nominal losses . . . Porat and Marcus lack 'sufficient financial interest in the outcome of the case to incentivize them to monitor counsel's performance and control the litigation on behalf of the putative class.'"

Following these court decisions, the *Credit Suisse* case was voluntarily dismissed, and Porat and Marcus have sought to overturn the ruling rejecting their motion in the *Tyson Foods* matter. Meanwhile, according to publicly filed institutional holdings data, there were hundreds of institutional investors with large stakes in either Credit Suisse or Tyson Foods that ostensibly could have stepped forward to lead these cases.

To the extent any of those institutional investors decided — based on the expectation that other suitable investor-candidates would seek the lead plaintiff role — to remain passive and stand by to collect their share of any recovery, as of now, no such recovery is coming.

Many large institutional investors opt to remain passive class members under the assumption that another investor will apply for the role of lead plaintiff, expecting to share in whatever recovery is achieved. Although this strategy may work some of the time, these recent cases highlight the risk that the court finds that the investors who do apply are unfit for the role, leaving the suit without any leadership at all.

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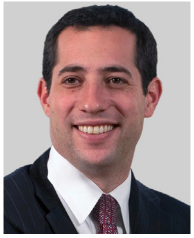

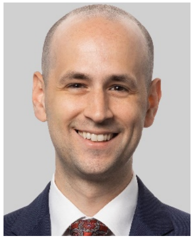

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