

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

Civil Action No. 07-cv-02351-REB-KLM

(Consolidated with Civil Action Nos. 07-cv-02412, 07-cv-02454, 07-cv-02465, 07-cv-02469)

In re CROCS, INC. SECURITIES LITIGATION

**MOTION TO APPOINT NATIONAL ROOFING INDUSTRY PENSION PLAN AS LEAD
PLAINTIFF AND TO APPROVE LEAD PLAINTIFF'S SELECTION OF LEAD AND
LIAISON COUNSEL**

National Roofing Industry Pension Plan (“Pension Plan”) hereby moves this Court for an order granting its motion to be appointed lead plaintiff and for approval of lead plaintiff’s choice of lead and liaison counsel (the “Motion”).¹ This Motion is brought pursuant to §21D of the Securities Exchange Act of 1934 (the “Exchange Act”) on the grounds that the Pension Plan has timely filed this motion and is the “most adequate plaintiff” pursuant to the Private Securities Litigation Reform Act of 1995 (“PSLRA”). The Pension Plan also seeks the Court’s approval of its selection of Coughlin Stoia Geller Rudman & Robbins LLP (“Coughlin Stoia”) as Lead Counsel and the Law Office of Jeffrey A. Berens, LLC as Liaison Counsel for the putative class.

I. INTRODUCTION

The Pension Plan submits this Motion for: (1) appointment as lead plaintiff; and (2) approval of its selection of lead and liaison counsel. The Pension Plan should be appointed as lead plaintiff because it purchased over 13,000 shares of CROCS, Inc. (“CROCS” or the “Company”) securities between July 27, 2007 and October 31, 2007 (the “Class Period”), and incurred losses of approximately \$260,000. See Declaration of Jeffrey A. Berens in Support of Motion to Appoint National Roofing Industry Pension Plan as Lead Plaintiff and to Approve Lead Plaintiff’s Selection of Lead and Liaison Counsel (“Berens Decl.”), Exs. A and B, filed concurrently herewith. To the Pension Plan’s knowledge, this

¹ D.C. Colo. LCivR 7.1.A requires a conference of counsel prior to filing motions. However, until motions have been filed, the Pension Plan will not know which other entities or persons plan to move for appointment as lead plaintiff. Under these circumstances, the Pension Plan respectfully requests that the conferral requirement of LCivR 7.1.A be waived.

represents the largest financial interest in the relief sought by the class. See 15 U.S.C. §78u-4(a)(3)(B)(iii). The Pension Plan also satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”) because its claims are typical of the claims of the class, it will fairly and adequately represent the interests of the class and it has retained counsel who is highly experienced in prosecuting securities class actions. See *In re Ribozyme Pharms. Sec. Litig.*, 192 F.R.D. 656, 658-59 (D. Colo. 2000).

Accordingly, the Pension Plan is “the most adequate plaintiff,” as defined by §21D(a)(3)(B) of the Exchange Act, and should be appointed lead plaintiff with approval of its choice of Lead and Liaison Counsel.

II. SUMMARY OF THE PENDING ACTIONS

Defendant CROCS and its subsidiaries design, develop and manufacture consumer products from specialty resins worldwide. The Company offers footwear for men, women and children under the “CROCS” brand. The Class Period commences on July 27, 2007. On July 26, 2007, after the close of trading, CROCS issued a press release announcing its financial results for the second fiscal quarter of 2007, the period ending June 30, 2007. The Company increased its earnings guidance for the third quarter of 2007 and fiscal year 2007. For fiscal 2007, the Company stated that it “now expects total revenues to range from \$810 million to \$820 million and net income per diluted share to range from \$1.89 to \$1.93.”

In response to the positive earnings announcement, on July 27, 2007, the price of CROCS stock surged, rising from \$50.59 per share to \$55.42 per share on heavy trading volume.

On September 27, 2007, CROCS presented at the Piper Jaffray Second Annual London Consumer Conference. Defendant Snyder presented at the conference. With respect to the Company's earnings per share, defendant Snyder stated:

EPS has grown nicely as well over the last few years and last – same quarter over quarter. Our operating margins have continued to come in around our expected targets of 26 to 28%. We see this being able to continue this rate going forward for the foreseeable future.

This statement was materially false and misleading when made because it failed to disclose and misrepresented the following material adverse facts, which were known to defendants or recklessly disregarded by them: (a) that the Company was experiencing significant distribution problems in Europe as it had moved distribution facilities and was experiencing distribution problems in Japan with a third-party distributor; (b) as a result of these problems, the Company had lost tens of millions of dollars in sales; (c) that the Company's sales were being negatively impacted by seasonal conditions as consumers reduced purchases of the Company's products in cold weather climates; (d) that the Company's inventory levels were building far beyond historic levels as sales began to slow and the Company's sales began to be impacted by seasonality; and (e) based on the foregoing, defendants lacked a reasonable basis for their positive statements about the Company, its earnings and prospects.

Then, on October 31, 2007, CROCS issued a press release announcing its financial results for the third quarter of 2007, the period ending September 30, 2007. For the quarter, the Company reported earnings per share of \$0.66 on revenue of \$256 million, as compared to analyst consensus estimates of \$0.63 per share and \$258 million in revenues. Following the earnings announcement, CROCS held a conference call for analysts and

investors. During the call, defendants discussed problems at its European and Japanese distribution centers and its growing inventory, among other things.

In response to the announcement, the price of CROCS stock declined from \$74.75 per share to \$47.74 per share on extremely heavy trading volume.

III. PROCEDURAL BACKGROUND

The plaintiffs in this putative class action each allege violations of §§10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5, on behalf of investors who purchased CROCS securities during the Class Period. Section 21D of the Exchange Act requires early notice of the first-filed action to advise class members of their right to move the court to be appointed “lead plaintiff” and provides that any member or members of the class may so request appointment as lead plaintiff within 60 days of publication of the notice. *Ribozyme*, 192 F.R.D. at 657-58. On November 8, 2007, notice was published in *Business Wire* (see Berens Decl., Ex. C), and the Pension Plan now timely moves the Court to appoint it as lead plaintiff and approve its choice of counsel. The Pension Plan now seeks to represent all persons injured by defendants’ violations of federal securities laws.

IV. ARGUMENT

A. The Pension Plan Is the Most Adequate Plaintiff

The “most adequate plaintiff” provision of the Exchange Act provides that a court shall 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 (hereafter in this paragraph referred to as the “most adequate plaintiff”) in accordance with this subparagraph.

15 U.S.C. §78u-4(a)(3)(B)(i). Moreover, the Exchange Act provides for a presumption that

the most adequate plaintiff in any private action arising under this chapter 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)(I); *Ribozyme*, 192 F.R.D. at 658.

1. The Pension Plan Has the Largest Financial Interest in the Relief Sought by the Class

During the Class Period, the Pension Plan purchased thousands of shares of CROCS stock at prices artificially inflated by defendants' false and misleading statements and has suffered losses of nearly \$260,000 as a result thereof. See Berens Decl., Exs. A, B. To its knowledge, the Pension Plan has the largest financial interest in the relief sought in the outcome of this litigation. See *Ribozyme*, 192 F.R.D. 659-61.

2. The Pension Plan Is Qualified Under Rule 23

The Exchange Act provides that the lead plaintiff or plaintiffs must also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc). Rule 23(a) requires that the claims of the class representative be typical of the claims of the class and that it will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a); *Ribozyme*, 192 F.R.D. at 658. The Pension Plan satisfies both of these requirements.

The typicality requirement of Rule 23(a)(3) is satisfied when a named plaintiff has: (1) suffered the same injuries as the absent class members; (2) as a result of the same

course of conduct by defendants; and (3) their claims are based on the same legal issues. See, e.g., *Schwartz v. Celestial Seasonings*, 178 F.R.D. 545, 551 (D. Colo. 1998).

Here, there is a well-defined community of interest in the questions of law and fact involved in this case.² The Pension Plan is typical because it acquired CROCS stock at prices inflated by defendants' misrepresentations and omissions and was damaged thereby. Typicality exists here, then, because the claims asserted by the Pension Plan are based on "the same alleged course of conduct and are based on the same theories as those of the absent class members." *Schwartz*, 178 F.R.D. at 552; see also *In re Intelcom Group Sec. Litig.*, 169 F.R.D. 142, 149 (D. Colo. 1996).

The Pension Plan is also adequate because its interests are clearly aligned with the members of the proposed class and there is no antagonism between the interests of those individuals and the proposed class members. The Pension Plan has also demonstrated its adequacy as a class representative by signing a sworn certification filed with the Court that affirms its willingness to serve as and assume the responsibilities of a class representative. See Berens Decl., Ex. B. In addition, the Pension Plan has selected counsel highly

² The questions of law and fact common to the members of the class that predominate over questions that may affect individual class members include the following: (1) whether the federal securities laws were violated by defendants; (2) whether defendants omitted and/or misrepresented material facts; (3) whether defendants' statements omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading; (4) whether defendants acted with scienter; (5) whether the price of CROCS stock was artificially inflated during the Class Period; and (6) the extent of damage sustained by class members and the appropriate measure of damages.

experienced in prosecuting securities class actions such as this to represent it. See Berens Decl., Exs. D, E.

B. The Court Should Approve the Pension Plan's Choice of Counsel

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to court approval. See 15 U.S.C. §78u-4(a)(3)(B)(v). Thus, the court should not disturb the lead plaintiff's choice of counsel unless necessary to protect the interests of the plaintiff class. The Pension Plan has selected the law firm of Coughlin Stoia to serve as lead counsel for the class and the Law Offices of Jeffrey A. Berens, LLC to serve as liaison counsel. These firms possess extensive experience in the area of securities litigation and have successfully prosecuted numerous securities fraud class actions on behalf of injured investors. See Berens Decl., Exs. D, E. Thus, the Court may be assured that, in the event this Motion is granted, the members of the class will receive the highest caliber of legal representation available. See, e.g., *Borochoff v. Glaxosmithkline, plc*, 246 F.R.D. 201, 205 (S.D.N.Y. 2007) ("Coughlin Stoia Geller Rudman & Robbins LLP . . . is well qualified and has successfully served as lead counsel . . . in numerous complex securities class actions."); *In re Cardinal Health, Inc. Sec. Litig.*, 226 F.R.D. 298, 307 (S.D. Ohio 2005) ("the Court finds that [Coughlin Stoia] will represent deftly the class's interests").

V. CONCLUSION

For all the foregoing reasons, the Pension Plan respectfully requests that the Court (1) appoint the Pension Plan as Lead Plaintiff in the above-captioned action, pursuant to 15 U.S.C. §78u-4(a)(3)(B); and (2) approve the Pension Plan's choice of Coughlin Stoia as

Lead Counsel and the Law Office of Jeffrey A. Berens, LLC as Liaison Counsel for the class.

DATED: January 7, 2008

Respectfully submitted,

LAW OFFICE OF JEFFREY A. BERENS,
LLC

s/ Jeffrey A. Berens
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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 7, 2008.

s/ Jeffrey A. Berens

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Mailing Information for a Case 1:07-cv-02351-REB-KLM

Electronic Mail Notice List

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)