

LAW360

July 12, 2010

Lovell Stewart, Zamansky To Lead ProShares Action

By Christie Smythe

A federal judge has ruled that the investor with the most money at stake will serve as lead plaintiff in a putative class action against ProShares Advisors LLC over alleged hidden risks in inverse exchange-traded funds, as well as naming [Lovell Stewart](#) Halebian Jacobson LLP and Zamansky & Associates LLC as co-lead counsel.

Judge John G. Koeltl of the U.S. District Court for the Southern District of New York on Monday designated investor Mark Karasick as lead plaintiff, while Lovell Stewart and Zamansky beat out more roughly half a dozen firms representing several groups of plaintiffs.

Aaron Brody of Stull Stull & Brody argued Monday that his clients from the so-called Savoie group were best-suited to lead the class because they invested in the most diverse array of funds.

Brody told the judge that securities

class action plaintiffs have encountered difficulties in some past cases when lead claimants were not invested in all funds at issue.

Moreover, he argued, appointing the Savoie group, which includes about 15 investors with purported losses totaling \$1.2 million, as the lead plaintiff would be far more manageable and less expensive than appointing Karasick's group, which is represented by four law firms.

Judge Koeltl, however, dismissed those arguments, noting that Karasick's alleged losses of \$8.3 million dwarf individual losses of all other claimants.

The judge also said that he was not bound to accept the entire group of plaintiffs included in a band with Karasick or the entire assortment of law firms representing the group.

Ultimately, the judge accepted only Karasick himself as the lead plaintiff and

left the other claimants grouped with him, as well as their lawyers from Gilman & Pastor LLP and [Bernstein Liebhard LLP](#), with the general class.

Judge Koeltl added that the Savoie group would likely prove to be far more unwieldy than Karasick and his pair of firms.

The group of 15 claimants appeared to be "constructed by lawyers" to allow them to steer the litigation, the judge said.

"While groups are permitted, groups formed solely for litigation are not permitted," he said.

The consolidated case over risks in leveraged inverse ETFs includes 11 initially separate suits.

In one of the initial cases, lodged in August, investors in ProShares' UltraShort Real Estate fund said that the ETF was not the simple directional play that the defendant claimed, but rather a risky short-term investment that should not have been marketed to retail clients.

ProShares, the fifth-largest ETF seller in the U.S., markets its Ultra and UltraShort ETFs as "simple" directional plays, according to the suit. Ultra ETFs are designed to go up when markets go up, while UltraShort ETFs — like the one at issue in this case — are designed to go up when markets go down, it said.

As the real estate market began to collapse in the summer of 2007, many investors sought safe harbor in the SRS

Fund as a way to create their own hedge or speculate that the sector would decline. By advertising how simple the directional play was, "ProShares made seeking shelter from the financial storm sound easy," the complaint said.

ProShares says it uses a mathematical approach to investing, one that uses an objective approach rather than the judgment of investment advisers, the suit said. That means that ProShares admits that it does no stock research or analysis for the SRS Fund, and does not attempt to forecast stock market movements or trend, it said.

Although ProShares claims that the SRS Fund is intended to deliver double the inverse return of the DJREI, between Jan. 2, 2008, and Dec. 17, 2008, the SRS Fund fell 48.2 percent, the complaint said. Judging by the claims made by ProShares, the fund should have picked up 78.4 percent during that time period, since the DJREI fell 39.2 percent in that span, it said.

"The SRS Fund is, therefore, the equivalent of a defective product," the complaint said.

ProShares is represented by [Ropes & Gray LLP](#).

The lead plaintiff is represented by Lovell Stewart Halebian Jacobson LLP and Zamansky & Associates LLC.

The case is In re: ProShares Trust Securities Litigation, case number 1:09-cv-06935, in the U.S. District Court for the Southern District of New York.

