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Docket: 2018-1591-BLS 2

Date: November 25, 2019

Parties: JACKIE 888, INC., individually and on behalf of other similarly situated v. TOKAI PHARMACEUTICALS, INC., et al.

Judge: /s/Janet L. Sanders, Justice of the Superior Court

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

This is a putative class action alleging violations of the Securities Act of 1933. It is brought on behalf of individuals and entities who purchased stock in an initial public offering (IPO) of the defendant Tokai Pharmaceuticals, Inc. (Tokai) that occurred on September 17, 2014. Plaintiff Hao Wu first lodged a claim against Tokai alleging these violations in a suit filed here in 2016; that case was removed to federal court, then remanded to this Court. Hao Wu v. Tokai Pharmaceutical, Inc., Civ. No. 2016-3725-BLS 2 (the 2016 Action). Plaintiff Jackie 888, Inc. then asserted the same claims in the instant action, which was consolidated with the 2016 Action on July 10, 2018. The 2016 Action was later dismissed because of plaintiff Hao Wu's failure to respond to outstanding discovery requests. The instant case is now before the Court on the plaintiff's Motion for Class Certification. This Court concludes that the motion must be DENIED.

This Court has already summarized the factual allegations lodged against Tokai in a Memorandum of Decision dated January 8, 2019 denying Tokai's Motion to Dismiss the Complaint in the 2016 Action. Briefly stated, plaintiff alleges that Tokai made misleading statements in its IPO's Registration Statement and Prospectus concerning Tokai's efforts to

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develop the drug Galeterone in the treatment of prostate cancer. This Court has also summarized the procedural history of both the 2016 Action and the instant case in a second decision dated December 14, 2018 on Defendants' Motion to Strike Class Allegations. As stated therein, plaintiff Jackie 888 originally filed its claim against Tokai in California, then dismissed that lawsuit and refiled in this Court, where the 2016 Action brought by plaintiff Hao Wu was then pending after being remanded from federal court in Boston. This Court denied the defendant's Motion to Strike class allegations in the consolidated cases principally because it regarded the motion as premature, no discovery on the class allegations having taken place.

With discovery now complete, the issue raised by that Motion to Strike is now ripe for decision. That issue is whether a Massachusetts state court may, consistent with Due Process, certify a nationwide class and thus exercise personal jurisdiction over out-of-state plaintiffs where Massachusetts Rule 23 does not contain a provision allowing those absent class members to "opt out." This Court concludes that, on the circumstances presented here, it may not.

This Court has already been confronted with this issue in another case alleging federal securities law violations. In re Ovascience Inc. Stockholder Litigation, 2017 WL 7362335 (Mass.Super. Ct. Nov. 8, 2017) (Ovascience). Like the instant case, plaintiffs in Ovascience alleged violations of Sections 11, 12 and 15 of the Securities Act of 1933. In declining to certify a nationwide class, this Court relied on two decisions. The first was Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (Shutts). The second was Moelis v. Berkshire Life Ins. Co., [451 Mass. 483](#) (2008) (Moelis).

In Shutts, the defendant was seeking to avoid enforcement of a judgment entered against it in a Kansas state court on behalf of a nationwide class of plaintiffs. The defendant argued that Kansas did not have personal

jurisdiction over class members because they had no "minimum

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contacts" with Kansas as that term is used in cases involving personal jurisdiction over out-of-state defendants. E.g. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Supreme Court declined to apply the same minimum contacts test to absent class action plaintiffs since, unlike the defendant in a normal civil suit, the absent class plaintiff is "not required to do anything." 326 U.S. at 810. "He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Id.* The Supreme Court noted, however, that the Due Process Clause protects "persons," not just "defendants," and concluded that the forum state may exercise jurisdiction over the claim of an absent class plaintiff only if it provides "minimal procedural due process protection," including notice plus and opportunity to be heard. *Id.* at 811-812. Importantly, the procedural rules that governed the Kansas state court permitted absent class plaintiffs to "opt out" of the case. The Supreme Court held that this opt out right was sufficient to satisfy the Due Process Clause and that the Kansas state court did have personal jurisdiction over these absent plaintiffs.

What if the forum state's procedural rules do not give absent class plaintiffs the ability to opt out? That question was addressed in *Moelis*. Unlike Kansas procedural rules governing class actions, Massachusetts Rule 23 does not permit the absent plaintiff to opt out. In *Moelis*, the SJC held that, without this opt out right, a Massachusetts state court could assert personal jurisdiction over absent class plaintiffs only if those plaintiffs satisfied the "minimum contacts" analysis traditionally applied to defendants. *Id.* at 487. In *Moelis*, the only contact that the nonresident class members had with Massachusetts was that they had purchased, through agents located in their own states, an insurance policy that was issued by a Massachusetts company. The SJC concluded that this was not enough to satisfy the Due Process Clause and for that reason, affirmed the lower court in declining to certify a nationwide class of plaintiffs.

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This Court is compelled to reach the same conclusion in the instant case. Despite having been given the opportunity to conduct discovery, plaintiff is unable to demonstrate that absent class members had any contact with Massachusetts aside from the fact that the stock they purchased -- through agents in other states-- was issued by a Delaware corporation headquartered in Massachusetts. Plaintiffs contend that this purchase in and of itself should be enough, since an out-of-state plaintiff could reasonably anticipate that litigation arising from this investment would occur here, given the defendants' connection with Massachusetts. This argument misses the point in that it focuses on the defendants' rather than the plaintiffs' contacts with the forum state. Indeed, this Court sees little difference between the plaintiffs in the instant case and those in *Moelis* who purchased life insurance policies from a Massachusetts defendant; if that purchase was insufficient to meet the minimum contacts test, then so is the absent class members' purchase of stock from Tokai, a Massachusetts based company.

Plaintiffs argue in the alternative, that this case is distinguishable because absent class members will be without any remedy -- the statute of repose having expired on their claims-- if this Court declines to certify a nationwide class. Due process applies (they argue) only if there is some property right at stake and the absent plaintiffs have no property interest to protect since they will, if this Court declines to certify the class, lose whatever ability they might have had to recover on their Securities Act claims. Due Process applies to more than just property rights, however: arguably, it embraces the right not to participate in litigation -- or if one

does pursue litigation, to file in the court of one's choice represented by counsel of one's choosing. Significantly, there is currently pending in federal court in Boston a claim against Tokai by an individual plaintiff whose rights would be directly affected if this Court were to allow plaintiff's motion. *Angelos v. Tokai, et al.* No. 17-CV-11365 (D.Mass.) As a member of the putative

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class, that individual plaintiff would be bound by any judgment handed down in this Court and essentially forfeit any right to proceed individually. Those due process rights cannot be simply ignored.[1]

For these reasons and for other reasons set forth in the Defendant's Memorandum in Opposition, plaintiff's Motion for Class Certification is DENIED. With respect to the individual plaintiff's claims, this case is scheduled for Rule 16 Conference December 19, 2019 at 2:00 p.m.

/s/Janet L. Sanders, Justice of the Superior Court

[1]Plaintiff acknowledges this difficulty and attempts to deal with it by asking this Court to define the nationwide class so as to expressly exclude this federal court plaintiff. This Court is not convinced that Rule 23 permits that, however.

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