UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs, - against - HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzmán

APPENDIX OF UNREPORTED AUTHORITIES SUBMITTED IN SUPPORT OF DEFENDANTS' RECOMMENDATIONS FOR PHASE TWO PROCEEDINGS, IF NEEDED

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TABLE OF CASES

TAB 1

Only the Westlaw citation is currently available.

United States District Court,
C.D. California, Southern Division.
Josephine Tucker ARENSON et al., Plaintiffs,
v.
BROADCOM CORPORATION et al., Defendants.
No. SA CV 02-301GLT.

Dec. 6, 2004.

Walter J. Lack, Adam D. Miller, Engstrom Lipscomb & Lack, Thomas V. Girardi, Girardi & Keese, Los Angeles, CA, for Plaintiffs.

David Siegel, Daniel P. Lefler, Harry A. Mittleman, Stephen Hasegawa, and Layn R. Phillips, Irell & Manella, Los Angeles, CA, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS WHO BENEFITTED FROM ALLEGED INFLATION

TAYLOR, J.

***1** Defendants' motion for summary judgment as to Plaintiffs who benefitted from alleged inflation is GRANTED.

I. *BACKGROUND*

Plaintiffs, stockholders of Defendant Broadcom, allege Defendants inflated the company's reported earnings and misled investors through a series of misrepresentations and fraudulent accounting methods between July 31, 2000 and February 26, 2001. Plaintiffs allege causes of action under section 10(b) of the Securities Exchange Act and Rule 10b-5. Plaintiffs opted not to join a consolidated class action against the Defendants; instead, they sue as individuals.

Defendants move for summary judgment on damages. Defendants argue twenty-six of the forty-seven Plaintiffs cannot establish damages because they profited from the alleged fraud by selling their shares of stock at an artificially inflated price. Because damages is an element of Plaintiffs' prima-facie case, and because Plaintiffs cannot establish it, Defendants ask the Court to grant their motion for summary judgment.

Following oral argument on October 4, 2004, the Court took under submission Defendants' motion and Plaintiffs' request for additional briefing. On October 6, 2004, the Court ordered additional briefing. The briefing is now in, and the Court rules as follows.

II. *DISCUSSION*

Summary judgment is proper if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c).

Defendants contend twenty-six Plaintiffs actually profited from selling Broadcom stock at an artificially inflated price. (Defs.' Supplemental Mem. Supp. Summ. J. at 2.) Defendants conclude Plaintiffs cannot establish damages, which is a required element under their prima-facie case.

Plaintiffs argue Defendants' contention is based on applying the "last in, first out" ("LIFO") accounting methodology, which is not supported by the case law. The case law, according to Plaintiffs, supports application of the "first in, first out" ("FIFO") methodology. Moreover, Plaintiffs' expert claims the FIFO methodology is customarily required in calculating damages in this type of case, not the LIFO methodology (Hakala Decl. ¶¶ 6-7), and applying the FIFO methodology demonstrates the presence of damages.

A number of courts have spoken clearly on this issue, treating it as a pure question of law and finding the FIFO methodology improper. *See, e.g., In re Cable & Wireless, PLC, Sec. Litig.*, 217 F.R.D. 372, 378-79 (E.D.Va.2003) ("[C]ourts have generally rejected FIFO as an appropriate means of calculating losses in securities fraud cases.") (internal quotation marks omitted); *In re Clearly Canadian Sec. Litig.*, Nos. C-93-1037-VRW, C-93-1278-VRW, C-93-4313-VRW, C-95-0699-VRW, C-95-2295-VRW, 1999 WL

707737, at *4 (N.D.Cal. Sept.3, 1999) ("[U]se of the 'first in, first out' method ... will identify damages where in reality there may be none; the 'FIFO' assumption is in no way based on actual trading practices in general, let alone the trades of actual claimants.").

***2** *In re Comdisco Securities Litigation,* 150 F.Supp.2d 943, 945-46 (N.D.Ill.2001) also rejected the FIFO methodology, stating:

> when the Class Period ... is focused upon, PASERS' claim that it suffered some $2.4 million in losses in connection with its investment in Comdisco common stock is only a mirage created by PASERS' adoption of a FIFO (first-in-first-out) approach to its dealings in the stock.... And when those transactions are *properly* matched, rather than by the impermissible application of a FIFO methodology ... PASERS' Class Period sales at inflated prices caused it to derive unwitting benefits rather than true losses from the alleged securities fraud.... There are a host of cases ... that reject the kind of artificial "loss" that is manufactured by PASERS' attempted FIFO construct in favor of a calculation that properly nets out purchases and sales *during* the class period and determines gains or losses in those terms.

Id.

Plaintiffs' expert claims FIFO is "customarily required" in calculating damages. (Hakala Decl. ¶ 6.) As the cases demonstrate, however, the issue of which accounting methodology applies is a question of law, not fact, for the Court to decide. *Crow Tribe v. Racicot,* 87 F.3d 1039, 1045 (9th Cir.1996).

Plaintiffs cite *In re Chipcom Corp. Securities Litigation,* No. CIV. A. 95-11114-DPW, 1997 WL 1102329, at *24 (D.Mass. June 26, 1997), in support of their position. This case is inapposite. While it does include seemingly on-point language-"the FIFO (first-in-first-out) matching basis will be applied"-the language is recited in the court's summary of the parties' settlement agreement; the decision itself does not address the issue.

Applying a LIFO methodology is supported by adequate authority, especially in light of the body of case law rejecting FIFO.

The authority is clear: where a plaintiff engages in multiple purchases and sales during the period in which the stock is inflated, the proper damages methodology is to take all the inflation losses resulting from all purchases at the inflated price and reduce this amount by all the inflation gain resulting from all sales at the inflated price. *See Wool v. Tandem Computers Inc.,* 818 F.2d 1433, 1437 & n. 4 (9th Cir.1987); *In re Seagate Tech. II Sec. Litig.,* 843 F.Supp. 1341, 1349 n. 7 (N.D.Cal.1994).

Plaintiffs attempt to distinguish *Wool,* arguing the *Wool* plaintiffs bought and sold stock during the period of inflation and, therefore, the Ninth Circuit did not need to decide what sales and purchases to match (i.e., what accounting methodology to apply). Here, Plaintiffs argue stock was held before the period of inflation, thereby raising the issue of methodology.

This factual distinction does not overcome the language in *Wool,* which establishes a general principle applicable here. *In re Seagate* makes the point even clearer.

III. *DISPOSITION*

Defendants' motion for summary judgment as to Plaintiffs who benefitted from alleged inflation is GRANTED. The following Plaintiffs cannot show they were damaged as a result of the conduct alleged in the First Amended Complaint:

***3** 1. Alexander R. Brishka, as an individual

2. Ilma Brishka, as an individual

3. Alexander R. Brishka and Ilma Brishka, as trustees of the Brishka Trust

4. Timothy J. Buckley, as an individual

5. Compass Communications, a Grand Cayman Islands Company

6. Robert J. Follman, as an individual

7. Carole A. Follman, as an individual

8. Robert J. Follman and Carole A. Follman, as trustees of the Robert J. and Carole A. Follman Living Trust

9. Robert J. Follman and Carole A. Follman, as administrators of the Robert J. Follman IRA Rollover

10. Robert J. Follman and Carole A. Follman, as administrators of the Carole A. Follman IRA

11. Jeff D. Martin, as an individual

12. Jill D. Martin, as an individual

13. Jeff D. Martin and Jill D. Martin, as trustees of the J. & J. Martin Trust

14. Jeff D. Martin and Jill D. Martin, as administrators of the Jeff Martin IRA

15. Jeff D. Martin and Jill D. Martin, as administrators of the Jill Martin IRA

16. Scott McCarter, as an individual

17. Scott McCarter, as an administrator of the Scott McCarter SEP-IRA

18. Sarajen Capital, LLC, a California limited liability company

19. Ronald E. Tendler, as an individual

20. Ronald E. Tendler, as trustee of the Tendler Family Trust

21. Ronald E. Tendler, as administrator of the J. Edward Company Money Purchase Pension Plan

22. Thomas T. Tierney, as an individual

23. Elizabeth C. Tierney, as an individual

24. Thomas T. Tierney and Elizabeth C. Tierney, as trustees of the Thomas T. and Elizabeth C. Tierney Trust

25. Thomas E. Tucker, as an individual

26. Thomas E. Tucker, as trustee for the Tucker Family Trust

C.D.Cal.,2004.
Arenson v. Broadcom Corp.
Not Reported in F.Supp.2d, 2004 WL 3253646 (C.D.Cal.)

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TAB 2

Westlaw

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2004 WL 905938 (N.D.Ill.), Fed. Sec. L. Rep. P 92,809
(Cite as: 2004 WL 905938 (N.D.Ill.))

United States District Court,
N.D. Illinois, Eastern Division.
In re COMDISCO Securities Litigation
No. 01 C 2110.

April 26, 2004.

Daniel W. Krasner, Wolf, Haldenstein, etal, New York, NY, Adam J. Levitt, Wolf, Haldenstein, Adler, Freeman & Herz LLC, Chicago, IL, for Plaintiff.

Alan Norris Salpeter, Javier H. Rubinstein, Michele Odorizzi, John Frederick Schomberg, Mayer, Brown, Rowe & Maw LLP, Andrew W. Worseck, Department of Law, Chicago, IL, for Defendants.

MEMORANDUM OPINION

SHADUR, Senior J.

***1** During the course of the previously scheduled status hearing held in this securities class action earlier this week, counsel for the lead plaintiff appointed by this Court under the Private Securities Litigation Reform Act ("Act")-see the June 27, 2001 opinion reported at 150 F.Supp.2d 943 ("Opinion"), as well as the earlier opinions in this case referred to there-drew to this Court's attention an article by Fred Burnside, *Fee-Fi-Fo-Fum: Why the Rejection of FIFO Is ... Not Smart,* 2 Class Action Litig. Report (BNA) 786 (2001), that criticized this Court's adoption of a LIFO rather than FIFO method in determining an investor's losses during the class period for purposes of identifying the "most adequate plaintiff" as called for by the Act. Under ordinary circumstances this Court would simply leave it at that-after all, criticism of judicial endeavors comes with the territory, and this Court has always been mindful of the teaching of *Craig v. Harney,* 331 U.S. 367, 376, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), which is just as valid today as when it was first written and which applies with equal force to less trenchant criticism and to nonpunitive judicial responses:

> This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him...." See *Craig v. Hecht,* 263 U.S. 255, 281, 44 S.Ct. 103, 108, 68 L.Ed. 293, Mr. Justice Holmes dissenting. The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.
>
> But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.[FN1]
>
> FN1. [Footnote by this Court] Indeed, this Court has always kept a copy of Justice Douglas' just-quoted language at hand on the bench.

But two special circumstances call for different treatment here:

1. For one thing, class counsel has previously apprised this Court of some serious personal problems that may affect the present class representative's ability to continue in that status, so that this Court's application of the Act's requirements may well be brought into question once again in this action.

2. Another look at Opinion at 945-46 in light of the Burnside article suggests that this Court may not have elaborated sufficiently in the Opinion as to why the methodology it chose was the correct one.

And although this added factor would not have carried any weight in the absence of those special circumstances, it is also worth noting that the same issue is potentially-and most likely actually-encountered in most if not all lawsuits brought under the Act. Accordingly this follow-up opinion will speak to the basic flaws in the cited article's treatment and will reconfirm this Court's view of the soundness of the approach that it took in the Opinion.

***2** It is entirely appropriate that the article's author chose, as he did, to illustrate his analysis by speaking

of green and red apples, for one possible consequence of working with apples may be the production of applesauce-as Webster's Third New Int'l Dictionary (unabridged) 104 defines that product:

an insincere expression of opinion: an assertion that is patently absurd and usu. phrased in exaggerated terms: BUNK, BALONEY (I know applesauce when I hear it-Ring Lardner).

Just so here, for any real-world analysis of how investors have fared in terms of their transactions in a security during a specified period necessarily first matches their in and out transactions *duringthatperiod,* and hence calls for LIFO rather than FIFO treatment.

There is of course a perfectly respectable place for the use of FIFO in measuring the economic results from stock transactions in other contexts. Thus Reg. § 1.1012-1(c)(1) provides for internal revenue purposes:

If shares of stock ... are sold or transferred by a taxpayer who purchased or acquired lots of stock on different dates or at different prices, and the lot from which the stock was sold or transferred cannot be adequately identified, the stock sold or transferred cannot be adequately identified, the stock sold or transferred *shall* be charged against the earliest of such lots purchased or acquired in order to determine the cost or other basis of such stock.

But the reasons for that treatment for income tax purposes are readily apparent: In light of the long-term trend of increasing values in stocks, plus the facts (1) that FIFO rather than LIFO therefore typically increases the measurement of currently recordable gains and (2) that stocks held until death get a stepped-up basis while at the same time escaping income taxation entirely, what other approach might be expected from taxing authorities who are properly interested in maximizing the benefits to the fisc?

By contrast, what this opinion has just referred to as real-world considerations mandate the opposite treatment in identifying what gains or losses have been sustained during a specified period when prices have been artificially inflated by some securities law violation. Consider an Investor A with accumulated holdings of 10,000 shares of XYZ Corporation that were acquired when everything was on the up and up in terms of corporate disclosures, and that represent the investor's long-term commitment to the company's prospects. Assume further that unknown to Investor A but during what later turns out to be a plaintiffs' class period-a time when the nondisclosure of adverse information caused the stock price to be too high in terms of real value-Investor A both buys and sells an aggregate of 5,000 shares of XYZ stock in various transactions before the stock price later falls out of bed, and that such class-period transactions leave Investor A neither out of pocket nor in pocket when the expenditures for and the proceeds of those transactions are aggregated.

***3** Is there any real question that Investor A, who has thus retained the same long-term stake in XYZ that preceded the class period, has sustained neither gain nor loss *from the transactions during the class period?*To sharpen the issue even further, is there any question that Investor A is in an economic position identical to that of Investor B, someone who also held 10,000 shares of XYZ before the beginning of what later proved to be the class period, and who didn't trade at all during the class period? Or is there any question that both Investor A and Investor B are in the identical economic position as Investor C, a person who held no XYZ shares before the class period and whose purchases and sales during the class period, each aggregating 5,000 shares, also resulted in a wash in terms of the dollars involved?

Little wonder, then, that an opinion such as *In re Olsten Corp. Sec. Litig.,* 3 F.Supp.2d 286, 295 (E.D.N.Y.1998) (emphasis added)(cited in Opinion at 945-46) speaks of "the number of *net* shares purchased during the class period" in identifying the "losses during the class period." Unable to deal rationally with that obvious reference to the matching of transactions during the class period, the author of the pro-FIFO article instead attempts an invalid sleight-of-hand distinction-immediately before entering into his invalid red apple-green apple simile-that "you cannot know the number of net shares purchased until you know which shares are considered as being in the net."

Simply put, the article's attempted criticism of the use of LIFO in determining the identity of the "most adequate plaintiff" under the Act impermissibly ignores the obvious fact that with every securities class action

having to identify a class period, the focal point of inquiry must begin (for standing purposes and otherwise) with purchases or sales-or both-*during* that class period. And in turn that focus calls for a primary concentration on class period transactions, which is consistent with LIFO rather than FIFO treatment. Regrettably the cited article, like the source from which it drew its *Fee-Fi-Fo-Fum* title, is no better than a fairy tale. In sum, this Court accordingly adheres to the analysis that it had set out more briefly in the Opinion.

N.D.Ill.,2004.
In re Comdisco
Not Reported in F.Supp.2d, 2004 WL 905938 (N.D.Ill.), Fed. Sec. L. Rep. P 92,809

END OF DOCUMENT

TAB 3

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Lee R. ELLENBURG III, Individually and on Behalf of All Others Individually Situated, Plaintiff,
v.
JA SOLAR HOLDINGS CO. LTD., Huaijin Yang, and Daniel Lui, Defendants.
Lei Zhang, Individually and on Behalf of All Others Similarly Situated, Plaintiff,
v.
JA Solar Holdings Co. Ltd., Huaijin Yang, and Daniel Lui, Defendants.
Nos. 08 Civ. 10475(JGK), 08 Civ. 11366(JGK).

April 17, 2009.

OPINION AND ORDER

JOHN G. KOELTL, District Judge.

***1** The plaintiffs, investors who purchased or otherwise acquired American Depository Shares of the China-based solar cell manufacturer JA Solar Holdings Co., Ltd. ("JA Solar") between August 12, 2008 and November 12, 2008 (the "class period"), bring these class actions against JA Solar, its Chief Executive Officer ("CEO") Huaijin Yang, and its Chief Financial Officer ("CFO") Daniel Lui alleging false statements and non-disclosures about the financial condition of the company during the class period. Both actions are brought under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) & 78t(a), respectively, and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. Putative class members Biao "Bill" Chen and Lee Chen move to consolidate the class actions and also make competing applications for appointment as lead plaintiff in the consolidated action and approval of their respective choices for lead class counsel.

I

Federal Rule of Civil Procedure 42(a) provides that "[i]f actions before the court involve a common question of law or fact, the court may ... consolidate the actions ...." Fed.R.Civ.P. 42(a). Trial courts retain "broad discretion to determine whether consolidation is appropriate." *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir.1990).

Consolidation is plainly appropriate here. The movants each seek consolidation and the motions to consolidate are unopposed. The allegations supporting the claims asserted in each class action are almost identical. Both actions turn on the allegation that JA Solar purchased a three month, $100 million note from a subsidiary of Lehman Brothers on or about July 9, 2008, when Lehman Brothers was under severe financial distress, and that the defendants failed properly to disclose this investment and made misleading representations about the financial condition of the company in light of this investment beginning with a press release issued on August 12, 2008. On November 12, 2008, the defendants made full disclosure with respect to the effect of the investment on the financial condition of the company, and the price of the company's American Depository Shares plummeted. (*Compare* No. 08 Civ. 10475 Compl. ¶¶ 3, 23-38 *with* No. 08 Civ. 11366 Compl. ¶¶ 4-8, 18-29.)

The factual and legal questions to be resolved in the class actions appear to be indistinguishable, and no party has suggested otherwise. Accordingly, the Court will consolidate the two class actions. *See Sofran v. LaBranch & Co., Inc.*, 220 F.R.D. 398, 401 (S.D.N.Y.2004) (consolidating securities fraud class actions where both groups of plaintiffs requested consolidation and each action "assert[ed] essentially similar and overlapping claims brought on behalf of purchasers of [the defendant's] securities [during the class period] who purchased in reliance of the materially false and misleading statements and omissions at all relevant times").

II

***2** There remains the question of who should be lead plaintiff in the consolidated class action. Bill Chen and Lee Chen each seek appointment as lead plaintiff and approval of their respective choices for lead class counsel. Bill Chen argues that he is the appropriate lead plaintiff because he has the greatest financial

interest in the litigation based on his losses due to the defendants' conduct during the class period. Lee Chen contends that Bill Chen actually enjoyed a financial gain and that his stated losses are based on incorrect accounting.[FN1] Lee Chen also argues that Bill Chen's trading practices during the class period subject him to unique defenses that undermine his capacity to serve as lead plaintiff.[FN2]

> FN1. Lee Chen's arguments about Bill Chen's accounting are raised for the first time in Lee Chen's reply brief in support of his motion for appointment as lead plaintiff. The Court considered these arguments as well as the responsive arguments in Bill Chen's sur-reply brief on this subject. Therefore, Bill Chen's motion for leave to file a sur-reply (Docket No. 29 in 08 Civ. 10475) is **granted.**

> FN2. A third putative class member, Wael Mahmoud Bahbahani, moved for consolidation and appointment as lead plaintiff (*see* Docket No. 9 in 08 Civ. 10475 and Docket No. 6 in 08 Civ. 11366), but later withdrew that motion.

Under the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), the district court must "appoint as lead plaintiff the member or members that the court determines to be most capable of adequately representing the interests of class members ...." 15 U.S.C. § 78u-4(a)(3)(B)(i)). Pursuant to the PSLRA, the Court must adopt a presumption that the most adequate plaintiff is the person who "has the largest financial interest in the relief sought by the class ... and ... otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B)(iii); *see also Hevesi v. Citigroup Inc.*, 366 F.3d 70, 81 (2d Cir.2004) ("Two objective factors inform the district court's appointment decision: the plaintiffs' respective financial stakes in the relief sought by the class, and their ability to satisfy the requirements of [Federal Rule of Civil Procedure] 23."). That presumption may be rebutted "upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff ... is subject to unique defenses that render such plaintiff incapable of adequately representing the class ." 15 U.S.C. § 78u-4 (a)(3)(B)(iii).

The PSLRA does not specify how a financial interest in the litigation is to be determined. "In determining which plaintiff has the greatest financial interest in the outcome of a securities litigation, courts have looked to four factors: (1) the number of shares purchased during the class period; (2) the number of net shares purchased during the class period; (3) the total net funds expended during the class period; and (4) the approximate losses suffered ...." *In re eSpeed Sec. Litig.*, 232 F.R.D. 95, 100 (S.D.N.Y.2005) (internal quotation marks omitted). The dispute in this case revolves around the approximate losses suffered by the lead plaintiff movants because of the inventory of shares that Bill Chen held at the beginning of the class period and sold soon after the class period began.

Bill Chen claims to have lost $65,136 due to the defendants' alleged misconduct during the class period. Lee Chen claims to have lost $39,801. However, Lee Chen argues that Bill Chen overstated his losses by using the "First-In, First-Out" accounting method ("FIFO") while he should have used the "Last-In, First-Out" method ("LIFO"). Lee Chen contends that application of the LIFO method reveals that Bill Chen actually enjoyed a financial gain where he alleges a loss.

***3** "In the context of a securities class action, FIFO and LIFO refer to methods used for matching purchases and sales of stock during the class period in order to measure a class member's damages ." *In re AOL Time Warner, Inc.*, No. 02 Civ. 5575, 2006 WL 903236, at *17 (S.D.N.Y. Apr. 6, 2006). The Court of Appeals for the Second Circuit has not established a categorical rule for the appropriate measurement of losses where there is a pre-existing inventory of stock followed by purchases and sales during the class period. "In this District, both FIFO and LIFO have been used to calculate the financial stake of movants for lead plaintiff status in securities class actions."*Id.* at *18 (citing *In re Veeco Instruments Inc. Sec. Litig.*, 233 F.R.D. 330, 333 (S.D.N.Y.2005) (applying FIFO), and *In re eSpeed Inc. Sec. Litig.*, 232 F.R.D. 95, 100-02 (S.D.N.Y.2005) (applying LIFO)).

The sole subject of the accounting dispute is Bill Chen's sale of 5,000 shares of JA Solar stock on August 20, 2008 that he purchased on July 17, 2008, before the class period. Bill Chen sold the shares for $86,500 after purchasing them for $81,000. (Mar. 13,

2009 Rudman Aff. Ex. A.) The movants disagree with respect to how the proceeds from the August 20, 2009 sale should be accounted for in calculating Bill Chen's losses. Bill Chen appears originally to have omitted these proceeds from his loss calculations under the FIFO method of accounting.[FN3](Feb. 2, 2009 Rosenfeld Aff. Ex. B.) In subsequent briefing, however, Bill Chen argues that the difference between the proceeds from the sale and the purchase price for the shares sold-$5,500-should be offset against his losses. This would result in a loss total of $59,636.59, leaving him comfortably in the lead over Lee Chen with respect to his financial interest in the litigation. (Mar. 13, 2009 Rudman Aff. Ex. A.) Lee Chen contends that the proceeds from the August 20, 2008 sale should not be netted against the purchase price of the shares that were sold, because the purchase of the shares preceded the class period, which began on August 12, 2008. Lee Chen argues that the Court should account for the proceeds from the August 20 sale by applying the LIFO method of accounting, which he argues would require offsetting the total proceeds from the sale against the cost of the last stock purchase within the class period.[FN4](*See* Lee Chen Reply Brief at 3 ("Since the LIFO method requires the last purchase made by the shareholder to be offset by his first sale proceeds, [Bill] Chen was required to include the 5,000 shares that he sold on August 20, 2008 to his total proceeds from his sales.").) This method of accounting for the proceeds from the August 20 sale would result in a net gain for Bill Chen during the class period. (Mar. 2, 2009 Brualdi Decl. Ex. 1.)

FN3. "Under FIFO, a plaintiff's sales of defendant's shares during the class period are matched first against any pre-existing holdings of shares. The net gains or losses from those transactions are excluded from damage calculations." *Johnson v. Dana Corp.*, 236 F.R.D. 349, 352 (N.D.Ohio 2006); *see also In re Organogenesis Sec. Litig.*, 241 F.R.D. 397, 401-02 (D.Mass.2007); *Cortese v. Radian Group Inc.*, No. 07 Civ. 3375, 2008 WL 269473, at *5 (E.D.Pa. Jan. 30, 2008).

FN4. Under LIFO, "a class member's damages are calculated by matching the class member's last purchases during the class period with the first sales made during the class period." *Bhojwani v. Pistiolis*, No. 06 Civ. 13761, 2007 WL 2197836, at *7 (S.D.N.Y. June 26, 2007) (internal quotation marks and alterations omitted); *see also In re AOL*, 2006 WL 903236 at *17; *Cortese*, 2008 WL 269473, at *5.

Lee Chen's arguments with respect to accounting for the proceeds from the August 20 sale ignore the reality of the financial transactions in this case. The most accurate and realistic way to account for the gain realized from the August 20 sale is to subtract the purchase price of the shares sold from the proceeds of their sale, and to offset the resulting gain against Bill Chen's class period losses. The actual cost basis for the August 20 sale is specifically identifiable in this case. It would make no sense to calculate the gain achieved from the August 20 sale by pretending that the shares sold were purchased at any price other than the actual, specifically identifiable price for which they were in fact purchased. To do so would "ignore[ ] the economic reality of a stock sale, which requires that the sales price for a share of stock be matched with that share's cost basis, in order to calculate a profit or loss on the sale of that share."*In re NPS Pharm., Inc. Sec. Litig.*, No. 06 Civ. 570, 2006 U.S. Dist. LEXIS 87231, at *7-8 (D.Utah Nov. 17, 2006) (rejecting argument that shares held prior to class period should be ignored).

***4** The cases cited by Lee Chen do not suggest otherwise. Those cases counsel the adoption of the LIFO method of accounting as an alternative to the FIFO method. Courts making this choice have explained that LIFO provides a more realistic estimate of a class member's losses than does FIFO, because LIFO accounts for gains attained through the sale of shares during the class period when share prices were inflated, while FIFO does not. *See, e.g.*, *Johnson*, 236 F.R.D. at 352; *In re Pfizer*, 233 F.R.D. 334, 337 n. 3 (S.D.N.Y.2005); *In re eSpeed*, 232 F.R.D. at 102. However, this case does not present a choice between the LIFO and FIFO accounting methods, because simply offsetting the $5,500 profit from the August 20 sale against Bill Chen's class period losses accounts for any gain accruing to Bill Chen from the alleged inflation of share prices at the time of that sale. Thus applying LIFO is not necessary to account for Bill Chen's gain from the August 20 sale. Put another way, the gain accruing to Bill Chen from his August 20 sale, including any portion of the gain

resulting from inflation, can be accounted for by comparing the price at which the shares were sold with the price for which they were purchased-the actual, specifically identifiable cost basis for the sale-and offsetting the difference against Bill Chen's class period losses. The movants' arguments with respect to LIFO and FIFO are therefore immaterial.[FN5]

> FN5. There is no dispute with respect to the calculation of gains and losses throughout the rest of the class period. The only dispute is how best to account for the proceeds from the August 20 sale. Indeed, Bill Chen points out that applying either LIFO or FIFO to the purchases and sales during the class period results in a net loss of $59,636.59, providing that the initial sales proceeds of $86,500 are treated as a net gain of only $5,500. (*See* Mar. 13, 2009 Rudman Aff. Exs. B & C.)

For the foregoing reasons, Bill Chen has a greater financial interest in the litigation than Lee Chen, and he is therefore the plaintiff with the greatest financial interest in the litigation.[FN6]

> FN6. Bill Chen and Lee Chen are the only two plaintiffs seeking appointment as lead plaintiff.

Because Bill Chen is the plaintiff with the greatest financial interest in the litigation, he is entitled to a presumption in favor of his appointment as lead plaintiff if he otherwise satisfies the requirements of Federal Rule 23. The specific provisions of Rule 23 that apply to the appropriateness of an individual class representative are that "the claims or defenses of the representative parties are typical of the claims or defenses of the class; and ... the representative parties will fairly and adequately protect the interests of the class."Fed.R.Civ.P. 23(a)(3) & (4); *see also Jolly Roger Offshore Fund Ltd. v. BKF Capital Group, Inc.*, No. 07 Civ. 3923, 2007 WL 2363610, at *4 (S.D .N.Y. Aug. 16, 2007)."The typicality requirement is satisfied where a plaintiff has suffered the same injuries as other class members as a result of the same conduct by defendants and has claims based on the same legal issues. In considering the adequacy of a proposed lead plaintiff, a court must consider whether: (1) the lead plaintiff's claims conflict with those of the class; and (2) class counsel is qualified, experienced, and generally able to conduct the litigation." *In re SLM Corp. Sec. Litig.*, No. 08 Civ. 1029, 2009 WL 969934, at *3 (S.D.N.Y. Apr. 1, 2009) (internal citation omitted). At the lead plaintiff stage of the litigation, in contrast to the class certification stage, a lead plaintiff movant need only make a "preliminary showing that it satisfies the typicality and adequacy requirements of [Rule 23]."*Id.*(internal quotation marks omitted); *see also Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F.Supp.2d 388, 397 (S.D.N.Y.2008); *Jolly Roger*, 2007 WL 2363610, at *4 ("In fact, a wide ranging analysis under Rule 23 is not appropriate at this initial stage of the litigation and should be left for consideration of a motion for class certification.") (internal quotation marks and alterations omitted).*Cf. In re Initial Pub. Offerings Sec. Litig .*, 471 F.3d 24, 41 (2d Cir.2006) ("[A] district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met ... such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement ...."). The defendants may of course challenge at the class certification stage whether each of the requirements of Rule 23 has been established.

***5** Bill Chen satisfies the typicality and adequacy requirements of Federal Rule 23. Lee Chen makes no argument that Bill Chen's claim is not typical of the class, and such an argument would have no basis. With respect to adequacy, although Lee Chen's argument that Bill Chen experienced a financial gain could be construed as an argument that Bill Chen lacks an interest in prosecuting the litigation, that argument is without merit for the reasons already discussed. There is no allegation or reason to believe that Bill Chen's claims conflict with those of other class members. Moreover, Bill Chen's choice of counsel-the law firm Coughlin Stoia Geller Rudman & Robbins LLP ("Coughlin Stoia")-is qualified to prosecute this action. (*See* February 2, 2009 Rosenfeld Aff. Ex. D.) Therefore, Bill Chen satisfies the requirements of Federal Rule 23.

Because Bill Chen has the greatest financial interest in the litigation and otherwise satisfies the requirements of Federal Rule 23, he is entitled to a presumption in favor of his appointment as lead plaintiff.

Lee Chen attempts to rebut this presumption by arguing that Bill Chen is subject to a unique defense on the basis of his "in-and-out" trading during the class

period. According to Lee Chen, Bill Chen bought and sold JA Solar stock during the class period, subjecting him to a unique defense regarding loss causation and thereby rendering him unsuitable to serve as lead plaintiff.

Lee Chen's effort to rebut the presumption in favor of Bill Chen is unavailing. First, any defense disputing loss causation on the basis of "in-and-out" trading would not be unique to Bill Chen, because Lee Chen, by his own admission, also engaged in such trading during the class period. *Cf.* *Montoya v. Mamma.com, Inc.*, No. 05 Civ. 2313, 2005 WL 1278097, at *2 (S.D.N.Y. May 31, 2005) ("[I]n-and-out purchasers do not appear to be unique and, thus, render such plaintiff incapable of adequately representing the class ....") (internal quotation marks omitted). Lee Chen attempts to distinguish Bill Chen's trading from his own by arguing that Bill Chen traded more often. However, Lee Chen fails to support this distinction with any authority and Lee Chen had three substantial sales of JA Solar stock during the class period. (*See* Feb. 2, 2009 Brualdi Decl. Ex. 3.)

In any event, selling shares during the class period does not disqualify a class member from being appointed lead plaintiff. *See, e.g.*, *Freudenberg v. E*Trade Fin. Corp.*, No. 07 Civ. 8538, 2008 WL 2876373, at *7 (S.D.N.Y. July 16, 2008); *Montoya*, 2005 WL 1278097, at *2 (declining to find in-and-out trading disqualifying based on possibility of loss causation defense where putative lead plaintiff acquired "substantial portion" of securities during class period and sold "substantial portion" after class period).[FN7]

FN7. Lee Chen admits that Bill Chen purchased more shares than he sold during the class period.

For these reasons, Lee Chen's argument that Bill Chen should not be appointed lead plaintiff because he is subject to a unique defense lacks merit. Bill Chen should therefore be appointed lead plaintiff of this consolidated action.

***6** Bill Chen also moves for approval of Coughlin Stoia as lead counsel to the class. As noted above, Coughlin Stoia is qualified to prosecute this litigation. Therefore, Coughlin Stoia should be approved as lead class counsel.[FN8] *Cf.* *In re Bausch & Lomb Inc. Sec. Litig.*, 244 F.R.D. 169, 175-76 (W.D.N.Y.2006) (collecting cases).

FN8. Because the Court is appointing Bill Chen as lead plaintiff and Coughlin Stoia as lead class counsel, it is unnecessary to address Bill Chen's argument that Lee Chen's chosen counsel is not qualified to serve as lead class counsel.

CONCLUSION

For all of the foregoing reasons, class actions Nos. 08 Civ. 10475 and 08 Civ. 11366 are consolidated. Bill Chen's motion for appointment as lead plaintiff and approval of lead plaintiff's selection of counsel is **granted.**Lee Chen's motion for appointment as lead plaintiff and approval of lead plaintiff's selection of counsel is **denied.**This consolidated action shall proceed with Bill Chen as the lead plaintiff and Coughlin Stoia as lead class counsel. The Clerk is directed to close Docket Nos. 3, 6, 9, and 29 in 08 Civ. 10475, and Docket Nos. 3 and 6 in 08 Civ. 11366.

SO ORDERED.

S.D.N.Y.,2009.
Ellenburg v. JA Solar Holdings Co. Ltd.
Slip Copy, 2009 WL 1033362 (S.D.N.Y.), Fed. Sec. L. Rep. P 95,211

END OF DOCUMENT

TAB 4

United States District Court,
N.D. Illinois, Eastern Division.
Margaret K. HILL, Trustee of Kelk Irrevocable Trust, on behalf of herself and all others similarly situated, Plaintiff,
v.
THE TRIBUNE COMPANY, Dennis J. Fitzsimons, Donald C. Grenesko, and Jack Fuller, Defendants.
Lawrence HOLLIE, individually and on behalf of all others similarly situated, Plaintiff,
v.
THE TRIBUNE COMPANY, Dennis J. Fitzsimons, Donald C. Grenesko, and Jack Fuller, Defendants.
Michael J. O'ROURKE, individually and on behalf of all others similarly situated, Plaintiff,
v.
THE TRIBUNE COMPANY, Dennis J. Fitzsimons, Donald C. Grenesko, and Jack Fuller, Defendants.
Thomas F. MURRAY, individually and on behalf of a class of similarly situated Plan participants, Plaintiff,
v.
THE TRIBUNE COMPANY, Dennis J. Fitzsimons, John W. Madigan, Donald C. Grenesko, Chandler Bigelow, David J. Granat, Tribune Company Employees Benefits Committee, Gerald W. Agema, Jeffrey Chandler, John Does 1-30, Fidelity Management Trust Company, Roger Goodan, Mark M. Harris, Enrique Hernandez, Betsy Holden, Brigid E. Kenney, Thomas D. Leach, Luis E. Lewin, Robert Morrison, Ruthellyn Muslin, William Osborn, J. Christopher Reyes, Irene M.F. Sewell, William Stinehart, Dudley Taft, Kathryn Turner, Vanguard Fiduciary Trust Company and Miles D. White, Defendants.
Chad BOYLAN, individually and on behalf of all others similarly situated, Plaintiff,
v.
THE TRIBUNE COMPANY, Dennis J. Fitzsimons, John W. Madigan, Donald C. Grenesko, Chandler Bigelow, David J. Granat, Jeffrey Chandler, Roger Goodan, Enrique Hernandez, Jr., Betsy D. Holden, Robert S. Morrison, William A. Osborn, William Stinehart, Jr., Dudley S. Taft, Kathryn C. Turner, Jack Fuller, Patrick G. Ryan, Tribune Company Employees Benefits Committee, John Does 1-30, Defendants.
Ross M. MCCAULEY, Plaintiff,
v.
THE TRIBUNE COMPANY, Tribune Company Employee Benefits Committee, Donald G. Grenesko, Chandler Bigelow, Jeffrey Chandler, Dennis J. Fitzsimmons, Roger Goodman, Enrique Hernandez, Jr., Betsy J. Holden, John W. Madigan, Robert S. Morrison, William A. Osborn, Christopher J. Reyes, William Stinehart, Jr., Dudley S. Taft, Kathryn C. Turner, John Does 1-30, Gerald W. Agema, Fidelity Management Trust Company, Mark M. Harris, Brigid E. Kenney, Thomas D. Leach, Luis E. Lewin, Ruthellyn Musil, Irene M.F. Sewell, Vanguard Fiduciary Trust Company, and Miles D. White, Defendants.
Kenneth PUGH, individually and behalf of himself and a class of persons similarly situated, Plaintiff,
v.
THE TRIBUNE COMPANY, Dennis J. Fitzsimmons, Donald C. Grenesko, Tribune Company Employee Benefits Committee, Chandler Bigelow, John Does 1-30, and Richard Roes 1-30, Defendants.
Anthony BURDELAS, on behalf of himself and all others similarly situated, Plaintiff,
v.
THE TRIBUNE COMPANY, Tribune Employee Benefits Committee, Donald G. Grenesko, Chandler Bigelow, Jeffrey Chandler, Dennis J. Fitzsimons, Roger Goodan, Enrique Hernandez, Jr., Betsy J. Holden, John W. Madigan, Robert S. Morrison, William A. Osborn, J. Christopher Reyes, William Stinehart, Jr., Dudley S. Taft, Katherine C. Turner, John Does 1-30, Defendants.
No. 05 C 2602, 05 C 2640, 05 C 2684, 05 C 2927, 05 C 3374, 05 C 3377, 05 C 3390, 05 C 3928.

Oct. 13, 2005.

Patrick Vincent Dahlstrom, Pomerantz Haudek Block Grossman & Gross LLP, Chicago, IL, Lead Attorney, Attorney to be Noticed, for City of Philadelphia Board of Pensions and Retirement, (proposed).

Marvin L Frank, Murray, Frank & Sailer LLP, New York, NY, Attorney to be Noticed, for Margaret K Hill, (Plaintiff).

Benny C. Goodman, III, Lerach Coughlin Stoia Geller Rudman & Robbins, San Diego, CA, for Mar-

garet K Hill, (Plaintiff).

David F. Graham, Sidley Austin Brown & Wood LLP, Chicago, IL, Lead Attorney, Attorney to be Noticed, for Tribune Company, (Defendant).

Leigh Robbin Handelman, Pomerantz Haudek Block Grossman & Gross LLP, Chicago, IL, Lead Attorney, Attorney to be Noticed, for City of Philadelphia Board of Pensions and Retirement, (proposed).

Christopher S. Hinton, Murray, Frank & Sailer LLP, New York, NY, for Deka Investment GmbH, (Movant).

Leigh R. Lasky, Lasky & Rifkind, Ltd., Chicago, IL, Attorney to be Noticed, for Margaret K Hill, (Plaintiff).

Adam J. Levitt, Wolf, Haldenstein, Adler, Freeman & Herz LLC, Chicago, IL, Attorney to be Noticed, for Deka Investment GmbH, (Movant).

Lawrence D. McCabe, Murray, Frank & Sailer LLP, New York, NY, for Margaret K Hill, (Plaintiff).

Brian Murray, Murray, Frank & Sailer LLP, New York, NY, Lead Attorney, Attorney to be Noticed, for Deka Investment GmbH, (Movant).

Amelia Susan Newton, Lasky & Rifkind, Ltd., Chicago, IL, for Margaret K Hill, (Plaintiff).

Kyle David Rettberg, Sidley Austin Brown & Wood LLP, Chicago, IL, Attorney to be Noticed, for Tribune Company, (Defendant).

Norman Rifkind, Lasky & Rifkind, Ltd., Chicago, IL, Lead Attorney, Attorney to be Noticed, for Margaret K Hill, (Plaintiff).

Douglas M Risen, Berger & Montaque, P.C., Philadelphia, PA, for City of Philadelphia Board of Pensions and Retirement, (proposed).

Henry Rosen, Lerach Coughlin Stoia Geller Rudman & Robbins, San Diego, CA, Attorney to be Noticed, for Margaret K Hill, (Plaintiff).

Sherrie R. Savett, Berger & Montaque, P.C., Philadelphia, PA, Lead Attorney, Attorney to be Noticed, for City of Philadelphia Board of Pensions and Retirement, (proposed).

MEMORANDUM OPINION AND ORDER

HART, J.

***1** Before the court are eight cases that fall into two categories. All the cases involve investments in Tribune Company stock. Overstatements regarding the circulation of certain newspapers owned by the Tribune Company and a drop in share prices following disclosure of the overstatements of circulation are alleged. Three cases [FN1] are brought on behalf of a putative class of persons who purchased Tribune Company stock between January 24, 2002 and July 15, 2004. These cases allege violations of federal securities law and are governed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Five cases [FN2] are brought on behalf of participants in two Tribune Company pension plans who held Tribune Company shares in their accounts during the pertinent time period.[FN3]These cases allege that certain Tribune Company officials who had knowledge of the overstated circulations were also fiduciaries of the pension plans. The defendants allegedly breached their fiduciary duties in violation of the Employee Retirement Income Security Act of 1974 ("ERISA").

FN1. The three cases are *Hill v. Tribune Co.,* No. 05 C 2602 (N.D.Ill.); *Hollie v. Tribune Co.,* No. 05 C 2640 (N.D.Ill.); and *O'Rourke v. Tribune Co.,* No. 05 C 2684 (N.D.Ill.). Collectively, these cases will be referred to as the "Securities Cases."

FN2. The five cases are *Murray v. Tribune Co.,* No. 05 C 2927 (N.D.Ill.); *Boylan v. Tribune Co.,* No. 05 C 3374 (N.D.Ill.); *McCauley v. Tribune Co.,* No. 05 C 3377 (N.D.Ill.); *Pugh v. Tribune Co.,* No. 05 C 3390 (N.D.Ill.); and *Burdelas v. Tribune Co.,* No. 05 C 3928 (N.D.Ill.). Collectively, these cases will be referred to as the "ERISA Cases."

FN3. The complaints propose various class periods.

Before the court are motions to consolidate each of the two sets of cases and appoint lead plaintiffs and lead counsel. The motions in the Securities Cases are pursuant to provisions of the PSLRA. The motions in the ERISA cases are pursuant to Fed.R.Civ.P. 42 and 23(g). As to each set of cases, the parties agree that the cases should be consolidated and that lead plaintiffs/counsel should be appointed. All parties also agree that the two types of cases, Securities and ERISA Cases, should be separately consolidated, though with coordinated discovery. The disagreement concerns who should be appointed as lead plaintiffs and counsel. As to each set of cases, there are two competing plaintiffs/counsel.[FN4]

> FN4. The ERISA Cases were reassigned to this bench with the motions for appointment of lead plaintiffs/counsel already fully briefed. The Securities Cases briefing schedule on the motions did not provide for replies. After the answer briefs were filed, two letters from counsel were sent to the court. One of those letters indicated a desire to file a reply brief and the other letter was a response to the first letter. A secretary skimmed the first two paragraphs of each letter in order to generally determine its subject matter and then returned each to the sender with a note that any communication with the court should be by motion or other appropriate pleading. The letters were not reviewed by the court. Also, telephone calls were received by chambers staff indicating that one or more parties would be moving to file a reply brief. Although motions by letter and telephone obviously are not considered, the court would not begin working on the pending motions only to receive additional briefs midstream. The court delayed considering the pending motions until it appeared that no further motions to file additional briefs would be filed. The attorneys involved in these cases are admonished that, other then oral statements at court hearings, communication with the court shall be limited to written motions and other appropriate written pleadings. Letters to a judge are an inappropriate form of communication and telephonic communications with the judge's staff are to be limited to telephone calls to the minute clerk (courtroom deputy) regarding scheduling or simple procedural issues not covered by the Federal Rules of Civil Procedure or the Northern District of Illinois Local Rules. For additional information concerning court practices, see the Northern District of Illinois website: http://www.ilnd.uscourts.gov/JUDGE/HART/wthpage.htm.

The Securities Cases will be considered first. Since the cases all concern the same subject matter and essentially the same claims, the motion to consolidate will be granted. All the cases except the *Hill* case (05 C 2602), which is the lowest numbered case, will be dismissed without prejudice and lead plaintiffs will be required to file a consolidated class action complaint in 05 C 2602. All further filings will be made in 05 C 2602.

Following the filing of the first Securities Case, the notice required by 15 U.S.C. § 78u-4(a)(3)(A) was timely issued. Initially, three sets of plaintiffs/counsel moved for appointment. Two of the sets subsequently combined together in a single motion. There are two sets of plaintiffs/counsel presently seeking appointment. The court must determine which lead plaintiffs are "most capable of adequately representing the interests of class members."*Id.* § 78u-4(a)(3)(B)(i). As to any plaintiffs who have filed a complaint or responded to the required notice and who otherwise satisfied the requirements of Fed.R.Civ.P. 23, it is rebuttably presumed that the most adequate plaintiff is the one with "the largest financial interest in the relief sought by the class."*Id.* § 78u-4(a)(3)(B)(iii)(I). This presumption may only be overcome by proof that the presumptively most adequate plaintiff:

***2** (aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

Id. § 78u-4(a)(3)(B)(iii)(II).

The PSLRA also provides:

For purposes of this subparagraph, discovery relating

to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

Id. § 78u-4(a)(3)(B)(iv).

One group that seeks to be appointed lead plaintiffs includes Deka Investment GmbH ("Deka Funds"), which manages and controls seven mutual funds that purchased Tribune Company stock during the pertinent time period. Deka Funds seeks to be co-lead plaintiff along with Livonia Employees' Retirement System ("Livonia"). Jointly, they refer to themselves as the "Institutional Investor Group." They propose the law firms of Murray, Frank & Sailer LLP and Lerach Couglin Stoia Geller Rudman & Robbins LLP as co-lead counsel, with the law firm of Lasky & Rifind, Ltd. as liaison counsel. The other plaintiff seeking appointment as lead plaintiff is the City of Philadelphia Board of Pensions and Retirement ("CPBPR"). CPBPR proposes the law firms of Pomerantz Haudek Block Grossman & Gross LLP and Berger & Montague, P.C. as co-lead counsel.

The first issue to decide is which proposed lead plaintiff has the largest financial interest. During the proposed class period, CPBPR and Deka Funds both bought and sold Tribune Company shares. Livonia only purchased shares. Initially, each party calculated its losses during the class period using a first-in-first-out ("FIFO") methodology. Under that methodology, CPBPR had a $310,600.00 loss, Livonia had a $101,000 loss, and Deka Funds had a $3,646,545 loss. In its answer to the other movants, CPBPR argued that it is more appropriate to use a last-in-last-out ("LIFO") methodology. Use of that methodology would not affect the calculation of Livonia's losses since it did not have any sales during the class period. Using LIFO methodology reduces CPBPR's losses to $289,957, which would still be larger than Livonia. As to Deka Funds, during the class period, it sold more shares than it purchased. As a net seller of Tribune Company shares, it may be viewed as gaining from the alleged overvaluation of shares during the class period.

The PSLRA does not specify how the "largest financial interest" that is the basis of the § 78u-4(a)(3)(B)(iii)(I) presumption is to be calculated. The current majority view, however, apparently is that securities fraud losses should be calculated using LIFO. *In re eSpeed, Inc. Securities Litigation,* 2005 WL 1653933 *4 (S.D.N.Y. July 13, 2005). LIFO is also often used in determining the largest financial interest for purposes of the PSLRA lead plaintiff presumption. *Id.* A leading proponent of using that methodology is Judge Shadur of this court. *SeeIn re Comdisco Securities Litigation,* 2004 WL 905938 (N.D. Ill. April 26, 2004); *In re Comdisco Securities Litigation,* 150 F.Supp.2d 943, 945-46 (N.D.Ill.2001). Under that methodology, a potential lead plaintiff which, during the class period, was a net seller of the pertinent stock generally has a net gain and therefore generally will not have the largest financial interest in the litigation. *Seeid.;In re Critical Path, Inc. Securities Litigation,* 156 F.Supp.2d 1102, 1108 (N.D.Cal.2001); *In re Goodyear Tire & Rubber Co. Securities Litigation,* 2004 WL 3314943 *4 (N.D.Ohio May 12, 2004); *In re McKesson HBOC, Inc. Securities Litigation,* 97 F.Supp.2d 993, 996-97 (N.D.Cal.1999).*See alsoAndrada v. Atherogenics, Inc.,* 2005 WL 912359 *4 (S.D.N.Y. April 19, 2005); *In re Cardinal Health, Inc. Securities Litigation,* 226 F.R.D. 298, 308 (S.D.Ohio 2005).

***3** Because Deka Funds was a net seller of Tribune Company shares, its financial interest in the litigation is not as large as CPBPR's nor are the combined interests of Livonia and Deka Funds as large as CPBPR's interest. CPBPR is the presumptive lead plaintiff.[FN5]There is no contention that CPBPR is an inadequate representative nor that it has any unique defenses. The court's independent examination of CPBPR's submission also reveals no deficiencies with CPBPR nor the proposed lead counsel. CPBPR and its counsel will be appointed lead plaintiff/counsel for the Securities Cases and will be required to file a consolidated amended class action complaint in 05 C 2602.

FN5. Since CPBPR is the presumptive lead plaintiff, it is unnecessary to consider CPBPR's contentions that Deka Funds has not provided an adequate certification, would not be an adequate representative, and would have unique defenses. Also, CPBPR's motion regarding discovery as to Deka Funds' qualifications and its motion to file a reply in support of that motion are

rendered moot.

The ERISA cases do not contain claims for violation of federal securities laws. The PSLRA provisions regarding appointment of lead plaintiff and lead counsel are not applicable to the ERISA cases. Instead, appointment of counsel in the ERISA cases is governed by Fed.R.Civ.P. 23. Although both sets of moving parties also seek appointment of lead plaintiffs, they cite no statute, rule, or case law requiring or permitting such an appointment. There is no express provision in Rule 23 regarding the appointment of a lead plaintiff. The only possible authority for such an appointment would be Rule 23(d)'s general provisions permitting a court to make certain orders appropriate for class actions. When time comes to rule on class certification, the court will have to determine whether a named plaintiff is an adequate representative, *see*Fed.R.Civ.P. 23(a)(4), 23(c), but that is not the same as appointing a lead plaintiff. *In re Initial Public Offering Securities Litigation,* 214 F.R.D. 117, 123 (S.D.N.Y.2002); *Greater Pa. Carpenters Pension Fund v. Whitehall Jewellers, Inc.,* 2005 WL 61480 *7 (N.D.Ill. Jan. 10, 2005). Moreover, the PSLRA presumes a lead plaintiff who is involved in and takes a critical role in managing the litigation. The lead plaintiff provision of the PSLRA is designed to contribute to the litigation being investor-driven instead of lawyer-driven. *Initial Public Offering,* 214 F.R.D. at 123. Rule 23 is different. It provides that class counsel "must fairly and adequately represent the interests of the class," not the named or lead plaintiff. Fed.R.Civ.P. 23(g)(1)(B). Class counsel's primary obligation is to the interests of the class and not any conflicting interests of the named plaintiff who may have been the initial client. *See* Advisory Committee Notes to the 2003 Amendments to Rule 23. At this time, the primary issue for the court is who should be appointed interim class counsel.

Rule 23(g) provides criteria to consider when appointing class counsel. No distinction is made regarding appointing interim counsel.

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,

***4** • 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.

Fed.R.Civ.P. 23(g)(1)(C).

There are two competing groups for appointment as interim class counsel in the ERISA cases. One group, which represents Pugh and Boylan as plaintiffs, consists of the law firms of Stull, Stull & Brody and Scott & Scott as co-lead counsel and Robert D. Allison & Associates as liaison counsel (the "Stull Group"). The other group, which represents Murray and McCauley as plaintiffs, consists of the law firms of Lowey Dannenberg Bemporad & Selinger, P.C. and Schatz & Nobel, P.C. as co-lead counsel and Susman, Watkins & Wylie, LLP as liaison counsel (the "Lowey Group"). All parties agree that the cases are appropriate for consolidation. Since the cases all concern the same subject matter and essentially the same claims, the motion to consolidate will be granted. All the cases except the *Murray* case (No. 05 C 2927), which is the lowest numbered case, will be dismissed without prejudice and interim counsel will be required to file a consolidated class action complaint in No. 05 C 2927. All further filings will be made in 05 C 2927.

Although the two groups make competing contentions regarding their skills, resources, and time already devoted to the case, both appear to be experienced litigators with the skills and resources neces-

sary to handle the present type of litigation. The Lowey Group contends it began its investigation earlier and has devoted more time to the case. Any differences as to who investigated the claims first is only a difference of weeks. The differences are not significant. The Lowey Group has not provided any convincing evidence that, compared to the Stull Group, it has already devoted substantially more time to identifying and investigating potential claims. The Lowey Group also contends it stands out because it has counsel in Chicago and also counsel in New York, where some of the pertinent newspapers are located. In both groups, however, liaison counsel (not lead counsel) are located in Chicago. Both groups also have one lead counsel law firm located in New York. The Stull Group contends it has more resources presently available because it recently completed work on another class action. While that may be given some weight, it appears that the Lowey Group also has adequate resources. Significantly, neither group makes any representation as to the level of attorney fees it intends to request. Neither group attempted to distinguish itself by indicating it would seek a lower amount of attorney fees out of any award to the putative class.[FN6]

> FN6. Any subsequent motion for class certification shall include information regarding any then-existing agreement concerning attorney fees and the nature of any potential fee request, and shall address the question of whether a class certification order should contain any provisions regarding attorney fees.

***5** While it is a close question as to which group to appoint, it appears that the Stull Group has more experience and possibly greater resources. The Stull Group, in the structure proposed, will be appointed interim counsel. They shall file a consolidated amended class action complaint in 05 C 2927. Since they were already clients of these law firms, the amended complaint may name Pugh and Boylan as named plaintiffs. However, to the extent that it may be determined that one or both would not be adequate plaintiffs for a class action, counsel may move to add or substitute other named plaintiffs.

IT IS THEREFORE ORDERED that:

(1) Cases 05 C 2640, 05 C 2684, 05 C 3374, 05 C 3377, 05 C 3390, and 05 C 3928 are dismissed without prejudice.

(2) In case 05 C 2602:

(a) Defendants' agreed motion and plaintiff Livonia Employee Retirement System's motions for consolidation [5, 17] are granted.

(b) Plaintiff City of Philadelphia Board of Pension and Retirement's motion for appointment as lead plaintiff and for approval of lead counsel [10] is granted in part and denied in part.

(c) Plaintiffs Deka Investment GmbH's and Livonia Employee Retirement System's motions for appointment as lead plaintiff and for approval of lead counsel [14, 17] are denied.

(d) Plaintiff City of Philadelphia Board of Pension and Retirement's motions for discovery [27] and for leave to file a reply [42] are denied without prejudice as moot.

(e) Plaintiff City of Philadelphia Board of Pension and Retirement is appointed lead plaintiff in this case. The law firms of Pomerantz Haudek Block Grossman & Gross LLP and Berger & Montague, P.C. are appointed co-lead counsel in this case.

(f) By October 28, 2005, lead plaintiff shall file an amended consolidated class action complaint. By November 14, 2005, defendants shall answer or otherwise plead to the amended consolidated class action complaint. Any motion shall be supported by a brief.

(3) In case 05 C 2927:

(a) Plaintiffs' motions for consolidation [21, 24] are granted.

(b) Plaintiffs Murray's and McCauley's motion for appointment of lead plaintiff and establishment of leadership structure [21] is denied.

(c) Plaintiffs Pugh's and Boylan's motion for appointment of co-lead plaintiffs, co-lead counsel, and liaison counsel [24] is granted in part and denied in part.

(d) The law firms of Stull, Stull & Brody and Scott & Scott are appointed interim co-lead class counsel and the law firm of Robert D. Allison & Associates is appointed interim liaison counsel.

(e) By October 28, 2005, interim counsel shall file an amended consolidated class action complaint. By November 14, 2005, defendants shall answer or otherwise plead to the amended consolidated class action complaint. Any motion shall be supported by a brief.

(4) Discovery in cases 05 C 2602 and 05 C 2927 is to be coordinated. Discovery taken or produced by any party may be used in either case. Until further order, any pleading or motion, regardless of whether it arguably pertains to only one of the cases, shall be served on the parties in both cases. Joint status hearings will be held for both cases. A status hearing will be held on November 30, 2005 at 11:00 a.m.

N.D.Ill.,2005.
Hill v. The Tribune Co.
Not Reported in F.Supp.2d, 2005 WL 3299144 (N.D.Ill.), Fed. Sec. L. Rep. P 93,560

END OF DOCUMENT

TAB 5

LEXSEE 2006 U.S. DIST. LEXIS 87231

IN RE NPS PHARMACEUTICALS, INC. SECURITIES LITIGATION

Case No. 2:06-cv-00570-PGC-PMW

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

2006 U.S. Dist. LEXIS 87231

November 17, 2006, Decided

SUBSEQUENT HISTORY: Motion denied by *In re NPS Pharms., Inc., 2007 U.S. Dist. LEXIS 48713 (D. Utah, July 3, 2007)*

COUNSEL: [*1] For Brian Roffe, on Behalf of Himself and All Others Similarly Situated, Plaintiff: Daniel Drosman, LEAD ATTORNEY, LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS (SAN DIEGO), SAN DIEGO, CA; David A. Rosenfeld, LEAD ATTORNEY, Mario Alba, Jr., LEAD ATTORNEY, Samuel H. Rudman, LEAD ATTORNEY, LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS (NY), MELVILLE, NY US; Jack G. Fruchter, LEAD ATTORNEY, Jeffrey S. Abraham, LEAD ATTORNEY, ABRAHAM FRUCHTER & TWERSKY LLP, NEW YORK CITY, NY US; Scott A. Call, LEAD ATTORNEY, ANDERSON & KARRENBERG, SALT LAKE CITY, UT.

For PHARMA/wHEALTH Management, Plaintiff: Jefferson W. Gross, LEAD ATTORNEY, Richard D Burbidge, LEAD ATTORNEY, Robert J. Shelby, BURBIDGE & MITCHELL, SALT LAKE CITY, UT; Lauren S. Antonino, LEAD ATTORNEY, MOTLEY RICE LLC, ATLANTA, GA US.

For Richard Baird, Individually and on Behalf of All Others Similarly Situated, Consol Plaintiff: A. John Pate, LEAD ATTORNEY, Gary D. E. Pierce, LEAD ATTORNEY, PATE PIERCE & BAIRD, PARKSIDE TOWER, SALT LAKE CITY, UT; Marc A. Topaz, LEAD ATTORNEY, Richard A. Maniskas, LEAD ATTORNEY, Alison K. Clark, SCHIFFRIN & BARROWAY (RADNOR), RADNOR, PA; Sean M. Handler, LEAD ATTORNEY, Stuart L. Berman, LEAD [*2] ATTORNEY, SCHIFFRIN & BARROWAY LLP, RADNOR, PA US.

For Audie Leventhal, Individually and on Behalf of All Others Similarly Situated, Consol Plaintiff: Scott A. Call, LEAD ATTORNEY, ANDERSON & KARRENBERG, SALT LAKE CITY, UT; Daniel Drosman, LEAD ATTORNEY, LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS (SAN DIEGO), SAN DIEGO, CA.

For Rudolf Skubella, on behalf of himself and all others similarly situated, Consol Plaintiff: Arthur L. Shingler, III, LEAD ATTORNEY, SCOTT & SCOTT LLC, SAN DIEGO, CA US; David R. Scott, LEAD ATTORNEY, SCOTT & SCOTT, COLCHESTER, CT US; Gary A Dodge, LEAD ATTORNEY, Mark F James, LEAD ATTORNEY, HATCH JAMES & DODGE, SALT LAKE CITY, UT.

For Steven McCormick, On behalf of himself and all others similarly situated, Consol Plaintiff: Blake D. Miller, LEAD ATTORNEY, Joel T. Zenger, LEAD ATTORNEY, MILLER GUYMON PC, SALT LAKE CITY, UT.

For NPS Pharmaceutical, N. Anthony Coles, Morgan R. Brown, Juergen Lasowski, Gerard J. Michel, Defendants: Michele F. Kyrouz, LEAD ATTORNEY, LATHAM & WATKINS LLP, SAN FRANCISCO, CA US; Paul H. Dawes, LEAD ATTORNEY, LATHAM & WATKINS (SF), SAN FRANCISCO, CA; Peter T. Snow, LEAD ATTORNEY, LATHAM & WATKINS LLP, MENLO PARK, [*3] CA US; Kent O. Roche, Raymond J. Etcheverry, PARSONS BEHLE & LATIMER, SALT LAKE CITY, UT.

For Hunter Jackson, Alan Rauch, Thomas Marriott, Consol Defendants: Kent O. Roche, Raymond J. Etcheverry,

PARSONS BEHLE & LATIMER, SALT LAKE CITY, UT; Michele F. Kyrouz, LEAD ATTORNEY, LATHAM & WATKINS LLP, SAN FRANCISCO, CA US; Paul H. Dawes, LEAD ATTORNEY, LATHAM & WATKINS (SF), SAN FRANCISCO, CA; Peter T. Snow, LEAD ATTORNEY, LATHAM & WATKINS LLP, MENLO PARK, CA US.

For Robert Rains, John Williams, Interested Partys: Sean M. Handler, LEAD ATTORNEY, Stuart L. Berman, LEAD ATTORNEY, SCHIFFRIN & BARROWAY LLP, RADNOR, PA US; A. John Pate, LEAD ATTORNEY, Gary D. E. Pierce, LEAD ATTORNEY, PATE PIERCE & BAIRD, PARKSIDE TOWER, SALT LAKE CITY, UT; Marc A. Topaz, LEAD ATTORNEY, SCHIFFRIN & BARROWAY (RADNOR), RADNOR, PA.

For Randhir Singh Judge, Interested Party: Arthur L. Shingler, III, LEAD ATTORNEY, SCOTT & SCOTT LLC, SAN DIEGO, CA US; David R. Scott, LEAD ATTORNEY, SCOTT & SCOTT, COLCHESTER, CT US; Gary A Dodge, LEAD ATTORNEY, Mark F James, LEAD ATTORNEY, HATCH JAMES & DODGE, SALT LAKE CITY, UT.

JUDGES: Paul M. Warner, United States Magistrate Judge.

OPINION BY: PAUL M. WARNER

OPINION

MEMORANDUM [*4] **DECISION AND ORDER APPOINTING LEAD PLAINTIFF AND APPROVING LEAD PLAINTIFF'S SELECTION OF COUNSEL**

This matter was referred to Magistrate Judge Paul M. Warner by District Judge Paul G. Cassell pursuant to *28 U.S.C. § 636(b)(1)(A)*. [1] Before the court are three competing motions for appointment as lead plaintiff and for approval of selection of counsel. [2] One motion was brought by Dr. Audie Leventhal, who is represented by the law firms Lerach Coughlin Stoia Geller Rudman & Robbins LLP and Anderson & Karrenberg. [3] Another motion was brought by PHARMA/wHEALTH Management Company S.A. ("PHARMA"), which is represented by the law firms Motley Rice LLC and Burbidge & Mitchell. [4] The final motion was brought by John Williams and Robert Rains (collectively, "Williams & Rains"), who are represented by the law firms Schiffrin & Barroway, LLP and Pate Pierce & Baird, PC. [5]

1 In an order dated September 14, 2006, Judge Cassell consolidated several previously filed actions under the instant case name and case number. *See* docket no. 30.

2 In addition to these three motions, two other motions for appointment as lead plaintiff and for approval of selection of counsel were filed, but both were subsequently withdrawn. *See* docket nos. 34, 37, 45, 48.

[*5]

3 Dr. Leventhal filed the same motion in three separate docket entries. *See* Docket nos. 17, 18, 32. The court's disposition of Dr. Leventhal's motion applies to all three of these entries.

4 Docket no. 21.

5 Docket no. 31.

The court has carefully reviewed the written submissions of the parties. Pursuant to local *rule 7-1(f)*, the court has determined that oral argument would not be helpful or necessary and will rule on the motions on the basis of the written submissions. *See DUCivR 7-1(f)*.

BACKGROUND

This case was brought as a securities class action on behalf of all purchasers of the publicly traded securities of NPS Pharmaceuticals, Inc. ("NPS") during a certain period of time (the "Class Period"). The suit claims that owners of NPS stock during the Class Period suffered losses based on the omissions and misrepresentations of NPS and its officers.

ANALYSIS

I. Rebuttable Presumption for Determining Lead Plaintiff

When considering motions for appointment as lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the [*6] court is required to adopt a rebuttable presumption

> that the most adequate plaintiff . . . 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 [r]ule *23 of the Federal Rules of Civil Procedure*.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa)-(cc). These requirements, as applied to each movant, are addressed below.

A. Complaint or Motion

All three movants satisfy the first requirement to obtain the rebuttable presumption--i.e., all three either filed a complaint or made a motion in response to a published notice.

B. Largest Financial Interest

Concerning the parties' claimed losses, PHARMA asserts that it lost approximately $ 3,000,000; Dr. Leventhal asserts that he lost approximately $ 400,000; and Williams & Rains claim that they lost approximately $ 200,000.

Although PHARMA clearly has the largest claimed financial interest in this case, Dr. Leventhal and Williams & Rains dispute PHARMA's [*7] loss figure, arguing that PHARMA actually made a profit during the Class Period. They also present arguments concerning the merits of the methods employed by the parties in measuring their respective losses--i.e., first in, first out ("FIFO") vs. last in, last out ("LIFO").

These arguments are without merit. In arguing that PHARMA actually made a profit during the Class Period, Dr. Leventhal and Williams & Rains focus exclusively on the stock purchased and sold by PHARMA during the Class Period, without recognizing the stock PHARMA held prior to the commencement of the Class Period. Dr. Leventhal and Williams & Rains show that PHARMA sold more shares than it purchased during the Class Period, and they treat the excess number of shares sold as pure gain to PHARMA. This ignores the economic reality of a stock sale, which requires that the sales price for a share of stock be matched with that share's cost basis, in order to calculate a profit or loss on the sale of that share. As demonstrated by PHARMA's submissions to the court, when this reality is recognized, Dr. Leventhal and Williams & Rains's argument is baseless. In addition, the arguments concerning the use of FIFO versus the [*8] use of LIFO are irrelevant because under the proper application of either method, PHARMA's loss is greater than that of either Dr. Leventhal or Williams & Rains.

For these reasons, PHARMA has the greatest financial interest in the relief sought by the class, thereby satisfying the second requirement to obtain the rebuttable presumption.

C. Requirements of *Rule 23*

Rule 23, which governs class actions, provides that a class action may be maintained

> only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a)(1)-(4). Of these four requirements, only *subsection (3)* ("typicality") and *subsection (4)* ("adequacy") are relevant to the consideration of motions for appointment as lead plaintiff. *See Meyer v. Paradigm Med. Indus., 225 F.R.D. 678, 680 (D. Utah 2004)* ("For the purposes of a motion for appointment [*9] of lead plaintiff under *[r]ule 23,* it is proper to limit a court's inquiry into the final two prongs of *[r]ule 23(a)*, typicality and adequacy. After the selected lead plaintiff moves for class certification, then a court is to engage in a more thorough analysis of the other requirements for class certification." (citations omitted)).

1. Typicality

The typicality requirement is satisfied when

> the "injury and the conduct are sufficiently similar." *Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988)*. Furthermore, a difference in the factual situations of class members per se, does not defeat typicality under *[r]ule 23(a)(3). See id.* This is true as long as the claims of class representatives and other class members are based on the same legal or remedial theory. *See id.*

Meyer, 225 F.R.D. at 680-81. All of the movants in this case satisfy the typicality requirement because, like the other class members, (1) they purchased NPS stock during the Class Period, (2) they allege the purchase price of the stock was inflated due to the omissions and misrepresentations of NPS and its officers, and (3) they all allegedly suffered [*10] damages. *See id. at 681* (citing *In re Ribozyme Pharm. Sec. Litig., 192 F.R.D. 656, 658 (D. Colo. 2000))*. "The claims made by the competing [movants] are typical of those in the rest of the class." *Id.* For these reasons, all of the movants satisfy the typicality requirement of *rule 23(a)(3)*.

2. Adequacy

When analyzing the adequacy requirement, "'[t]he PSLRA directs courts to limit [their] inquiry regarding adequacy to the existence of any conflicts between the interests of the proposed lead plaintiffs and the members of the class.'" *Id.* (quoting *In re Ribozyme, 192 F.R.D. at 659*). The adequacy standard

> is met by fulfilling two requirements. First, there must be an absence of potential conflict between the named plaintiffs and other class members. *See* [*In re Ribozyme, 192 F.R.D. at 659*]. Second, the counsel chosen by the representative party must be "qualified, experienced and able to vigorously conduct the proposed litigation." *Id.*

Meyer, 225 F.R.D. at 681. There is no evidence of a conflict between the named plaintiffs, the competing movants, and the [*11] other class members. In addition, the parties' written submissions demonstrate that each movant has retained qualified and experienced counsel who will be "'able to vigorously conduct the proposed litigation.'" *Id.* (quoting *In re Ribozyme, 192 F.R.D. at 659*). Therefore, all movants satisfy the adequacy requirement of *rule 23(a)(4)*.

Based upon the foregoing, PHARMA is the only movant who has satisfied all of the requirements for obtaining the rebuttable presumption as the most adequate plaintiff under the PSLRA. *See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa)-(cc)*. This notwithstanding, the PSLRA provides the other movants with the ability to rebut this presumption in favor of PHARMA. *See id. § 78u-4(a)(3)(B)(iii)(II)(aa)-(bb)*. Dr. Leventhal has presented arguments to this effect, which will be addressed below.

II. Rebutting the Presumption

Once the rebuttable presumption described in the PSLRA is established, it

> may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff--
>
> > (aa) will not fairly and adequately protect the interests of the class; or
> >
> > (bb) [*12] is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

Id. § 78u-4(3)(B)(iii)(II)(aa)-(bb).

Dr. Leventhal does not argue that PHARMA will not fairly and adequately protect the interests of the class. However, Dr. Leventhal does argue that PHARMA is incapable of adequately representing the class because its status as a foreign investment entity subjects it to unique defenses. Relying on cases from other jurisdictions, *see Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366 (D. Del. 2006)*; *In re Royal Dutch/Shell Transp. Sec. Litig., 380 F. Supp. 2d 509 (D. N.J. 2005)*; *In re Royal Ahold N. V. Sec. & ERISA Litig., 219 F.R.D. 343 (D. Md. 2003)* (mem.), Dr. Leventhal asserts that PHARMA's status as a foreign investment entity could serve as the basis for an attack from the defendants concerning a lack of subject matter jurisdiction. Dr. Leventhal also claims that the res judicata effect of any judgment in favor of PHARMA is uncertain because of its status as a foreign investment entity. As noted by PHARMA in its reply memorandum, these arguments are without merit.

In response [*13] to these arguments, PHARMA correctly notes that the cases relied upon by Dr. Leventhal involved facts not present in this case. Those cases involved foreign defendants and stock traded on foreign markets. *See Blechner, 410 F. Supp. 2d at 371*; *In re Royal Dutch/Shell, 380 F. Supp. 2d at 539-40*; *In re Royal Ahold, 219 F.R.D. at 351*. In this case, NPS is a United States company, and PHARMA purchased its shares on an exchange based in the United States. Consequently, the concerns over subject matter jurisdiction and res judicata raised in the cases cited by Dr. Leventhal are not present in this case. Even the authority cited by Dr. Leventhal makes it clear that the court has subject matter jurisdiction over claims of foreign investors for losses sustained on United States exchanges. *See In re Royal Ahold, 219 F.R.D. at 351*. In addition, it is clear that any potential judgment rendered by the court in favor of PHARMA would be enforceable in the United States against NPS, a United States company.

Based upon the failure of these arguments, the presumption in favor of PHARMA as the most adequate plaintiff has not been rebutted. [*14] Therefore, PHARMA's motion for appointment as lead plaintiff is granted.

III. Selection of Counsel

Pursuant to the PSLRA, the party selected to serve as lead plaintiff "shall, subject to the approval of the

court, select and retain counsel to represent the class." *15 U.S.C. § 78u-4(a)(3)(B)(v)*. PHARMA has selected Motley Rice LLC to serve as lead counsel and Burbidge & Mitchell to serve as liaison counsel. As demonstrated by their submissions to the court, both firms have expertise and experience in the prosecution of shareholder and securities class actions and, as a result, are adequate to represent the interests of the class. *See id.; Meyer, 225 F.R.D. at 684*.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED:**

1. PHARMA's motion for appointment as lead plaintiff and for approval of selection of counsel [6] is **GRANTED.** PHARMA is appointed as lead plaintiff, Motley Rice LLC is appointed as lead counsel, and Burbidge & Mitchell is appointed as liaison counsel.

6 Docket no. 21.

[*15] 2. Dr. Leventhal's motion for appointment as lead plaintiff and for approval of selection of counsel [7] is **DENIED.**

7 Docket nos. 17, 18, 32.

3. Williams & Rains's motion for appointment as lead plaintiff and for approval of selection of counsel [8] is **DENIED.**

8 Docket no. 31.

4. Pursuant to previous orders of the court, [9] all portions of any pending motions relating to consolidation of cases [10] are moot.

9 Docket nos. 30, 40.

10 Docket nos. 18, 31, 32.

DATED this 17th day of November, 2006.

BY THE COURT:

PAUL M. WARNER

United States Magistrate Judge