

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 06-61844-MARRA**

GEORGE DURGIN, individually and on behalf)
of all others similarly situated,)
)
Plaintiff,)
)
v.)
)
TECHNICAL OLYMPIC USA, INC., ANTONIO)
P. MON, DAVID J. KELLER, RANDY L.)
KOTLER, KONSTANTINOS STENGOS,)
ANDREAS STENGOS, TOMMY L. MCADEN,)
BEATRIZ L. KOLTIS, LARRY HORNER,)
WILLIAM HASLER, MICHAEL POULOS,)
SUSAN B. PARKS, J. LONNIE M. FEDRICK,)
MARIANNA STENGOU, GEORGE STENGOS,)
BRYAN WHITWORTH, TECHNICAL OLYMPIC)
SA, UBS SECURITIES LLC, CITIGROUP)
GLOBAL MARKETS INC., DEUTSCHE BANK)
SECURITIES, INC. and JMP SECURITIES LLC,)
)
Defendants.)

**MOTION (1) OF DIAMONDBACK CAPITAL MANAGEMENT, LLC TO
WITHDRAW AS LEAD PLAINTIFF, (2) FOR EXTENSION OF TIME FOR
PLAINTIFF CLASS TO RESPOND TO DEFENDANTS' MOTIONS TO DISMISS AND
(3) TO ESTABLISH PROCEDURE FOR APPOINTMENT OF A NEW LEAD
PLAINTIFF AND INCORPORATED MEMORANDUM OF LAW**

MOTION

Lead Plaintiff Diamondback Capital Management, LLC (“Diamondback”) respectfully moves, pursuant to Rule 21 of the Federal Rules of Civil Procedure, to withdraw as Lead Plaintiff in this case. In addition, this motion seeks an extension of time for the plaintiff class to oppose the defendants’ pending motions to dismiss the Consolidated Complaint. The opposition papers are currently due May 2, 2008. Last, this motion seeks establishment of a procedure for appointment of a new lead plaintiff.

Good cause exists for this motion, as set forth below in the accompanying memorandum of law.

CERTIFICATION PURSUANT TO LOCAL RULE 7.1(A)(3)

Undersigned counsel for Plaintiff communicated with opposing counsel on April 29-30, 2008 in a good faith effort to resolve the issues raised in this motion. Counsel for the Underwriter Defendants (UBS Securities LLC, Citigroup Global Markets Inc., Deutsche Bank Securities, Inc. and JMP Securities LLC) has informed undersigned counsel that these defendants take no position on the relief sought in this motion. Counsel for Antonio Mon and TOUSA, Inc. have indicated that they do not consent to the motion. Counsel for the remaining defendants have not as yet informed plaintiff’s counsel of their position on the motion.

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

Lead plaintiff Diamondback respectfully submits this memorandum of law in support of its motion to withdraw as Lead Plaintiff.

ARGUMENT

I. DIAMONDBACK MAY WITHDRAW AS LEAD PLAINTIFF UNDER WELL ESTABLISHED LAW

Diamondback has acted in good faith in carrying out its duties as Lead Plaintiff in this case to date. However, Diamondback no longer wishes to serve as lead plaintiff and instead wishes to withdraw as Lead Plaintiff. See Declaration of Diamondback General Counsel, Joel Harary (Exhibit A to this motion).

Rule 21, Fed. R. Civ. P., provides that “parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.” Fed. R. Civ. P. 21. Courts regularly apply this Rule to permit a lead plaintiff who no longer wishes to undertake the responsibilities of lead plaintiff to withdraw. *See, e.g., In re Initial Public Offering Sec. Litig.*, 224 F.R.D. 550, 552 (S.D.N.Y. 2004) (permitting the court-appointed lead plaintiffs to withdraw from the case for personal reasons). “[T]here is nothing extraordinary about this request, and removing. . .[a] lead plaintiff is the appropriate and just approach if it does not wish to represent this class.” *In re NeoPharm, Inc. Sec. Litig.*, 02 Civ. 2976, 2004 WL 742084, at *3 (N.D. Ill. Apr. 7, 2004).

This permissive view of lead plaintiff withdrawal requests is based on the fact that a plaintiff should not be compelled to litigate if it does not wish to do so. *In re Currency Conversion Fee Antitrust Litig.*, No. MDL No. 1409, 2004 WL 2453927, at * 1 (S.D.N.Y. Nov. 3, 2004) (granting motion of withdrawing plaintiffs to “ensure that reluctant plaintiffs do not jeopardize the interests of absent class members”).

II. THE COURT SHOULD PROVIDE FOR A PROCEDURE TO SUBSTITUTE A NEW LEAD PLAINTIFF TO REPRESENT THE PUTATIVE CLASS IN THIS ACTION

Unless a new lead plaintiff is appointed by the Court, the putative class – shareholders of TOUSA – will be unrepresented. It is respectfully submitted that the prior movants for lead plaintiff status should be allowed to move again. The attorneys for all the prior lead plaintiff movants will be served with a copy of this motion either by mail or by CM-ECF notice, to ensure they are on notice and have an opportunity to be heard. For the reasons discussed below, this request should be granted.

A. Substituting a Lead Plaintiff is Proper Under the PSLRA

This Court has the authority, where a lead plaintiff withdraws, to allow the substitution of another lead plaintiff. *See In re Baan Co. Sec. Litig.*, 98 Civ. 2465 (ESH), 2002 WL 32307825, *2-4 (D.D.C. July 19, 2002). The Private Securities Litigation Reform Act (“PSLRA”) provides no guidance here. In the absence of legislative guidance, courts that have addressed requests for substitution first consider the timeliness of the request. Requests for substitution are timely where the proposed lead plaintiff “[e]ither (a) filed a complaint in these consolidated actions, as explicitly contemplated by the PSRLA, (b) moved to be appointed lead plaintiff in response to the initial notice of pendency, or (c) moved to be appointed lead plaintiff within 60 days of the withdrawal of the previous lead plaintiff.” *In re Initial Public Offering Sec. Litig.*, 214 F.R.D. 117, 120 (S.D.N.Y 2002) (“IPO 1”). *See Neopharm*, 2004 WL 742084, at *3 (stating that “[t]he court’s reasoning in [IPO I] is sound, particularly based on the absence of express guidance in the PSRLA”).

In this case, three other parties or groups previously moved to be appointed lead plaintiff: (1) The Jutkowitz Group, (2) Bricklayer's & Trowel Trades International Pension Fund and (3) the Central Laborers' Pension Fund & Communications Workers of America group. Undersigned counsel has served the attorneys for these parties and they are on notice of the instant motion.

In addition, when, as here, the litigation is well underway, substitution of a lead plaintiff is preferable and more efficient than any alternative, including the issuance of a new notice to the class soliciting more lead plaintiff movants. See *In re Initial Public Offering Sec. Litig.*, 224 F.R.D. 550, 552 (S.D.N.Y. 2004) ("IPO II") ("where a new lead plaintiff is willing to step forward, there is no need to start the process anew when all putative class members were given notice of the opportunity to move for appointment of lead plaintiff by means of the statutorily required published notice"). In *re Bellsouth Corp. Sec. Litig.*, No. 1:02-cv-2142-WSD, slip op. (N.D. Ga. Dec. 29, 2005) at *3, the Court allowed the withdrawal of the previous lead plaintiff, an institution, and permitted a new class member, an individual investor, to intervene as a substitute lead plaintiff without the publication of a new notice to the class. The *Bellsouth* court stated that doing so would "further the interest of judicial economy and . . . avoid undue delay and prejudice." Similarly, in *re Baan Co. Sec. Litig.*, 98 Civ 2465 (ESH), 2002 WL 32307825, *2-4 (D.D.C July 19, 2002), the court ordered the substitution of individual investors as lead plaintiffs without a new notice where only one of the original lead plaintiffs remained, and granted class certification. 2002 WL 32307825, at *2.

The same is true in this case. The statutorily required notice published in connection with this action produced four lead plaintiff applicants. Here, "where a new lead plaintiff is willing to step forward, there is no need to start the process anew when all putative class

members were given notice of the opportunity to move for appointment of lead plaintiff by means of the statutorily required published notice.” *IPO II*, 224 F.R.D. at 552. To do so at this stage would just waste time and resources. As the court concluded in *Baan*, there is no reason to believe that an additional notice at this stage of the case would encourage another institutional investor to step forward. *See Baan*, 2002 WL 32307825, at *2.

The Proposed Order submitted with this motion proposes that prospective lead plaintiffs be given twenty days from entry of the order to file a motion for appointment as lead plaintiff.

III. PLAINTIFFS’ TIME TO RESPOND IN OPPOSITION TO THE DEFENDANTS’ MOTIONS TO DISMISS SHOULD BE ADJOURNED UNTIL 30 DAYS AFTER A NEW LEAD PLAINTIFF IS APPOINTED

Lead Plaintiff is currently scheduled to respond to the pending motions to dismiss on May 2, 2008. *See* D.E. 122. Granting additional time for Plaintiff’s response to the motions is necessary to allow a new lead plaintiff to be appointed and to allow the new lead plaintiff to participate in the preparation of a response to the current motions to dismiss.

CONCLUSION

For the reasons set forth above, the motion to relieve Diamondback from its position as lead plaintiff should be granted, an extension of time for the plaintiff class to respond to Defendants’ motions to dismiss should be granted and the Court should establish a procedure to

allow for the appointment of a new lead plaintiff, together with such other, further or different relief which to the court seems just and proper.

Dated: April 30, 2008

Respectfully Submitted,

VIANALE & VIANALE LLP

By: s/ Julie Prag Vianale
Julie Prag Vianale
Florida Bar No. 0184977
jvianale@vianalelaw.com
Kenneth J. Vianale
Florida Bar No. 0169668
kvianale@vianalelaw.com
2499 Glades Road, Suite 112
Boca Raton, FL 33431
Telephone: (561) 392-4750
Facsimile: (561) 392-4775

Liaison Counsel for the Class

GAINEY & MCKENNA

Thomas J. McKenna
295 Madison Avenue
4th Floor
New York, New York 10017
Telephone: (212) 983-1300
Facsimile: (212) 983-0383

SQUITIERI & FEARON, LLP

Stephen J. Fearon, Jr.
32 East 57th Street
New York, New York 10022
Telephone: (212) 421-6492
Facsimile (212) 421-6553

Co-Lead Counsel for the Class

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2008, I electronically filed the foregoing documents with the Clerk of Court using CM/ECF, which will transmit a Notice of Electronic Filing to the following parties who participate in the CM-ECF system:

- **David Paul Ackerman**
dackerman@alslaw.com tcampbell@alslaw.com
-
- **Francis A. Anania**
FAnania@anania-law.com
-
- **Chris A. Barker**
cbarker@barkerrodemsandcook.com sodell@barkerrodemsandcook.com
-
- **Richard James Brener**
richard@alslaw.com tcampbell@alslaw.com
-
- **Zhonette M. Brown**
zbrown@kirkland.com
-
- **Denise Brody Crockett**
dcrockett@stackfernandez.com
-
- **Bruce A. Ericson**
bruce.ericson@pillsburylaw.com
-
- **Stephen J. Fearon, Jr**
stephen@sfclasslaw.com
-
- **David J. George**
dgeorge@csgrr.com e_file_fl@csgrr.com; e_file_sd@csgrr.com
-
- **Allan Michael Lerner**
amlrwp@aol.com lernerlawclerk@aol.com; alassitant@aol.com
-
- **Kevin Bruce Love**
klove@hanzmancriden.com
-
- **Lindsay Lutz**
lindsay.lutz@pillsburylaw.com
-
- **Thomas J. McKenna**
tjmckenna@gaineyandmckenna.com

-
- **Martin B. McNamara**
mmcnamara@gibsondunn.com
-
- **Joseph F McSorley**
jfrein@shutts.com
- jameswareham@paulhastings.com;jameshubler@paulhastings.com;wendyphinny@paulhastings.com;andrewblazic@paulhastings.com
-
- **Tracy Ann Nichols**
tracy.nichols@hkklaw.com brenda.scott@hkklaw.com
-
- **Jeffrey S. Powell**
jpowell@kirkland.com
-
- **David A. Rosenfeld**
drosenfeld@csgrr.com
-
- **Jacob R. Sorensen**
jake.sorensen@pillsburylaw.com
-
- **Brian Joseph Stack**
bstack@stackfernandez.com mwolf@stackfernandez.com
-
- **Sarah Toraason**
storaason@gibsondunn.com
-
- **Stanley Howard Wakshlag**
swakshlag@kennynachwalter.com jruiz@kennynachwalter.com

I further certify that I will on May 1, 2008 serve the following parties who do not receive service in this case on the CM-ECF system by sending a full and correct copy of the foregoing by U.S. Mail to the following addresses:

Stanley Bernstein

Bernstein Liebhard & Lifshitz
10 E 40th Street
22nd Floor
New York, NY 10016

Patrick V. Dahlstrom

Pomerantz Haudek Block Grossman & Gross
1 N LaSalle Street
Suite 2225

Chicago, IL 60602

James T. Hubler

Paul Hastings Janofsky & Walker
875 15th Street NW
Washington, DC 20005-2400

James D. Wareham

Paul Hastings Janofsky & Walker
875 15th Street NW
Washington, DC 20005-2400

By: s/ Julie Prag Vianale

Julie Prag Vianale
Florida Bar No. 0184977
Kenneth J. Vianale
Florida Bar No. 0169668
2499 Glades Road, Suite 112
Boca Raton, FL 33431
Telephone: (561) 392-4750
Facsimile: (561) 392-4775

Liaison Counsel for the Class