IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

	:	**CIVIL ACTION**
JAMES B. SMITH, On Behalf of Himself and Others Similarly Situated,	:	
Plaintiff,	:	
v.	:	
DOMINION BRIDGE CORPORATION (f/k/a CEDAR GROUP, INC.), MICHEL L. MARENGERE and NICOLAS MATOSSIAN,	:	
Defendants.	:	**NO. 96-7580**

M E M O R A N D U M

Reed, J. **March 5, 1998**

Before the Court is the motion of plaintiff James B. Smith ("Smith"), on behalf of himself and others similarly situated, for class certification (Document No. 16). Because I find that Smith has satisfied all the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) for class members who purchased shares on the NASDAQ Stock Exchange but that Smith is not an adequate representative of purchasers on the Vancouver Stock Exchange and his claim is not typical of the claims of those purchasers, I will grant the motion in part.

I. BACKGROUND

The following facts are taken from the complaint as the Court is required to accept the allegations of the complaint as true. See Roe v. Operation Rescue, 123 F.R.D. 500, 502

(E.D. Pa. 1988). Cedar Group, Inc. ("Cedar") was an international engineering, infrastructure, project management, aerospace and industrial metal transformation company. In August of 1996, Cedar changed its name to Dominion Bridge Corporation ("Dominion").[1] Defendant Michel L. Marengere was Dominion's Chairman of the Board and Chief Executive Officer, and defendant Nicolas Matossian was Dominion's President, Chief Financial Officer, and Chief Operating Officer during the period of time relevant to this lawsuit. The common stock of Dominion was traded publicly in the United States on the NASDAQ Stock Exchange and in Canada on the Vancouver Stock Exchange.

Smith alleges that between April 20, 1995 and May 18, 1996 ("the class period"), defendants failed to disclose to the investment community that Dominion's construction contracts were at risk of either not being formed or being canceled, that Dominion lost $40 million in contracts for fiscal 1996, that Dominion suffered from a lack of adequate accounting controls, that Dominion's financial status lacked credibility because of inaccurate and misleading accounting practices, and that the defendants had been accused of violations of federal securities law in a letter from a former executive. The Montreal Gazette published this information on May 18, 1996. In addition to Dominion's failure to disclose, Smith alleges that Dominion issued several misleading statements to the press touting the purported success and growth of Dominion during the class period.

Smith brought this action in this Court on November 12, 1996 alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and

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[1] For the sake of simplicity, I will refer to the corporate defendant as "Dominion" for the balance of this memorandum.

78t, and Rule 10b-5, 17 C.F.R. 240.10b-5, which was promulgated thereunder. The proposed class consists of all persons who purchased or otherwise acquired shares of Dominion common stock from April 20, 1995 through May 18, 1996, inclusive, and who were damaged thereby. Excluded from the class are the defendants, officers and directors of Dominion, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest. Smith is proceeding under the fraud-on-the-market doctrine, which provides a purchaser of stock from an efficient exchange a rebuttable presumption that he relied on the market's valuation of the stock price.

The defendants argue that Smith is not an adequate representative of the purchasers who bought Dominion stock on the Vancouver Stock Exchange because Smith only purchased shares on the NASDAQ Stock Exchange, did not mention these shareholders in his complaint, and did not argue that the Vancouver Stock Exchange is an efficient market entitling its purchasers to proceed under a fraud-on-the-market theory. In addition, the defendants argue that Smith did not review any of the company's disclosures which contain alleged misrepresentations but rather relied solely on the advice of this broker or market maker in his decision to invest in Dominion. The defendants claim that even proceeding under a fraud-on-the-market theory, the presumption of reliance can be overcome by showing that the misrepresentations did not affect the market price or that the plaintiff would have purchased the stock even at the price at which it would have been but for the misrepresentations. The defendants also allege that Smith has no written fee agreement with his counsel and consequently has no control of the class.

II. CLASS CERTIFICATION UNDER

FEDERAL RULE OF CIVIL PROCEDURE 23

Smith bears the burden to establish that the proposed class satisfies all of the requirements of Rule 23(a) and that the case falls within one of the categories of Rule 23(b). See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163 (1974). The task of this Court in determining the motion to certify the class is not to consider the merits of the case, but rather to determine whether the mandates of Rule 23 have been met. See id. at 157; Roe, 123 F.R.D. at 502; Snider v. Upjohn Co., 115 F.R.D. 536, 539 (E.D. Pa. 1987). Rule 23 provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (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 interests of the class.

Rule 23(b)(3) provides:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The use of the class action mechanism to resolve securities law claims is widely accepted in this circuit. See In re Laidlaw Securities Litigation, No. 91-1829, 1992 WL 68341, *2 (E.D. Pa. March 31, 1992) ("Class action treatment of related claims is

particularly appropriate where plaintiffs allege violations of the securities laws."); Snider, 115 F.R.D. at 536 (noting that class actions are a 'particularly appropriate and desirable' way to resolve securities law claims and in a doubtful case courts should err in favor of allowing the class") (quoting Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir.), cert denied, 474 U.S. 946 (1985)). Courts are required, however, to conduct a "rigorous analysis" under Rule 23 before approving any class action. General Telephone Co. v. Falcon, 457 U.S. 147, 161 (1982). I will address each of the requirements of Rule 23 in turn.

A. RULE 23(a)

1. NUMEROSITY

While Rule 23(a)(1) requires that the class be so numerous as to render joinder of all class members impracticable, there is no magic number that satisfies this requirement and the plaintiff is not required to allege the exact number or identities of the class members. See Snider, 115 F.R.D. at 539; Laidlaw, 1992 WL 68341 at *3. In determining whether a proposed class meets the numerosity requirement, a court may "accept common sense assumptions in order to support a finding of numerosity." Wolgin v. Magic Marker Corp., 82 F.R.D. 168, 171 (E.D. Pa. 1979).

Smith claims that Cedar had over 15 million shares of common stock outstanding and actively traded on the NASDAQ Stock Exchange and estimates the number of class members to be in the hundreds. The defendants do not contest this assertion. Thus, I find that the class is so numerous as to make joinder impracticable.

2. COMMONALITY

The remaining requirements of Rule 23(a) for class certification -- commonality, typicality, and adequacy -- aim to protect the unnamed members of the class and ensure that those members are fairly and adequately represented. As a result, the analyses of these requirements tend to overlap.

Smith alleges that Dominion made misrepresentations regarding its financial status, which is the basis of the "paradigmatic common questions of law or fact in a securities fraud class action." Laidlaw, 1992 WL 68341 at *4; Moskowitz v. Lopp, 128 F.R.D. 624, 629 (E.D. Pa. 1989). The common questions of law and fact present in this case include whether Dominion made misrepresentations in the information that it disseminated to the public, whether the misrepresentations affected the market price of the stock, and whether the purchasers of the stock during the time period suffered losses as a result. I find that Smith has satisfied the commonality requirement.

3. TYPICALITY

The typicality element serves to ensure that there are no intra-class conflicts by requiring that the named plaintiff's claims be typical of the claims of other class members. Typicality does not require that the claims of the named plaintiff be identical to the other class members. See Eisenberg, 766 F.2d at 786. A named plaintiff's claim is typical of other class members if it arises out of the same conduct of the defendants from which the other claims arise and if it is based on the same legal theory. See Zeffiro v. First Pennsylvania Banking and Trust Co., 96 F.R.D. 567, 569-70 (E.D. Pa. 1983) (observing that

if the named plaintiff and class members have an interest in prevailing on similar legal claims "particular factual differences, differences in the amount of damages claims, or even the availability of certain defenses against a class representative may not render his or her claims atypical").

The defendants argue that Smith's claim is not typical of the claims of other class members because he did not rely on the alleged misrepresentations in making the decision to purchase stock, but rather relied wholly on the advice of his broker or market maker.[2] Smith is proceeding, however, on a fraud-on-the-market theory. According to this theory, material information regarding a company is immediately reflected in the market price of the stock in an efficient market; thus a plaintiff claiming violations of the securities laws does not need to prove direct reliance on the alleged misrepresentations made by Dominion. See Basic, Inc. v. Levinson, 485 U.S. 224, 247 (1988) (noting that "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action"); Peil v. Speiser, 806 F.2d 1154, 1161 (3d Cir. 1986) ("The causal connection between the defendants' fraud and the plaintiffs' purchase of stock [in reliance on the price as an indication of the value of the stock] is not less significant than in a case of direct reliance on misrepresentations.") This presumption is not defeated if an investor purchases stock in reliance on a broker who has no inside information about the alleged misrepresentations.

[2] The defendants also allege that Smith's market maker may have had inside information about Dominion which would provide an individual and unique defense against Smith on the fraud-on-the-market theory. I find that because the defendants have provided no support for this bare allegation, it does not weigh against finding that Smith's claim is typical of the claims of the class.

See In re Regal Communications Corp. Securities Litigation, No. 94-179, 1995 WL 550454, *5 (E.D. Pa. Sept. 24, 1995) (noting that reliance by a purchaser on a broker does not defeat typicality under a fraud-on-the-market theory, even if the broker does not rely wholly on the stock price). As Dominion does not contest the efficiency of the NASDAQ Stock Exchange, Smith's purchase of stock entitles him to a finding of presumptive reliance on the alleged misrepresentations by Dominion, and thus his claim is typical of those members of the class who purchased on the NASDAQ Stock Exchange.

Smith's claim is not typical, however, of class members who purchased stock on the Vancouver Stock Exchange because those purchasers will not benefit from the rebuttable presumption of reliance from the fraud-on-the-market theory unless Smith establishes that the Vancouver Stock Exchange is efficient. Because Smith did not purchase stock on the Vancouver Stock Exchange, he has no interest in establishing the efficiency of the Vancouver Stock Exchange nor has he addressed this issue in his complaint or motion for class certification. Thus, unlike Smith, purchasers on the Vancouver Exchange would have to establish individual reliance in their purchasing decisions on the alleged misrepresentations made by Dominion and would be subject to individual defenses from Dominion.

4. ADEQUACY

In determining whether the named plaintiff is able to adequately represent the class, a court should consider the qualification and competence of plaintiff's counsel and whether plaintiff's interests are contrary to those of the other class members. See Weiss v. York

Hospital, 745 F.2d 786, 811 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985).

The defendants do not contest the quality and experience of class counsel, and it is evident from the resume of Weiss & Yourman, class counsel, that the firm has extensive experience in representing members of securities law class actions. (Pl.'s Mem. Ex. C).

The defendants contend that Smith is unknowledgeable about the case and that he has given total control of the lawsuit to his counsel. As evidence of this, Dominion asserts that Smith admitted in his deposition that he did not have a fee arrangement with the firm. I find this argument to lack merit. Smith's deposition testimony reveals that although Smith may not have understood the exact mechanics of the agreement, he knew he had a contingency fee agreement with class counsel. (Smith dep. at 34-36). In any event, the courts in this circuit have consistently found that it is counsel, not the named plaintiff, who controls the class action. See Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 n. 9 (3d Cir. 1973); Snider v. Upjohn Co., 115 F.R.D. 536, 541 (E.D. Pa. 1987). The representative plaintiff is not required to be knowledgeable about the lawsuit. See Lewis v. Curtis, 671 F.2d 779, 788, (3d Cir.), cert. denied, 459 U.S. 880 (1982).

I find that Smith is an adequate class representative and Weiss & Yourman, with Jordan L. Lurie, Esq. as counsel of record, are adequate class counsel for purchasers of stock on the NASDAQ Stock Exchange. However, for reasons similar to those given for my finding that Smith's claim is not typical of purchasers on the Vancouver Stock Exchange, I find that Smith is not an adequate class representative for purchasers of stock on the Vancouver Stock Exchange. Smith does not have in interest in establishing whether the misrepresentation affected prices on the Vancouver Stock Exchange, in establishing the

efficiency of the Vancouver Stock Exchange for application of the fraud-on-the-market theory, in establishing the reliance of those purchasers on the alleged misrepresentations of Dominion, or in defending against any individual defenses from Dominion.

Because I find that Smith cannot adequately represent purchasers on the Vancouver Stock Exchange and that his claim is not typical of the claims of those purchasers, they will be excluded from the class. See Laidlaw, 1992 WL 68341 at *6.

B. RULE 23(b)(3)

Having concluded that purchasers on the Vancouver Stock Exchange are excluded from the class, I will only discuss the requirements of Rule 23(b)(3) as they pertain to purchasers on the NASDAQ Stock Exchange.

1. PREDOMINANCE OF COMMON QUESTIONS

Although Rule 23(b)(3) requires that common issues of law and fact predominate, it does not require that there be an absence of any individual issues. See Piel v. National Semiconductor Corp., 86 F.R.D. 357, 369 (E.D. Pa. 1980). I have already found that common questions of law and fact exist in this case. See supra II(A)(2). Although the claims of the class may require individual factual determinations such as the amount of damages, I find that these potential inquiries do not predominate over the common questions regarding liability. See Bogosian v. Gulf Oil Corporation, 561 F.2d 434, 456 (3d Cir. 1977).

2. SUPERIORITY OF CLASS ACTION

The mechanism of the class action is particularly effective for the resolution of this

case. Forcing the plaintiffs to litigate their claims individually would impose unnecessary burdens on the courts and the litigants in pursuing duplicative claims. Despite the potentially large number of people who may have been injured by the alleged conduct of the defendants, the damages for each plaintiff may not be large enough as to induce him to bring his own case, leaving the whole class without redress. See Laidlaw, 1992 WL 68341 at *6. Thus, I find that a class action is superior to other available methods for the fair and efficient adjudication of this case.

III. CONCLUSION

Based on the foregoing, I find that Smith has satisfied the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) as to purchasers of Dominion common stock during the class period on the NASDAQ Stock Exchange only. Accordingly, I will grant the motion to certify the class in part.

An appropriate Order follows.

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Plaintiff,	:	
v.	:	
DOMINION BRIDGE CORPORATION (f/k/a CEDAR GROUP, INC.), MICHEL L. MARENGERE and NICOLAS MATOSSIAN,	:	
Defendants.	:	**NO. 96-7580**

O R D E R

AND NOW, this 5th day of March, 1998, upon consideration of the motion of plaintiff James B. Smith, on behalf of himself and others similarly situated, for class certification (Document No. 16), the response of defendants Dominion Bridge Corporation (f/k/a Cedar Group, Inc.), Michel L. Marengere, and Nicolas Matossian, including the substituted pages (Document Nos. 17 and 18), and the reply (Document No. 21), having found that plaintiff has satisfied the requirements of numerosity, commonality, typicality, and adequacy in Federal Rule of Civil Procedure 23(a) and the requirements of predominance of common questions and superiority of the class action in Rule 23(b)(3), and based on the reasoning given in the foregoing memorandum, the motion is **GRANTED IN PART**, and it is, subject to alteration or amendment under Federal Rule of Civil Procedure 23(c), hereby **ORDERED** that:

1. Civil Action No. 96-7580 shall be maintained as a class action on behalf of all purchasers of Cedar Group, Inc. common stock only on the NASDAQ Stock Exchange during the

period April 20, 1995 through May 18, 1996, inclusive, with respect to any claims for damages or other relief under Section 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t and Rule 10-b5, 17 C.F.R. 240.10b-5, which was promulgated thereunder;

2. Excluded from the class are purchasers of Cedar Group, Inc. common stock on the Vancouver Stock Exchange and the defendants and members of their immediate families, officers and directors of Cedar Group, Inc. or Dominion Bridge Corporation, any entity in which a defendant has a controlling interest, and the legal representatives, heirs, successors or assigns of any such excluded party;

3. Subject to further Order of this Court, James B. Smith is designated as class representative and Weiss & Yourman, by Jordan L. Lurie, Esquire, is designated as counsel for the class.

LOWELL A. REED, JR., J.