SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **49M**

Justice

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SUSAN KOZA,

Plaintiff,

- v -

MUTUAL FUND SERIES TRUST, ALPHACENTRIC ADVISORS LLC, NORTHERN LIGHTS DISTRIBUTORS, LLC, JERRY SZILAGYI, BERT PARISER, TOBIAS CALDWELL, TIBERIU WEISZ, ERIK NAVILOFF, GARRISON POINT CAPITAL, LLC, FREDRICK SCHMIDT,

Defendants.

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INDEX NO. 655297/2020

MOTION DATE 09/01/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 112, 113, 114, 115, 116, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

Plaintiff Susan Koza brings this action alleging violations of §§ 11, 12(a)(2), and 15 of the Securities Act of 1933 against the above-captioned defendants. Plaintiff now moves for class certification, and appointment of class representative and class counsel pursuant to CPLR 901 and 902 (MS 005). Defendants oppose the motion.

Background

Defendant AlphaCentric Income Opportunities Fund (Fund) is an open-end mutual fund that primarily invests in asset-backed fixed income securities, such as securities backed by credit card receivables, automobiles, aircraft, student loans, and agency and non-agency mortgage-backed securities (NYSCEF # 132 – 2017 Registration Statement at 8). The Fund was structured in such a way as to allow investors to contribute low entry-level dollar amounts and to redeem their investments at will (NYCEF # 8 – Amended Complaint [AC] ¶ 4). At the heart of this controversy is the non-agency residential mortgage-backed securities (RMBS), specifically, the so-called "legacy" non-agency RMBS, which are also known as the "subprime" or "Alt-A" loans of the 2008 financial crisis (*id.*).

Plaintiff alleges that, in violation of §§ 11, 12(a), and 15 of the Securities Act of 1933, the Fund deviated considerably from the representations made in its 2017

Registration Statement and other offering documents[1]—namely, that it "may hold up to 15% of its net assets in illiquid securities (AC ¶ 103). However, plaintiff alleges that "approximately 76 % of the Fund's assets comprised of illiquid non-agency RMBS" (AC ¶ 58).

The Fund, like many other companies and investment vehicles, faced turmoil at the onset of the COVID-19 pandemic in March 2020 (Answer ¶ 9). However, according to plaintiff, the Fund was ill-equipped to weather such turmoil because it had grossly exceeded its 15 % holding of illiquid assets and instead invested in as much as 70 % (AC ¶ 8). Such overinvestment, plaintiff alleges, would cause the Fund to resort to a fire sale of over $1 billion in its assets to meet its redemptions, causing the Fund's valuation to drop precipitously by $ 1.8 billion in a matter of days (*id.* ¶ 9).

Plaintiff Susan Koza invested in 1,538.18 Class A shares of the Fund between October 14, 2017 and March 22, 2020, at an average price of $12.75 per share (NYSCEF # 115 ¶ 2 – Koza Aff). Plaintiff claims that the Fund's offering material misrepresented the Fund's liquidity and that her claims are reflective of the "hundreds (if not thousands) of Class members [that] likely exist" (NYSCEF # 113 – Pltf's MOL at 1, 7). Plaintiff seeks appointment of herself as class representative and Scott+Scott Attorney at Law LLP as class counsel (*id.* at 7-8).

Legal Standard

Under CPLR 902, an action "may be maintained as a class action only if the court finds that the prerequisites under section 901 [of the CPLR] have been satisfied"(CPLR 902). And CPLR 901(a) states:

> "[O]ne or more members of a class may sue ... as representative on behalf of all if:
> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

[1] In the Complaint, plaintiff describes the "Offering Materials" as follows: (1) The "Registration Statements" comprise of the July 25, 2017 Registration Statement (the 2017 Registration Statement); the July 27, 2018 Registration Statement (the 2018 Registration Statement); and the July 26, 2019 Registration Statement (the 2019 Registration Statement); the "Prospectuses" comprise of the Prospectuses dated August 1, 2017, August 1, 2018, and August 1, 2019; the "Fund Statements of Additional Information (SAIs) comprise of documents allegedly incorporated into the Registration Statements and Prospectuses dated August 1 of each year from 2017 to 2019; and the "Fund Fact Sheets"

4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy"

(CPLR 901 (a)).

Once the court has determined that these prerequisites, which are "commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]) have been met, "the court, in deciding whether to grant class action certification should then consider the additional factors promulgated by CPLR 902 such as the interest of individual class members in maintaining separate actions and the feasibility thereof; the existence of pending litigation regarding the same controversy; the desirability of the proposed class forum; and the difficulties likely to be encountered in managing the class action" (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 421-422 [1st Dept 2010] [internal citation omitted]). However, the determination of whether class status should be granted is within the sound discretion of the court, which must be mindful that the statute is to be liberally construed (*Kudinov v Kel-Tech Const. Inc.*, 65 AD3d 481, 481 [1st Dept 2009]). Any error should be construed in favor of certification (*Pruitt v Rockefeller Ctr. Properties, Inc.*, 167 AD3d 14, 21 [1st Dept 1991]). The court's inquiry into the merits of the plaintiffs' claims should be limited to assessing whether they are "neither spurious nor a sham" (*Bloom v Cunard Line*, 76 AD2d 237, 240 [1st Dept 1980]).

The proponent of an application for class certification has the burden of establishing with evidence in admissible form that the requirements of CPLR 901 and 902 have been met (*Mid Island LP v Hess Corp.*, 184 AD3d 439, 440 [1st Dept 2020]). Conclusory allegations which rest upon nothing but the pleadings and the affirmations of counsel will not meet that burden (*Chimenti v American Express Co.*, 97 AD2d 351, 352 [1st Dept], *appeal dismissed*, 61 NY2d 669 [1983]). Sworn party testimony and corroborating documentation may suffice (*see Dabrowski v Abax Inc.*, 84 AD3d 633, 634 [1st Dept 2011]).

Discussion

Both parties address mainly the adequacy of representation and typicality prerequisites of CPLR 901(a).

Adequacy of Representation

"A class representative acts as principal to the other class members and owes them a fiduciary duty to vigorously protect their interests" (*Rochester v Chiarella*, 65 NY2d 92, 100 [1985]). "[Some of] the factors to be considered in determining

adequacy of representation are [1] whether any conflicts exist between the representatives and the class members, ... [2] his or her financial resources, ... [3] the competence and experience of class counsel," (*Ackerman v Price Waterhouse*, 252 AD2d 179, 202 [1st Dept 1998] [internal citations omitted]; *see also Cooper v Sleepy's, LLC*, 120 AD3d 742, 743-744 [2d Dept 2014]), and [4] the representative's background and personal character, as well as his [or her] familiarity with the lawsuit, to determine his ability to assist counsel in its prosecution and, if necessary, 'to act as a check on the attorneys' (*Pruitt v Rockefeller Ctr. Properties, Inc.*, 167 AD2d 14, 24 [1st Dept 1991] [citations omitted]).

Regarding the fourth sub-factor listed above regarding a representative's familiarity with the lawsuit, New York courts have noted that "in a sophisticated commercial case ... it is not reasonable to expect that a layman ... would have detailed knowledge of the matters at issue," and as long as he or she has a "general awareness of the claims," that is sufficient (*Brandon v Chefetz*, 106 AD2d 162, 179 [1st Dept 1985], citing *Surowitz v Hilton Hotels Corp.*, 383 US 363, 372-374 [1966]; *see also Pludeman v Northern Leasing Systems*, 24 Misc 3d 1206[A], 2009 NY Slip Op 51290[U] [Sup Ct, NY County 2009], *aff'd* 74 AD3d 420 [1st Dept 2010]). "An adequate understanding does not require that the representative have command of every detail of the case. It is sufficient that the class representative be familiar with the basic elements of the claim [citations omitted]" (*Borden v 400 E. 55th Street*, NY Slip Op 33712[U] [Sup Ct, NY County 2012], *aff'd* 105 AD3d 630 [1st Dept 2013]).

Defendants proffer that plaintiff is not an adequate representative to the class because she has "demonstrate[d] a wholesale disengagement from her responsibilities to the class" (NYSCEF # 121 – Defts' MOL at 13). Defendants submit excerpts from plaintiff's deposition in which plaintiff could not recall speaking to her lawyers about the action or had communications with them (*id.* at 13-15 referring to NYSCEF # 123 – tr excerpts). Defendants also argue that "[p]laintiff's lawyers—not [plaintiff]—raised liquidity as a potential issue" (MOL at 10-11). Defendants take issue with plaintiff's being unaware that her attorneys hired industry experts to do a liquidity analysis (*id.*). Thus, defendants perceive plaintiff as evasive and disengaged, and posit that plaintiff would merely be "'a key to the courthouse door dispensable once entry has been effected'" (*id.* at 14 quoting *Weisman v Darneille* (78 FRD 669, 671 (US Dist Ct, SD NY 1978)).

In response, plaintiff's current counsel explained during oral argument on this motion, that at the subject deposition, plaintiff was questioned about the Florida action toward the end of the day. The Florida action, with different counsel, was dismissed on jurisdictional grounds prior to the commencement of the instant action in New York in 2020. Plaintiff's counsel informs the court that the questions about how many times plaintiff spoke to her attorneys or reviewed the complaints, of which there were several, came at plaintiff after a long day of questioning. And it was unclear as to which action defendants' counsel was inquiring about.

Apparently, as shown in defendants' opposition, there was yet another dismissed putative class action in the district court in Illinois in 2018 involving plaintiff and her current counsel (Defts' MOL at 13, n.15). As for the "experts" that plaintiff's attorneys hired that plaintiff did not know, these "experts" were for the attorneys themselves to learn about the case – akin to attorney work product. Plaintiff maintains that the client would not need to know about this part of the attorney's work. Plaintiff also distinguishes the *Weisman* case on which defendants rely. The plaintiff in *Weisman* was a felon convicted on the same securities fraud provision as in the class action; he lied in his deposition testimony; he "[could] not describe his claim or name the defendants" (*id.* at 671); and "[h]e was not even certain that he had seen a copy of the complaint before his deposition" (*id.* at 671).

Plaintiff proffers that "[f]ar from showing [plainitff's] ignorance of the litigation or [her] inability to serve as class representative, [a plaintiff's consulting experts] demonstrates [plaintiff's] ability to appreciate the limits of [her] knowledge and rely on those with the relevant expertise" (*Baffa v Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F3d 52, 62 (2d Cir 2000). The tenor of the cases cited by plaintiff is that a class representative can rely on experts and advisors as long as the representative's reliance thereupon does not undermine her ability to represent the class effectively and to serve as a "check on the attorneys" (*see Pruitt*, 167 AD2d at 24).

Although defendants are correct to point out that a class representative must not be a lifeless marionette controlled entirely by counsel, such does not appear to be the case here. For one, plaintiff understood that the case concerned "misrepresented statements in the offering materials" and the Fund's being "more illiquid than [she] thought it would be" when she invested (NYSCEF # 133 – Pltf's Reply at 5). In her deposition, plaintiff was able to define what a class action is in layman's terms (*id.* at 4); differentiate between liquid and illiquid assets (*id.*); and appreciate that the illiquid assets were intended to only constitute a small portion of the Fund's portfolio (*id.*). Indeed, even attending the deposition itself required plaintiff to travel to New York, meet with counsel on multiple occasions for preparatory sessions, and spend hours in the deposition (*id.*). And plaintiff, in her affidavit has averred that she has supervised and monitored this litigation and that she understands that she owes a fiduciary duty to the class, which she is willing to do (NYSCEF # 115 at ¶¶ 4-5).

Even if defendants were to argue that plaintiff does indeed possess a general awareness but is nonetheless *controlled by counsel*, defendants proffer no evidence other than citations from deposition testimony purportedly showing that plaintiff lacks awareness to substantiate their claim that she is controlled by counsel. As noted in *Pruitt*, a defendants must proffer evidence relating to the representative's [1] background, [2] personal character, and [3] familiarity with the lawsuit to determine a plaintiff's ability to assist counsel and to 'act as a check on the

attorneys' (167 AD2d at 24). And, as noted in *Brandon v Chefetz*, "general awareness" is satisfactory (106 AD2 at 179).

Defendants have proffered insufficient evidence to demonstrate that plaintiff's personal character or background will disqualify her as a class representative. Plaintiff has presented sufficient evidence that plaintiff possesses the threshold knowledge necessary to assist in satisfying the adequacy of representation prerequisite under CPLR 901. And since defendants do not contest that plaintiff has conflicts, that she lacks financial resources, or that her class counsel is incompetent in any way, the adequacy of representation requirement under CPLR 901 is satisfied.

Typicality

A plaintiff's claim fulfills the requirement of typicality where it "derives from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory" (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 99 [2d Dept 1980]). "Each case depends upon the particular circumstances surrounding the proposed ... and the court should consider the reasonable inferences and common-sense assumptions from the facts before it" (*id.* [internal citations omitted]). To be typical, "it is not necessary that the claims of the named plaintiff be identical to those of the class'" (*Pruitt*, 167 AD3d at 22).

Defendants agree with plaintiff that "typicality may be satisfied based on misleading statements in the offering documents such as registration statements or prospectuses" but contend that the "claims of *all* class members must be encompassed by the pleading" (Defts' MOL at 16). Defendants therefore contend that plaintiff is not typical because not all of the members of the putative class relied on the statements in the 2017 Registration Statement and other offering materials.

Plaintiff's Amended Complaint defines the class members as all investors who invested in the Fund from October 14, 2017 to March 22, 2020 "pursuant and/or traceable to one of the Fund's Registration Statements or Prospectuses" (AC ¶ 1). Defendants argue that, because the first Registration Statement or Prospectus only became effective on August 1, 2018, it is not possible for those class members from October 14, 2017 to July 31, 2018 to have relied on those offering materials (Defts' MOL at 16). Plaintiff argues that defendants are overlooking relevant offering materials from October 14, 2017 to July 31, 2018, such as the 2018 Annual Report, noting that the "[t]otal illiquid securities represent[ed] 0.11% of net assets as of March 31, 2018" (Pltf's Reply at 13). Plaintiff furthermore points to a 4Q2017 Fact Sheet published on December 31, 2017, that notes that the Fund will conduct "stress test[s] [of] different interests, credit, and macroeconomic environments" (NYSCEF # 52 – Exhibit 21).

As this case concerns the shares that plaintiff purchased pursuant or traceable to the Registration Statements and Prospectuses at issue in the Amended Complaint, the class members must also be limited to those who relied on such materials. Even though, as plaintiff contends, the Fund reported in its March 31, 2018 Annual Report that the Fund's total illiquid securities comprised 0.11 % of net assets, it stands to reason that (1) investors before that date could not have relied on that number and (2) even if the Fund had held 0.11 % of net assets at that time, it is not a promise that it will continue to do so. The representations made in its Annual Report are different from the representation in the Registration Statement that the Fund "may hold up to 15% of its net assets in illiquid securities" (2017 Registration Statement at 8) and, for that reason, can raise unique defenses from those class members who did not rely on the Registration Statements at the center of this controversy.

Accordingly, insofar as the class is certified, it is certified only as to those investors who invested in the Fund from July 27, 2018 (the date of the Fund's Registration Statement) to March 22, 2020

Conclusion

For the aforementioned reasons, it is hereby

ORDERED that the plaintiff Susan Koza's motion for class certification, and appointment as class representative and Scott+Scott Attorney at Law LLP as class counsel is granted in part; and it is further

ORDERED that, insofar as the class is certified, it is certified only as to those investors who invested in the Fund from July 27, 2018 to March 22, 2020; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Decision and Order, along with notice of entry, on defendants within ten days of this filing.

This constitutes the Decision and Order of the court.

07/02/2024
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE