

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Case No. 15-cv-01857-KLM

MICHAEL ELLIS, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

THE SPECTRANETICS CORPORATION,
SCOTT DRAKE, and
GUY A. CHILDS,

Defendants.

**MOTION OF ALLEN J. WIESENFELD FOR APPOINTMENT AS LEAD
PLAINTIFF AND APPROVAL OF LEAD PLAINTIFF'S SELECTION OF
COUNSEL**

Proposed lead plaintiff Allen J. Wiesenfeld ("Movant") hereby moves, under §§21(D) *et seq.* of the Securities Exchange Act of 1934 ("1934 Act") as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), for an order (a) appointing Allen J. Wiesenfeld as Lead Plaintiff; and (b) approving Movant's selection of Glancy Prongay & Murray LLP and WeissLaw LLP as Co-Lead Counsel and The Shuman Law Firm as liaison counsel for the Class.

Movant Allen J. Wiesenfeld seeks appointment as Lead Plaintiff and approval of Movant's choice of counsel pursuant to the 1934 Act, the Federal Rules of Civil Procedure and the PSLRA.¹

¹ This motion is filed pursuant to Section 21D of the Exchange Act, as amended by the PSLRA, which provides that within 60 days after publication of the required notice, any

I. **FACTUAL BACKGROUND**²

This is a securities class action on behalf of all persons who purchased or otherwise acquired the common stock of The Spectranetics Corporation (“Spectranetics” or the “Company”) between February 19, 2015 and July 23, 2015, both dates inclusive (the “Class Period”). The Complaint on file alleges violations of the 1934 Act by Spectranetics and certain of its officers and/or directors (“Defendants”).

Spectranetics develops, manufactures, markets and distributes medical devices used in minimally invasive procedures within the cardiovascular system. The Company’s products are sold in over 65 countries and are used to cross, prepare, and treat arterial blockages in the legs and heart and to remove pacemaker and defibrillator cardiac leads.

The Complaint alleges that defendants made false and/or misleading statements and/or failed to disclose to investors that: (1) the Company was being negatively impacted by increasing competition; (2) that the Company’s sales force optimization efforts were inadequate; (3) that, as a result, the Company was performing below expectations; (4) that the Company lacked adequate internal controls; and (5) that, as a result of the foregoing, Defendants’ statements about Spectranetics’ business, operations and prospects were false and misleading and/or lacked a reasonable basis.

member of the proposed class may apply to the Court to be appointed as lead plaintiff; consequently, at this time Movant’s counsel has no way of knowing which class members, if any, are filing competing lead plaintiff motions. As a result, Movant’s counsel has been unable to conference with opposing counsel as prescribed into D.C.COLO.LCivR 7.1A, and respectfully requests that the conference requirement of D.C.COLO.LCivR 7.1A, be waived for this motion.

² Summary of facts taken from the filed class action complaint for violations of federal securities laws, captioned *Ellis v. The Spectranetics Corporation, et al.*, No. 15-cv-01857-KLM.

On April 23, 2015, the Company reported disappointing earnings results and lowered its forecast for the rest of the year. The Company attributed much of the lowered forecast to increased competition from other drug-coated balloon products. Following this news, shares of Spectranetics declined \$8.18 per share, over 23%, to close on April 24, 2015, at \$26.52 per share, on unusually heavy volume.

On July 23, 2015, the Company lowered revenue guidance for the remainder of 2015. According to the Company, competitive pressure from the rapid adoption of drug-coated balloons and ongoing sales force optimization efforts were causing its AngioSculpt franchise to perform below expectations. On this news, shares of Spectranetics declined \$8.53 per share, over 34%, to close on July 24, 2015, at \$16.30 per share, on unusually heavy volume.

As a result of Defendants' wrongful acts and omissions, and the precipitous decline in the market value of the Company's securities, Movant and other Class members have suffered significant losses and damages.

II. PROCEDURAL HISTORY

Plaintiff Michael Ellis ("Plaintiff") commenced the above-captioned action on August 27, 2015; and on that same day counsel for Plaintiff published a notice of the pendency of Plaintiff's case on *Business Wire*, a widely circulated national business-oriented wire service. See Exhibit A, August 27 Notice, attached hereto.

Movant brings the instant motion pursuant to Plaintiff's complaint and notice of pendency, and files this motion prior to expiration of the 60-day period from publication of the August 27, 2015 notice.

III. ARGUMENT

A. Movant Should Be Appointed Lead Plaintiff

Section 21D(a)(3)(B) of the PSLRA provides the procedure for selecting lead plaintiff in class actions brought under the 1934 Act. The PSLRA directs courts to consider any motion to serve as lead plaintiff filed by class members in response to a published notice of class action by the later of (i) 60 days after the date of publication of the notice; or (ii) as soon as practicable after the Court decides any pending motion to consolidate. 15 U.S.C. §78u-4(a)(3)(B). The PSLRA provides a “rebuttable presumption” that the “most adequate plaintiff” to serve as lead plaintiff is the person or group of persons that:

(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); *see also Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 584 (N.D. Cal. 1999).

As set forth below, Movant satisfies all three of these criteria and, thus, is entitled to the presumption that he is the “most adequate plaintiff.”

1. Movant Is Making a Motion in Response to a Notice

On August 27, 2015, counsel for Plaintiff published a notice on *Business Wire*, pursuant to §21D(a)(3)(A)(I) of the PSLRA, announcing that a securities class action had been filed against Defendants herein, and advising purchasers of Spectranetics common stock that they had until October 26, 2015 to file a motion to be appointed as lead plaintiff.

Pursuant to the provisions of the PSLRA and within the requisite time period after publication of the notice, Movant timely moves this Court to be appointed lead plaintiff on behalf of all plaintiffs and putative class members in this action and any other actions deemed related by this Court, and submits herewith his sworn certification attesting that Movant is willing to serve as representative of the Class and willing to provide testimony at deposition and trial, if necessary. See Exhibit B, Wiesenfeld Certification, attached hereto. Movant, therefore, satisfies the requirement of either filing a complaint or making a motion in response to a published notice.

2. Movant Has the Largest Financial Interest

The PSLRA requires a court to adopt the rebuttable presumption that “the most adequate plaintiff . . . is the person or group of persons that . . . has the largest financial interest in the relief sought by the class.” 15 U.S.C. §78u-4(a)(3)(B)(iii).

During the Class Period, Movant purchased shares of Spectranetics common stock at prices alleged to be artificially inflated by Defendants’ materially false and misleading statements and omissions, and as result, Movant has suffered financial losses of over \$49,630. See Exhibit C, Wiesenfeld Loss Chart. Movant believes that he has the largest known financial interest in this case among Class members who filed timely applications for appointment as lead plaintiff, and accordingly is presumed to be the “most adequate plaintiff.” See *In re Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002).

3. Movant Satisfies the Requirements of Rule 23 of the Federal Rules of Civil Procedure

Section 21D(a)(3)(B)(iii)(I)(cc) of the PSLRA further provides that, in addition to possessing the largest financial interest in the outcome of the litigation, a lead plaintiff must “otherwise satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure.”

Rule 23(a) provides that a party may serve as a class representative if the following four requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

Fed. R. Civ. P. 23(a).

In making its determination that a lead plaintiff satisfies the requirements of Rule 23, the Court need not raise its inquiry to the level required in ruling on a motion for class certification. *A prima facie* showing that a PSLRA movant satisfies the requirements of Rule 23 is sufficient. *See Lane v. Page*, 250 F.R.D. 634, 640 (D.N.M. 2007); *Delashmet v. Custom Designed Compressor Systems, Inc.*, 2006 WL 2016080, at *5 (D.N.M. March 9, 2006). Courts, thus, limit their inquiry to the typicality and adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until class certification. *In re Ribozyme Pharmaceuticals, Inc. Secs. Litig.*, 192 F.R.D. 656, 658 (D. Colo. 2000).

a. Movant's Claims Are Typical

The Rule 23(a) typicality requirement is satisfied when a plaintiff's claims arise from the same practice or course of conduct that gives rise to other class members' claims, and plaintiff's claims are based on the same legal theory. *See Ribozyme* 192 F.R.D at 658. Rule 23 does not require the lead plaintiff to be identically situated with all class members. It is enough that the lead plaintiff's situation shares a common issue of law or fact. *In re Intelcom Group, Inc. Sec. Litig.*, 169 F.R.D. 142, 148 (D.Colo. 1996)

Here, Movant's claims are typical of the claims asserted by the proposed Class. Movant, like all members of the Class, alleges that Defendants violated the federal

securities laws by publicly disseminating false and misleading statements concerning Spectranetics's business operations and prospects. Movant, like all of the members of the Class, purchased Spectranetics common stock during the Class Period at prices artificially inflated by Defendants' misrepresentations and omissions, and was damaged thereby. Consequently, Movant's interests are closely aligned with other Class members' and Movant's interests are, therefore, typical of the Class. *Ribozyme*, 192 F.R.D. at 658-659.

b. Movant Is an Adequate Representative

The adequacy of representation requirement of Rule 23 is satisfied where it is established that a representative party "will fairly and adequately protect the interest of the class." Accordingly:

The standard for adequacy of representation under [Rule 23] is met by: (1) the absence of potential conflict between the named plaintiffs and the class members and (2) that counsel chosen by the representative parties is qualified, experienced and able to vigorously conduct the proposed litigation.

Id., at 659. Movant has demonstrated his adequacy as lead plaintiff by communicating with experienced and able counsel, filing this motion, and submitting his sworn certification attesting that Movant is willing to serve as representative of the Class and willing to provide testimony at deposition and trial, if necessary. See Exhibit B, Wiesenfeld Certification, attached hereto; *Id* at 658. In addition, Movant's interests are clearly aligned with the Class, and no antagonism exists between Movant's claims and those of the other members of the Class. See *In re Intelcom*, 169 F.R.D. at 149 (citation omitted).

4. Movant Is Presumptively the Most Adequate Plaintiff

The presumption in favor of appointing Movant as Lead Plaintiff may be rebutted only upon proof "by a purported member of the Plaintiffs' class" that the presumptively most adequate plaintiff:

(aa) will not fairly and adequately protect the interest of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. §78 u-4(a)(3)(b)(iii)(I).

As discussed above, Movant has timely filed this motion for appointment as Lead Plaintiff and has submitted his sworn certification stating that he has reviewed the complaint and is willing to serve as representative of the Class. Movant is not aware of any unique defenses Defendants could raise against him that would render Movant inadequate to represent the Class. Moreover, Movant has selected and retained qualified and experienced counsel who are able to vigorously represent her and the Class. Accordingly, Movant is presumptively the most adequate plaintiff and should be appointed Lead Plaintiff for the Class.

C. The Court Should Approve Movant's Choice of Counsel

The PSLRA vests authority in the lead plaintiff to select and retain counsel, subject only to approval of the Court. See §21D(a)(3)(B)(v) of the Exchange Act. Thus, the Court should not disturb the lead plaintiff's choice of counsel unless "necessary to protect the interest of the plaintiff class." 15 U.S.C. §78u-4(a)(3)(B)(iii)(II)(aa); see also *In re Cavanaugh*, 306 F.3d at 733. In the present case, Movant has retained Glancy Prongay & Murray LLP and WeissLaw LLP to pursue this litigation on his behalf, and will retain these firms as plaintiff's Co-Lead Counsel, in the event Movant is appointed Lead Plaintiff.³ Glancy Prongay & Murray LLP and WeissLaw LLP possess extensive experience in securities litigation and have successfully prosecuted numerous securities fraud class

³ As noted in footnote 1 above, The Shuman Law Firm has agreed to serve as liaison counsel for Movant contingent upon the Court's appointment of Movant as lead plaintiff.

actions on behalf of injured investors, as reflected by the firms' résumés. Exhibit D, Glancy Prongay & Murray LLP Résumé, and Exhibit E, WeissLawLLP Résumé, attached hereto. Thus, the Court may be assured that, by granting Movant's motion, the Class will receive the highest caliber of legal representation.

IV. CONCLUSION

For the foregoing reasons, Movant respectfully asks the Court to grant his motion and enter an Order (a) appointing Allen J. Wiesenfeld as Lead Plaintiff; (b) approving his selection of Glancy Prongay & Murray LLP and WeissLaw LLP as Co-Lead Counsel, with The Shuman Law Firm as Liaison Counsel; and (c) granting such other relief as the Court may deem just and proper.

Dated: October 26, 2015

THE SHUMAN LAW FIRM

By: *s/ Kip B. Shuman*

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Proposed Co-Lead Counsel for the Class

Certificate of Service

I hereby certify that the foregoing Motion of Allen J. Wiesenfeld for Appointment as Lead Plaintiff and Approval of Lead Plaintiff's Selection of Counsel was filed with this Court on October 26, 2015 through the CM/ECF system and will be sent electronically to all registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non-registered participants.

s/ Rusty E. Glenn
Rusty E. Glenn