

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

GARY T. WINNETT, FRED A JACKSON- CHITTUM, and CASPER R. HARRIS, on behalf of themselves and others similarly situated,)	
)	
Plaintiffs,)	Civil No. 3:06-0235
)	Judge Trauger
v.)	
)	
CATERPILLAR, INC.,)	
)	
Defendant.)	

MEMORANDUM and ORDER

Pending before the court is the Motion of the Winnett Plaintiffs For Appointment of Lead Counsel (Docket No. 58), to which plaintiff Finn has responded, containing therein his own Motion to Appoint Craig V. Gabbert, Jr. and H3GM as Co-Lead Counsel (Docket No. 65). Defendant Caterpillar has responded to both of these motions (Docket No. 70). The Winnett plaintiffs have responded to the plaintiff Finn’s Motion for Appointment of Co-Lead Counsel (Docket No. 71), and plaintiff Finn has filed a Reply (Docket No. 73).

Because this consolidated case brought under ERISA and the Labor Management Relations Act, 29 U.S.C. § 185, was filed as a class action, Rule 23(g), FED. R.CIV.P., governs the appointment of class lead counsel. That rule allows the appointment of “interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.” Rule 23(g)(2)(A). The court may only appoint counsel who is deemed “adequate” under the criteria set forth in subsections (1)(B) and (C) of Rule 23(g) and, if more than one adequate applicant seeks appointment, the court “must appoint the applicant best able to represent the

interests of the class.” Rule 23(g)(2)(B). The criteria set forth in subsection (1)(B) and (C) are as follows:

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel’s knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

Rule 23(g)(1), FED.R.CIV.P. Because the court finds both Michael M. Mulder (the *Winnett* plaintiffs’ counsel) and Craig V. Gabbert (plaintiff Finn’s counsel) “adequate,” the court must determine which is “best able to represent the interests of the class.”

With regard to the first criterion under subsection (C)(i), “the work counsel has done in identifying or investigating potential claims in the action,” Mr. Mulder and his firm, Meites, Mulder, Mollica and Glink, present the stronger credentials. The *Winnett* case was filed in this court on March 28, 2006. Mr. Mulder and his team filed an Amended Complaint on September 5, 2006, adding additional counts (Docket No. 61), and they have detailed in their filings the

substantial efforts they have made to identify and investigate potential claims for this case (*see* Docket No. 59 at 3-5). On the other hand, counsel for the Finn plaintiffs initially provided the court with no information as to their similar efforts and, in their Reply, merely state that they collected from their lone client, Finn, certain minimal information—“when he worked, when he retired, how much money was deducted from his pension plan to pay for premiums, and how much money he was supposed to pay for the premiums in the future” (Docket No. 73 at 3). (*See* Docket No. 65) Moreover, Finn’s counsel admits that the *Finn* Complaint, originally filed in the Northern District of Illinois on May 16, 2006, dismissed June 16, 2006, and refiled in this court on August 18, 2006, was “modelled” on the earlier-filed *Winnett* Complaint,¹ an indication that Finn’s counsel did little or no independent legal research on the claims asserted. This factor weighs heavily in favor of the Winnett team.

The second criterion is “counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action.” The papers and affidavits filed in connection with this motion clearly substantiate that Mr. Mulder and his firm have participated in numerous large ERISA class actions of this sort, whereas Finn’s counsel appears not to have engaged in any similar such litigation. Certainly this court is familiar with both Mr. Gabbert and his firm and has a high opinion of their practice and work before this court. However, their failure to cite to any specific litigation similar to this litigation makes Mr. Gabbert, a weaker applicant for lead counsel status.²

¹Indeed, the Winnett team accuses the Finn team of copying the Winnett Complaint “word for word.” (Docket No. 71 at 4)

²Although Mr. Gabbert’s demonstrated ability to work cooperatively with other lawyers “in the successful reorganizations of several large public and private debtors in bankruptcy court” (Docket No. 73 at 4) is valuable experience, it is no substitute for the substantial relevant subject matter experience of the Mulder firm.

The third criterion, “counsel’s knowledge of the applicable law,” probably weighs in favor of Mr. Mulder, in that he has handled several similar ERISA class action cases in a leadership capacity. Certainly both Mr. Gabbert and Kim Presbrey, Illinois counsel for plaintiff Finn, have substantial ERISA experience. However, the class action aspect of the claims before the court in this case makes the more specific and particularized experience of Mr. Mulder likely to make him more familiar with the law applicable to this case.

The last criterion under subsection (C)(i) is “the resources counsel will commit to representing the class.” The court finds that both teams would commit sufficient resources to representing the class in this case. However, the presence of the firm of Lieff, Cabraser, Heimann & Bernstein, LLP on the team of Mr. Mulder is certainly a positive factor, as that firm is known nationally for its expertise in handling complex class action litigation. Moreover, the presence on Mr. Mulder’s team of experienced counsel for the AARP Foundation, who has extensive and relevant ERISA experience, is also a positive factor. The concern expressed in the Finn Reply that Mr. Mulder may be over-extended, given the size of his firm and his role in the *Nauman* litigation is misplaced. Mr. Mulder is co-lead counsel in *Nauman*, and his small firm, in conjunction with the other counsel and resources assisting him, have so far managed this case with expedition and competence.

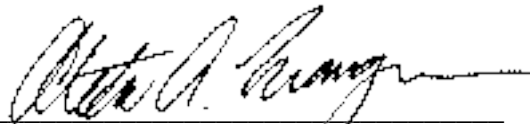
Mr. Gabbert’s firm of Harwell, Howard, Hyne, Gabbert & Manner, PC and Mr. Gabbert himself, have an excellent reputation in this legal community, and their credentials for handling complex litigation of all sorts, including ERISA, cannot be challenged. Mr. Presbrey’s long history of representing individuals who will be included in the putative plaintiff class, no doubt, will be extremely valuable as this case progresses. However, in examining the criteria for the appointment of lead class counsel that this court must consider, the court is of the opinion that

Mr. Mulder and his team will not only “fairly and adequately represent the interests of the class” (Rule 23(g)(1)(B)), but also will be “best able to represent the interests of the class” (Rule 23(g)(2)(B)), Fed.R.Civ.P. The court encourages Mr. Mulder to call upon the expertise, relationships and participation of plaintiff Finn’s legal team whenever advisable during the progression of this case, so long as it does not result in cumulative or duplicative efforts.

For the reasons expressed herein, it is hereby **ORDERED** that Michael M. Mulder and his firm Meites, Mulder, Mollica & Glink are appointed Lead Counsel for the putative class and their Motion for Appointment (Docket No. 58) is **GRANTED**. Plaintiff Finn’s Motion to Appoint Craig V. Gabbert, Jr. and H3GM as Co-Lead Counsel (Docket No. 65)³ is **DENIED**.

It is so **ORDERED**.

ENTER this 26th day of September 2006.



Aleta A. Trauger
ALETA A. TRAUGER
U.S. District Judge

³Docket No. 68 appears to be a duplicate of this motion and, for purposes of the record, is also **DENIED**.