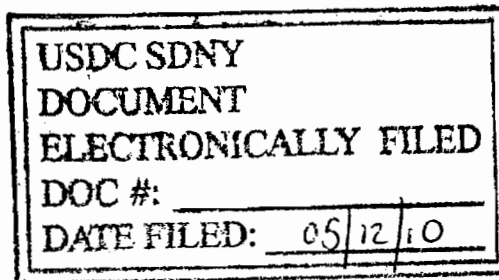


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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In re J. EZRA MERKIN AND BDO SIDEMAN
SECURITIES LITIGATION

08 Civ. 10922 (DAB)
Related to:
09 Civ. 6031 (DAB)
09 Civ. 6483 (DAB)

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DEBORAH A. BATTS, United States District Judge.

On April 6, 2009, the Court appointed Abbey Spanier Rodd & Abrams, LLP as lead counsel and appointed New York Law School and Scott Berrie as lead plaintiffs in the above-captioned consolidated action. On June 25, 2009, the Court consolidated the following actions for all purposes: 08 Civ. 10922, 09 Civ. 2001, 09 Civ. 2688 and 09 Civ. 4407.¹

In its June 25, 2009 Order, the Court invited all Plaintiffs wishing to seek, or oppose any modification of the appointment of lead plaintiffs and lead counsel to submit a motion doing so. On July 6, 2009, Jacob E. Finkelstein CGM IRA Rollover Custodian ("Jacob Finkelstein") moved to vacate the Court's Order of June 25, 2009, and appoint Jacob Finkelstein as lead plaintiff over the claims by the investors in Ariel Fund Ltd. ("Ariel Fund") and appoint Wolf Haldenstein Adler Freeman & Herz LLP as lead

New York Law School v. Parnis, D.P. opp

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¹ In September of 2009, the matters Croscill, Inc. et al. v. Gabriel Capital L.P. et al., 09 Civ. 6031 (DAB) and Morris Fuchs Holdings LLC v. Gabriel Capital, L.P. et al., 09 Civ. 6483 (DAB) were transferred to this Court and are now designated as related to the above-captioned action.

counsel. In its motion of July 24, 2009, lead plaintiffs New York Law School and Scott Berrie sought to confirm this Court's prior appointment of New York Law School and Scott Berrie as lead plaintiffs and Abbey Spanier LLP as lead counsel to represent investors for the funds Ascot Partners, LP ("Ascot Fund") and Gabriel Partners, LP ("Gabriel Fund").

By various letter requests, both the current lead plaintiffs, New York Law School and Scott Berrie, as well as the proposed additional lead plaintiff, Jacob Finkelstein, moved jointly to be appointed co-lead plaintiffs. It was proposed that New York Law School and Scott Berrie would be co-lead plaintiffs for the proposed class of investors that invested with the Ascot and Gabriel Funds. Jacob Finkelstein would be a co-lead plaintiff for the proposed class of investors that invested with the Ariel Fund. New York Law School, Scott Berrie and Jacob Finkelstein moved for Abby Spanier LLP to be co-lead counsel on behalf of New York Law School and Scott Berrie, and Wolf Haldenstein LLP to be co-lead counsel on behalf of Jacob Finkelstein. Defense Counsel to Defendants J. Ezra Merkin and Gabriel Capital Corporation, Dechert LLP ("Defendants Merkin and Gabriel Capital"), objected to the proposed appointment of multiple class representatives and multiple lead counsel.

In its January 28, 2010 Order, the Court modified its June

25, 2009 Consolidation Order and ordered that New York Law School and Scott Berrie be appointed as lead plaintiffs on behalf of all investors, and Abbey Spanier Rodd and Abrams LLP be appointed lead counsel on behalf of lead plaintiffs New York Law School and Scott Berrie. Jacob Finkelstein's request to be appointed co-lead plaintiff, and Wolf Haldenstein Adler Freeman & Herz LLP to be appointed co-lead counsel, was denied.

In its January 28, 2010 Order, the Court found that rejecting co-lead plaintiffs and counsel in this action better served the interests of the investors in this case as the use of co-lead counsel(s) would likely increase attorney's fees and expenses. In re Oxford Health Plans, Inc. Securities Litigation, 182 F.R.D. 42 (S.D.N.Y. 1998). The Court believed, and still believes, that cost consideration is important in this action as result of the massive Madoff fraud alleged. The Court also found that Abby Spanier is sufficiently experienced and sophisticated as to represent all investors competently.

The Court is in receipt of counsel to Jacob Finkelstein, Wolf Haldenstein's letters of March 10, 25 and April 1 and 8, arguing that a member of the Ariel Fund class must be a named plaintiff in the above-captioned action. The Court treats these letters jointly as a Motion to Reconsider its January 28, 2010 Order under Fed. R. Civ. P. 60(b). The Court is also in receipt

of lead counsel Abby Spanier LLP's letters dated March 23 and April 2, expressing a willingness to amend the Second Amended Complaint and add an Ariel Fund investor as a named plaintiff.

The standard for granting a motion to reconsider "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSC Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995); see also Range Road Music, Inc. v. Music Sales Corp., 90 F. Supp. 2d 390, 392 (S.D.N.Y. 2000). Furthermore, a motion for reconsideration is not one in which a party may reargue "those issues already considered when a party does not like the way the original motion was resolved." In re Houbigant, Inc., 914 F. Supp. 997, 1001 (S.D.N.Y. 1996).

The Court agrees with Wolf Haldenstein that the Ariel Fund Class claims are subject to dismissal as no named plaintiff representative in the Second Consolidated Complaint has standing to pursue those claims, because no named plaintiff invested in the Ariel Fund and acquired Ariel Fund securities. W.R. Huff Asset Management Co. LLC v. Deloitte & Touche LLP, 549 F.3d 100, 106 n.5 (2d Cir. 2008). It was mistake by the Court to allow this consolidated action to proceed without requiring an Ariel

investor to be added as a named plaintiff.

The Court appropriately grappled with the question of whether to allow the co-lead plaintiff and co-lead counsel structure originally proposed by New York Law School, Scott Berrie and Jacob Finkelstein in the time leading up to the Court's January 28, 2010 Order. Given the limited funds that may be recovered, this concern is certainly valid. However, the Court can not ignore, as Wolf Haldenstein has pointed out, that it is the duty of the Court to continue to monitor whether lead plaintiffs are capable of adequately protecting the interests of class members. In re SLM Corp. Sec. Litig., 258 F.R.D. 112, 114 (S.D.N.Y. 2009) (courts have the ability to consider motions to add lead plaintiffs throughout the litigation of a securities class action). The Court is now convinced, despite its initial cost concerns, that the earlier co-lead plaintiff and co-lead counsel structure proposed by New York Law School, Scott Berrie and Jacob Finkelstein is the best structure for proceeding in this lawsuit. It will ensure that an Ariel Fund investor will be a lead plaintiff to help direct the litigation, and its chosen counsel will be there to represent it throughout.²

² The Court is fully aware that Defendants Merkin and Gabriel Capital opposes the lead plaintiff-counsel structure that the Court establishes in this Order. The reasons for Defendants objections include: (1) the Ariel and Gabriel Funds generally

Accordingly, the Court's June 25, 2009 and January 28, 2010 Consolidation Orders are HEREBY MODIFIED to the extent as follows and it is ORDERED that:

(1) New York Law School and Scott Berrie are HEREBY APPOINTED as Co-Lead Plaintiffs on behalf of the Ascot Fund and Gabriel Fund investors, and Jacob E. Finkelstein CGM IRA Rollover Custodian is HEREBY APPOINTED Co-Lead Plaintiff on behalf of the Ariel Fund investors;

(2) Abbey Spanier Rodd and Abrams LLP is HEREBY APPOINTED Co-Lead Counsel on behalf of Co-Lead Plaintiffs New York Law School and Scott Berrie, and Wolf Haldenstein Adler Freeman & Herz LLP is HEREBY APPOINTED Co-Lead Counsel on behalf of Co-Lead Plaintiff Jacob E. Finkelstein CGM IRA Rollover Custodian;

(3) New York Law School, Scott Berrie and Jacob E. Finkelstein CGM IRA Rollover Custodian are permitted to prosecute specific issues that are distinct between the Ariel Fund Co-Lead Plaintiff and those issues of the Ascot Fund and Gabriel Fund Co-

invested in parallel and typically in the same investments; (2) as a result of Bernard Madoff's fraud, the Ariel and Gabriel Funds each lost approximately 30% of their value, while the Ascot Fund was rendered virtually worthless; and (3) a single receiver has been appointed for both the Ariel and Gabriel Funds. These objections have been thoroughly considered by the Court. Notwithstanding these objections, the Court finds that the lead plaintiff and counsel structure set forth in this Order is proper.

Lead Plaintiffs, however, with respect to overlapping issues, the Parties and its counsel are HEREBY ORDERED to work together to avoid duplication and any unnecessary cost to the Defendants, Classes and the Court.

(4) Plaintiffs shall file a Consolidated Third Amended Complaint within 30 days of the date of this Order;

(5) Defendants shall move or answer within 45 days after the filing of the Consolidated Third Amended Complaint;

(6) Upon motion of any party, any other actions now pending or later filed in this district which arise out of or are related to the same facts as alleged in the above-identified case shall be consolidated for all purposes with the current lead plaintiff and lead counsel structure, if and when they are brought to the Court's attention.

SO ORDERED.

Dated: New York, New York

May 12, 2010



Deborah A. Batts
United States District