

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 21-2989-MDL-ALTONAGA/Torres

**IN RE: JANUARY 2021 SHORT SQUEEZE
TRADING LITIGATION**

**MOTION AND MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF
PLAINTIFF MICHAEL OBERLIN FOR A LEADERSHIP POSITION IN
CONNECTION WITH THE CLAIMS AGAINST TD AMERITRADE AND TO
APPROVE HIS SELECTION OF COUNSEL**

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MOTION

PLEASE TAKE NOTICE that pursuant to the Court's Order dated April 19, 2021, Plaintiff Michael Oberlin will move, before the Honorable Cecilia M. Altonaga, United States District Judge for the United States District Court, Southern District of Florida, at Wilkie D. Ferguson, Jr. United States Courthouse, 400 North Miami Avenue Room 12-2, Miami, Florida 33128, on a date and at a time designated by the Court, for an Order appointing Plaintiff to a leadership position in the presentation pending against TD Ameritrade, Inc. and appointing their counsel, Safirstein Metcalf LLP and Kantrowitz Goldhamer & Graifman, P.C. Counsel in a leadership role in the present matter. This Motion is supported by the accompanying Memorandum of Law in Support of the Motion of Plaintiff Michael Oberlin and accompanying exhibits.

MEMORANDUM OF LAW

I. INTRODUCTION and BACKGROUND

Plaintiff Michael Oberlin hereby moves for appointment to a leadership position in the present action pending against TD Ameritrade, Inc. ("TD"). TD is alleged to have prohibited its clients from selling multiple publicly traded stocks, including but not limited to GameStop ("GME") and AMC Entertainment ("AMC"). Plaintiff has today filed a complaint alleging breach of contract and breach of the implied covenant of good faith and fair dealing.

Because Mr. Oberlin put in an order for the sale of 50,000 shares that was not properly executed by TD, Mr. Oberlin has either the largest, or one of the largest, financial losses of any named plaintiff in this litigation against TD.

II. ARGUMENT

A. Plaintiff And His Counsel Should Be Appointed To Leadership Positions

Although Plaintiff's claims are not brought pursuant to the PSLRA, the PSLRA provides valuable guidance regarding the appointment of a lead plaintiff and counsel in cases of this type. The PSLRA "requires the court to appoint a 'lead plaintiff' in private securities class actions who is '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.'" *In re Bank of Am. Corp. Sec. Derivative & ERISA Litig.*, 258 F.R.D. 260, 268 (S.D.N.Y. 2009).

Here, Plaintiff has filed a complaint, is a resident of the State of Florida (the home state for this MDL litigation), and, by virtue of the failure of TD to properly execute Plaintiff's sell order of 50,000 shares, has either the largest or one of the largest financial interests in the outcome of this litigation. We note that under the PSLRA, "[t]he most important factor in determining the lead plaintiff is the amount of financial interest claimed." *Newman v. Eagle Bldg. Techs.*, 209 F.R.D. 499, 502 (S.D. Fla. 2002).

Moreover, Plaintiff is able to make a *prima facie* showing that his claims satisfy the requirements of Fed. R. Civ. Proc. Rule 23 as to commonality, typicality and adequacy.

Here, the proposed counsel for leadership positions have substantial experience handling class actions and other complex litigation. Both Safirstein Metcalf LLP and Kantrowitz Goldhamer & Graifman, P.C. have many years of experience litigating all aspects of complex litigation throughout the United States. The cases they have litigated

as lead or co-lead counsel include both securities fraud litigation and consumer class action litigation.

Safirstein Metcalf LLP is headed by Peter Safirstein, a former Assistant United States Attorney in the Southern District of Florida. Mr. Safirstein has specialized in the investigation and prosecution of white collar fraud for more than 35 years. Prior to his appointment in the Southern District of Florida, Mr. Safirstein served as a Special Assistant United States Attorney in the Southern District of New York (Securities and Commodities Fraud Division) and as an attorney in the Division of Enforcement at the United States Securities and Exchange Commission. Mr. Safirstein has tried federal cases to verdict both as part of a team and individually.

Mr. Safirstein and his partner, Elizabeth Metcalf, have years of experience in the class action bar investigating and prosecuting class action matters as set forth in the accompanying firm resume annexed hereto as Exhibit A.

Gary S. Graifman is a senior partner with KGG. KGG is a leading national class action firm in the area of consumer class action litigation and under Mr. Graifman's direction, the firm has successfully litigated numerous class matters in this Court and in other courts throughout the nation. *See* KGG Resume attached hereto as Ex. B

For example, in *In re Home Depot Consumer Data Security Breach Litig.*, 1:14-MD-02583-TWT (N.D. Ga.), Mr. Graifman and KGG served on the five-member Plaintiffs' Steering Committee. The *In re Home Depot* matter involved one of the earliest massive data breach consumer class actions and affected approximately 50 million consumers. It was settled on a nationwide basis in 2016, and the settlement was valued at approximately \$27

million.

In addition, Mr. Graifman and KGG were actively involved in litigating the massive data breach class action, *In re Premera Blue Cross Customer Data Security Breach Litig.* 3:15-md-2633 (D. Ore). In *In re Premera*, KGG's client was the sole named plaintiff and representative for the California state subclass. The California subclass asserted a claim under the California Confidential Medical Information Act, Cal. Civ. Code §§ 56, *et seq.*, which was sustained by the Court and resulted in California residents who had their Personal Information breached, receiving additional compensation in the settlement over and above that which was available to other class members of the nationwide settlement, based solely on that claim.

Mr. Graifman was also Co-Lead Counsel in the action, *Coffeng, et al. v. Volkswagen Group of America, et al.*, 3:17-cvb—01825-JD (N.D. Cal.) which involved defective water pumps in certain Volkswagen and Audi vehicles and involved a nationwide class of owners and lessees of approximately 873,779 class vehicles. Final Approval was granted to the settlement on May 14, 2020 in the Northern District of California and was valued at approximately \$22 million.

Mr. Graifman and the firm were also Co-Lead Class Counsel in the related actions, *Chiarelli, et al. v. Nissan, N.A.* 14-CV-4327 (NGG) (E.D.N.Y.) and *Duncan, et al. v. Nissan N.A.*, No. 1:16-CV-12120-DJC (D. Mass.), two companion cases involving multi-state claims concerning defective timing chains on various Nissan model vehicles. Final Approval of the settlement was granted on August 25, 2020 before Judge Denise Casper in the U.S. District Court for the District of Massachusetts. The settlement was valued at \$8,650,000.

Mr. Graifman was also co-lead class counsel in *In re Volkswagen Timing Chain*

Product Liability Litig., 16-cv-2765-JLL-JAD (D.N.J.), settled on a nationwide basis in the District of New Jersey, involving approximately 477,000 class vehicles. Final approval was granted to the settlement on December 14, 2018. The settlement provided one hundred percent reimbursement for timing chain repairs to class members and was valued at approximately \$50 million (inclusive of warranty extension repairs).

Mr. Graifman was also a member of the Plaintiffs' Steering Committee in the Multi-District Litigation, *In re Apple Inc. Device Performance Litig.*, 5:18-md-02827 (N.D. Cal. 2018), recently settled in the Northern District of California.

Mr. Graifman was also Co-Lead Class Counsel in the matter *Gelis, et al. v. Bayerische Motoren Werke Aktiengesellschaft, et al.*, pending in the U.S. District Court of the District of New Jersey, Civ. Action No. 17-cv-7386-WHW-CLW, involving defective timing chain assemblies in certain model BMW vehicles, which was granted final approval on February 16, 2021.

Several other consumer class action cases in which Mr. Graifman has served as lead counsel or co-lead counsel have resulted in positive results for plaintiffs' classes, including:

- *Seift, et al. v. Mercedes-Benz USA, LLC*, No: 5:16-cv-03370-EJD, 2014 WL 8370026 (N.D. Cal. Dec. 17, 2014) (KGG was co-lead counsel, and the matter settled on a nationwide basis at the class certification stage. Plaintiffs sought compensation for reimbursement for repairs to various Mercedes model vehicles due to a balance shaft defect. The action settled on a nationwide basis in 2015, valued at approximately \$25 million);
- *In re Nissan Radiator Transmission Cooler Litig.*, No. 10-cv-07493 (VB), 2013 WL 4080946 (S.D.N.Y. May 30, 2013) (referred to as "*Nissan Radiator Transmission Cooler Litig.*") (KGG was co-lead counsel and the matter settled on a nationwide basis at the class certification stage. The nationwide settlement, approved in May 2013, involved approximately 300,00 class vehicles and was valued at approximately \$17 million);
- *Sheris v. Nissan North Am., Inc.*, No. 07-cv-2516 (WHW), 2008 WL 2354908 (D.N.J. June 3, 2008) (sustaining breach of warranty and NJCFA

claims. KGG was co-lead counsel and matter subsequently settled on behalf of class); and

- *Heverly v. Symantec Corp.*, No. 1-05-cv-053711 (Cal. Super. Ct., Santa Clara County) (settled on a nationwide basis against major provider of internet security software).

Melissa R. Emert is a partner at KGG. She has been representing aggrieved consumers and investors for more than 30 years with KGG and with her previous firm. *See* KGG Resume attached hereto as Ex. B. Ms. Emert's practice specializes in consumer class actions with an emphasis on product defect and data breach cases. She has litigated consumer cases throughout the United States and holds prominent positions in many large MDLs and non-MDL consumer class actions. As an endorsement of her expertise, substantial experience, and successful results, Ms. Emert was recently named as one of two women attorneys in the country who received the highest number of appointments to leadership structures in nationwide MDLs by the Judges overseeing those MDLs.¹

Some of Ms. Emert's appointments and involvement in consumer class actions cases include:

- Court-appointed Co-Lead Counsel in *Carder v. Graco Children's Products, Inc.*, 2:20-cv-00137-LMM (N.D. Ga. 2021) (alleging state consumer protection and common law claims on behalf of consumers resulting from defendant's defective and allegedly unsafe children's car seat products);
- Court-appointed Co-Lead Counsel in *In re: Daily Fantasy Sports Litig.*, 1:16-md-02677-GAO (D. Mass 2016) (alleging state consumer protection and common law claims on behalf of consumers participating in defendants' online fantasy sports websites);
- Court-appointed member of Plaintiffs' Executive Committee in *In re: Hill's Pet Nutrition, Inc. Dog Food Products Liab. Litig.*, No. 19-md-2887 (D. Kan. 2019) (alleging state consumer protection and common law claims on behalf

¹ *See* Amanda Bronstad, *There Are New Faces Leading MDLs. And They Aren't All Men.*, LAW.COM (July 6, 2020, 10:53 p.m.), <https://www.law.com/2020/07/06/there-are-new-faces-leading-mdls-and-they-arent-all-men/>.

of consumers who purchased defective dog food that contained toxic levels of Vitamin D);

- Discovery Committee in *In re: Rock 'N Play Sleeper Marketing, Sales Practices, & Prods. Liab. Litig.*, 1:19-md-2903 (W.D.N.Y. 2019) (alleging state consumer protection and common law claims on behalf of consumers who purchased the defective and inherently unsafe Fisher-Price Rock 'n Play Sleeper for infants);
- Court-appointed member of Plaintiffs' Steering Committee in *In re: Intel Corp. CPU Mktg. & Prods. Liab. Litig.*, 3:18-md-02828 (D. Or. 2018) (alleging state consumer protection and common law claims on behalf of purchasers of defective Intel processors);
- Court-appointed member of Plaintiffs' Executive Committee in *In re: Apple Inc. Device Performance Litig.*, 5:18-md-02827 (N.D. Cal. 2018) (alleging state consumer protection and common law claims on behalf of iPhone users subject to intentional slowdown);
- Court-appointed member of Plaintiffs' Steering Committee in *In re: German Auto. Mfrs. Antitrust Litig.*, 3:17-md-02796 (N.D. Cal. 2017) (alleging anticompetitive conduct in the market for German-made automobiles);
- Court-appointed member of Plaintiffs' Steering Committee in *In Re: Sonic Corp. Customer Data Security Breach Litig.*, 1:17-md-02807 (N.D. Ohio 2017) (claims on behalf of persons affected by Sonic's data breach resulted in a class-wide settlement);
- Court-appointed Interim Class Counsel in *In re: Google Location History Litig.*, 5:18-cv-05062-EJD (N.D. Cal. 2019) (privacy breach action alleging Google tracked millions of mobile device users' location contrary to false representations);
- Co-Chair of Plaintiffs' Vetting Committee in *In re Wawa, Inc. Data Breach Litig.*, No. 19-6019 (E.D. Pa. 2019) (claims on behalf of persons affected by Wawa's data breach and had their personal information compromised); and
- Class Representative Communications and Client Vetting Committee in *Echavarria, et al. v. Facebook, Inc.*, Case No. C 18-05982 (N.D. Cal. 2018) (claims on behalf of persons that affected by Facebook's "View As" data breach).

Both Safirstein Metcalf LLP and Kantrowitz Goldhamer & Graifman, P.C. have the resources necessary to devote to the prosecution of this litigation.

Given proposed Lead Plaintiff and Counsels' qualifications, this Court should approve proposed the requested appointments.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant his motion to appoint him and his counsel to leadership positions with regard to the claims against Defendant TD Ameritrade, Inc.

Dated: April 26, 2021

Respectfully submitted,

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