UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHIRIN BAYATI and MOJAN KAMALVAND, *individually and on behalf of all others similarly situated,*	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 3:22-CV-0410-B**
GWG HOLDINGS INC., BRAD K. HEPPNER, ROY W. BAILEY, PETER T. CANGANY, JR., DAVID F. CHAVENSON, THOMAS O. HICKS, DENNIS P. LOCKHART, BRUCE W. SCHNITZER, DAVID H. DE WEESE, MURRAY T. HOLLAND, and TIMOTHY L. EVANS,	§	
Defendants.	§	

ORDER APPOINTING LEAD PLAINTIFF AND APPROVING LEAD PLAINTIFF'S SELECTION OF COUNSEL

Before the Court is a Motion for Appointment as Lead Plaintiff and Approval of Selection of Lead Counsel filed by Thomas Horton and Frank Moore (Doc. 37). After reviewing the motion the evidence, and the applicable law, the Court **GRANTS** Horton and Moore's motion (Doc. 37). Thomas Horton and Frank Moore are hereby appointed Lead Plaintiff for the putative class pursuant to the Private Securities Litigation Reform Act of 1995 (PSLRA). The law firms of Girard Sharp LLP and Malmfeldt Law Group P.C. are hereby appointed as Lead Counsel.

I.

BACKGROUND[1]

GWG Holdings (GWGH) is in the business of acquiring life insurance policies in secondary markets. *Id.* ¶ 35. GWGH raised funds to purchase the policies through the sale of bonds called "L Bonds." *Id.* ¶ 36. In 2017 GWGH, "raised approximately $131.8 million" by issuing L Bonds. *Id.*

On January 18, 2018, GWGH filed with the Securities and Exchange Commission (SEC) to form a strategic relationship with The Beneficient Company Group (Ben LP). *Id.* ¶¶ 3, 38. Beginning in August 2018, GWGH transferred "approximately $359 million in cash . . . to Ben LP and its subsidiaries"—which "GWGH raised . . . through the sale of L Bonds"—in an effort to assist in Ben LP's development. *Id.* ¶ 39. In December of 2019, "GWGH obtained the right to appoint a majority of the Board of Directors of Ben LP's general partner, Beneficient Management, and therefore obtained control of Ben LP." *Id.* ¶ 46. "[Defendant Brad] Heppner became a Director and the Chairman of GWGH's Board of Directors" and "GWGH began reporting the results of Ben LP and its subsidiaries on a consolidated basis." *Id.*

GWGH raised $403 million in 2019 and $440 million in 2020 through the sale of L Bonds. *Id.* ¶ 53. The sale of L Bonds was suspended on April 16, 2021. *Id.* "[O]nly a small percentage of the funds raised were used to develop Ben LP's business or to make investments consistent with Ben LP's objectives." *Id.*

At the time GWGH "first reported Ben LP's financial information on a consolidated basis," Ben LP had "little or no cash" remaining, and Ben LP's only significant assets were loans receivable "in the amount of approximately $232 million." *Id.* ¶ 47. A 2019 Annual Report statement revealed

[1] The Court draws the following factual content from Plaintiffs' Complaint (Doc. 1).

that Ben LP was "indebted to an entity affiliated with Mr. Heppner, HCLP Nominees, LLC (HCLP) in the amount of approximately $153 million." *Id.* ¶ 50. GWG Life (a GWGH subsdiary) and HCLP entered into an intercreditor agreement, resulting in GWG Life's $80 million dollar loan to Ben LP affiliates being subordinated to HCLP's loan. *Id.* ¶ 51. "Ben LP made a $28.6 million payment to HCLP in July 2020, a $25 million payment in . . . September 2020, and a $25 million payment . . . in December 2020." *Id.* ¶ 52. A balance of $77 million remains as of Sept. 30, 2021. *Id.*

On November 12, 2021, GWGH filed with the SEC announcing an agreement to make Ben LP independent. *Id.* ¶ 59. In order to pay off the $202 million loan that GWGH gave Ben LP prior to consolidation, Ben LP issued GWGH "approximately 19 million units of common limited partnership of Ben LP," which Plaintiffs claim are of little value since GWGH "owned approximately 89% of Ben LP's outstanding units of common limited partnership." *Id.* ¶¶ 40, 60. "On November 5, 2021, GWGH filed its 2020 Annual Report with the SEC . . . where GWGH . . . announced that it had been served a subpoena by the SEC in October 2020." *Id.* ¶ 61. In the report, GWGH stated that the SEC's "investigation . . . may have a material adverse effect on the Company's . . . ability to raise capital through the sale of L Bonds and equity services." *Id.* (emphasis omitted). At the time, GWGH stated that the inability "to raise enough capital to meet [its] cash needs could have a material adverse effect on [its] operations and the value of [its] securities. *Id.* "GWGH attempted to resume [L Bond Offerings] after filing its 2020 Annual Report . . . but was unable to effectively do so." *Id.* ¶ 62.

On January 18, 2022, GWGH disclosed that it did not make its $10.35 million interest payment and $3.25 million principal payment on existing L bonds, which was due January 15, 2022. *Id.* ¶ 63. On February 24, 2022, GWGH notified the SEC that it "would be unable to make . . .

payments on the L Bonds, . . . and that GWGH would notify L Bond holders if and when L Bond[2] [sic] would be able to make any future payments." *Id.* ¶ 65.

Plaintiffs claim that GWGH's June 2020 Registration Statement for the sale of L bonds made "false and misleading statements relating to the transactions with Ben LP." *Id.* ¶ 70. The statements suggested that GWGH "intended to use the net proceeds from [its L Bond Offerings] to grow [GWGH's] 'alternative asset exposure' . . . through investments in Ben LP.'" *Id.* ¶ 4. Further, the statement "materially misrepresented Ben LP's business prospects and ability to achieve [the stated business] objectives." *Id.* According to Plaintiffs, GWGH did not have the capital to develop the business lines promoted in the June 2020 Registration Statement. *Id.* ¶ 71. "The June 2020 Registration Statement also misrepresented the purpose of the loans" that GWG Life made to its borrowers because the loans were not used to better position Ben LP's balance sheet. *Id.* ¶ 72. Plaintiffs believe that these misrepresentations adversely affected L Bond holders and resulted in "an SEC investigation and the restatement . . . of GWGH's 2019 financial statements." *Id.* ¶ 73.

Although GWGH became aware that the investigation had the potential to negatively effect the value of L Bonds sold by GWGH in October 2020, "GWGH failed to disclose the existence of the SEC investigation or its receipt of the subpoena in its Prospectus Supplement No. 2 to the June 2020 Prospectus (filed with the SEC on November 23, 2020)," and GWGH did not provide any public notice until the 2020 Annual Report was released on November 5, 2021. *Id.* ¶ 75. Even after the SEC served the subpoena in October 2020, "GWGH raised over $200 million" through L Bond offerings. *Id.* ¶ 76.

[2] Since GWGH was the only corporation issuing L Bonds, the sentence is understood to mean that GWGH would notify if and when it would be able to make future payments.

Plaintiffs filed their complaint on February 18, 2022, against GWGH and several of its current and former directors (collectively Defendants), alleging that Defendants violated the Securities Act of 1933 by presenting untrue and misleading statements of material fact regarding privately issued bonds, resulting in Plaintiffs purchase of these bonds. Doc. 1, Compl., ¶¶ 87–88, 99. Girard Sharp LLC announced pendency of a class action lawsuit against GWGH on February 23, 2022, in *Business Wire*. Doc. 38, App. Supp. Appointment, 16. On April 20, 2020, GWGH filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Texas. Doc. 34, Notice Suggestion Bankr., 1. Because of the bankruptcy court's § 362 automatic stay, the next day, this Court stayed all actions against GWGH and ordered the nondebtor parties to advise the Court on whether the stay should also extend to these parties. Doc. 35, Elec. Order. Four days later, Plaintiffs Thomas Horton and Frank Moore filed the instant motion. *See* Doc. 37, Mot. Appointment. The parties then asked the Court to "enter an order staying the proceedings in this action," but reserving the right to ask the bankruptcy court to lift the § 362 automatic stay to review the instant motion. Doc. 41, Agreed Joint Statement Auto. Stay, 3. On May 31, 2022, the bankruptcy court lifted the automatic stay to allow this Court to entertain Plaintiffs' motion for appointment of lead plaintiff, to permit the proposed lead plaintiff to serve and enforce third-party subpoenas, and to allow the proposed lead plaintiff to take related actions on the motion for appointment of lead plaintiffs, consistent with the order. *See* Doc. 43-1, Notice Order Lifting Auto. Stay, 2–5. The motion is ripe for review. The Court considers it below.

II.

APPOINTMENT OF LEAD PLAINTIFF

The PSLRA sets forth the procedure governing the appointment of lead plaintiffs in securities class actions regarding claims under the Securities Act of 1933. 15 U.S.C. § 77z-1(a)(3). The Act directs the Court to "consider any motion made by a purported class member" and to "appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." *Id.* § 77z-1(a)(3)(B)(i). The Court is to adopt a rebuttable presumption that the "most adequate plaintiff" is the person or group of persons that "has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i)"; "in the determination of the court, has the largest financial interest in the relief sought by the class"; and "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." *Id.* § 77z-1 (a)(3)(B)(iii)(I).

The first criterion in appointing a lead plaintiff requires timely notice of the class action and motion for appointment. Within twenty days of filing the complaint, the plaintiff

> shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—
>
> > (I) of the pendency of the class action, the claims asserted therein, and the purported class period; and
> > (II) that, not later than 60 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.

Id. § 77z-1(a)(3)(A)(i). If multiple class actions are filed asserting substantially the same claims, only the plaintiff in the first-filed action need publish notice. *Id.* § 77z-1 (a)(3)(A)(ii). Any potential class member, not only those named as plaintiffs in a complaint, can move to be appointed lead plaintiff.

Id. § 77z-1(a)(3)(B)(i).

Notice of this suit was published in *Business Wire* on February 23, 2022. Doc. 38, App., 12–14. The notice contained the required information, including a description of the claims asserted, the description of the potential class, and the right of any potential class member to move for appointment as lead plaintiff. *Id.* No challenge to the adequacy of the February 23 notice has been raised. As a result, the Court finds that the initial notice requirement has been satisfied. Horton and Moore moved for appointment as lead plaintiff on Monday, April 25, 2022, sixty-one days after publication of the notice. Doc. 37, Mot. Appointment. Under the Federal Rules of Civil Procedure, if the last day of the period to file a motion falls on a "Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." Fed. R. Civ. P. 6(a)(1)(C). Since the sixtieth day after the notice of pendency fell on Sunday, April 24, 2022, the Court finds that the motion filed on Monday, April 25, 2022, is timely.

The PSLRA directs that the Court next consider whether a potential lead plaintiff "has the largest financial interest in the relief sought by the class." 15 U.S.C. 77z-1(a)(3)(B)(iii)(I)(bb). The SEC as well as other courts "ha[ve] taken the position that a group of investors appointed to serve as lead plaintiffs, ordinarily should comprise no more than three to five persons." *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 478 n.2 (5th Cir. 2001) (citing *In re Baan Co. Sec. Litig.*, 186 F.R.D. 214, 224 (D.D.C. 1999)). The SEC has also advised that "the movant must bear the burden of demonstrating that the group not only has the largest financial interest in the outcome of the litigation, but also a pre-litigation relationship based on more than the losing investments at issue in the securities fraud class action." *In re Enron Corp., Securities Litigation*, 206 F.R.D. 427, 442 (S.D. Tex. 2002) (citing *In re Waste Mgmt., Inc. Sec. Litig.*, 128 F. Supp. 2d 401, 412–13 (S.D. Tex. 2000)).

The group must also be able to "adequately control the litigation." *Id.* at 452 n.27 (citing *In re Waste Mgmt.*, 128 F. Supp. 2d at 412).

Here, Horton and Moore contend that they lost $5,883,000 from their L Bond purchases. Doc. 37-1, Br. Appointment, 6. No other prospective lead plaintiff has informed the Court of a larger financial interest. Both Horton and Moore signed a joint declaration accepting the responsibilities of lead plaintiff including control of the litigation. Doc. 38, App. 3–5. Accordingly, Horton and Moore jointly satisfy the "largest financial interest" requirement.

Additionally, the PSLRA requires that a potential lead plaintiff "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(cc). When conducting a Rule 23 evaluation under the PSLRA, "only the typicality and adequacy prongs . . . are relevant." *Patel v. Reata Pharms., Inc.*, 549 F. Supp. 3d 559, 565 (E.D. Tex. 2021) (first citing *Marcus v. J.C. Penney Co.*, 2014 WL 11394911, at *5 (E.D. Tex. Feb. 28, 2014); and then citing *Okla. L. Enf't Ret. Sys. v. Adeptus Health Inc.*, 2017 WL 3780164, at *4 (E.D. Tex. Aug. 31, 2017)). At this point in the proceedings, "it is sufficient that a lead-plaintiff movant make only a prima facie showing that he or she satisfies the typicality and adequacy requirements." *Id.* at 566 (citing *Singh v. 21 Vianet Group, Inc.*, 2015 WL 5604385, at *1 (E.D. Tex. Sept. 21, 2015)). A typical lead plaintiff "must have 'the same essential characteristics as those of the other class members.'" *Id.* (quoting *Marcus*, 2014 WL 11394911, at *5). "[A] lead plaintiff . . . is adequate when he or she is 'prepared to prosecute the action vigorously,' and when no conflicts exist between the named plaintiffs' interests and the class members' interests." *Id.* (first quoting *Stein v. Match Grp., Inc.*, 2016 WL 3194334, at *5 (N.D. Tex. June 9, 2016); and then citing *James v. City of Dall.*, 254 F.3d 551, 571 (5th Cir. 2001)).

Horton and Moore have made the required preliminary showing of typicality and adequacy. Horton and Moore allege that Defendants violated the Securities Act of 1933 by producing materially misleading statements with regards to L Bonds. Doc. 37-1, Br. Appointment, 7. Both Horton and Moore claim that they purchased L Bonds and suffered damages in relation to a June 2020 Registration Statement made by Defendants. *Id.* "If successful in proving [their] injury and losses resulting from" Defendants' actions, Horton and Moore "will necessarily prove the conduct which underlies the claims of all purported plaintiffs." *See Gluck v. CellStar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex. 1997). Thus, there appears to be no conflict between the lead plaintiff's interest and those of the rest of the class. Additionally, Horton and Moore signed a joint declaratory statement stating that they will "take an active role in the prosecution in the case[,] . . . ensuring that the case is handled in an effective manner." Doc. 38, App. Supp. Appointment, 7. Both Horton and Moore "intend to communicate with [their] counsel as necessary to ensure the vigorous and efficient prosecution of this case." *Id.* After reviewing the above statements, it appears that Horton and Moore's claims are typical of those of the purported class and have demonstrated a willingness to adequately represent the case moving forward.

Because Horton and Moore have satisfied the requirements set forth by the PSLRA, the Court adopts the presumption that they are the most adequate plaintiff. *See* 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I). Accordingly, the Court appoints Thomas Horton and Frank Moore as Lead Plaintiff.

III.

APPOINTMENT OF LEAD COUNSEL

The PSLRA provides that the lead plaintiff shall select lead counsel to represent the class,

subject to the Court's approval. *Id.* at § 77z-1(a)(3)(B)(v). Horton and Moore seek the approval of its selection of Girard Sharp LLP and Malmfeldt Law Group P.C. as Lead Counsel for the class. The Court sees no reason to upset Horton and Moore's choice here. Pursuant to 15 U.S.C. § 77z-1(a)(3)(B)(v), Girard Sharp LLP and Malmfeldt Law Group P.C. are approved as lead counsel for the class.

IV.

CONCLUSION

The Court **GRANTS** Thomas Horton and Frank Moore's Motion for Appointment as Lead Plaintiff and for Approval of Selection of Counsel (Doc. 37) and **ORDERS** as follows:

The Court appoints Thomas Horton and Frank Moore as lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1(a)(3)(B); and

Thomas Horton and Frank Moore's selection of the law firm of Girard Sharp LLP and Malmfeldt Law Group P.C. as lead counsel is approved, pursuant to 15 U.S.C. § 77z-1(a)(3)(B)(v).

SO ORDERED.

SIGNED: August 5, 2022.

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE