Mitchell M.Z. Twersky (MT-6739)
Lawrence D. Levit (LL-9507)
ABRAHAM, FRUCHTER & TWERSKY, LLP
One Penn Plaza, Suite 2805
New York, New York 10119
Tel: (212) 279-5050
Fax: (212) 279-3655
Proposed Co-Lead Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, -against- PFIZER INC., HENRY A. McKINNELL, JEFFREY B. KINDLER, FRANK D'AMELIO, DAVID L. SHEDLARZ, ALAN G. LEVIN and IAN C. READ, Defendants.	Civil Action No. 10-cv-03864-AKH JUDGE ALVIN K. HELLERSTEIN ECF Case

MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION OF OKLAHOMA FIREFIGHTERS PENSION AND RETIREMENT SYSTEM AND UNION ASSET MANAGEMENT HOLDING AG FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF THEIR SELECTION OF COUNSEL, AND IN OPPOSITION TO ALL COMPETING MOTIONS

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Oklahoma Firefighters Pension and Retirement System ("Oklahoma Firefighters") and Union Asset Management Holding AG ("Union") respectfully submit this memorandum of law in further support of their motion for appointment as Lead Plaintiff and approval of their selection of Counsel, and in opposition to the competing motions.[1]

I. INTRODUCTION

The lead plaintiff provision of the Private Securities Litigation Reform Act of 1995 ("PLSRA") sets forth a straightforward process for the appointment of lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B). Pursuant to the PSLRA, this Court "shall appoint as lead plaintiff the member or members of the class . . . most capable of adequately representing the interests of class members . . . ." 15 U.S.C. § 78u-4(a)(3)(B)(i). In that regard, the Court is to adopt a presumption that the most adequate plaintiff is the movant with the "largest financial interest" in the relief sought by the class and who also makes a prima facie showing that it is an adequate class representative under Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"). 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

Here, Oklahoma Firefighters and Union are together the presumptive lead plaintiff because they have the largest financial interest in the litigation among all movants and also satisfy the requirements of Rule 23. Moreover, Oklahoma Firefighters and Union have submitted ample evidence that they will work cohesively and communicate effectively to direct counsel and vigorously prosecute this action in the best interests of the class. They already have experience working together as court-appointed lead plaintiff in a pending securities class action. See Minneapolis Firefighters' Relief Ass'n v. Medtronic, Inc., No. 08-6324 (PAM/AJB), 2009

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[1] The two other competing movants are Stichting Philips Pensioenfonds ("Stichting Philips") and the group of Martin Meister, Paul Meister, and Carol Meister (the "Meister Group").

WL 1458234 (D. Minn. May 26, 2009). Competing movants can offer no proof to the contrary. See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). Therefore, and for the reasons set forth herein, Oklahoma Firefighters' and Union's motion to be appointed lead plaintiff should be granted, their selection of lead counsel approved, and all competing motions should be denied.

II. ARGUMENT

A. Oklahoma Firefighters And Union Have The Largest Financial Interest In The Relief Sought By The Class

1. Oklahoma Firefighters and Union Prevail on Each of the Four Factors Used To Determine the Largest Financial Interest

To determine which movant has the largest financial interest in the relief sought by the class, "the Court is to consider: (1) the number of shares purchased during the class period; (2) the number of net shares purchased during the class period (i.e. the number of shares retained during the period); (3) the total net funds expended during the class period; and (4) the approximate loss suffered during the class period." In re Elan Corp. Sec. Litig., No. 1:08-cv-08761-AKH, 2009 WL 1321167, at *1 (S.D.N.Y. May 11, 2009) (Hellerstein, J.) (citations omitted); accord City of Monroe Employees' Ret. Sys. v. Hartford Fin. Servs. Group, Inc., No. 10 Civ. 2835(NRB), 2010 WL 2816797, at *2 (S.D.N.Y. July 15, 2010) (Buchwald, J.) (collecting cases). The results of this four-factor test, often referred to as the "Lax," "Lax/Olsten" or "Olsten/Lax" test, make clear that Oklahoma Firefighters and Union have the largest financial interest under each and every measure.

Based on the trading information provided in each movant's Certification and as summarized in the chart below, Oklahoma Firefighters and Union prevail on each of the four Lax/Olsten factors.[2]

Movant	Purchased Shares	Net Shares	Net Funds Expended	Approximate Losses
Oklahoma Firefighters & Union	4,624,100	2,668,915	$52,203,191.18	($14,705,809.08)
Stichting Philips	2,385,396	1,319,600	$37,437,630.32	($14,430,804.46)
Meister Group	47,028	18,628	$406,817.40	($92,752.29)

Based on the results of the four factor test, and as set forth herein, it is beyond dispute that Oklahoma Firefighters and Union have the largest financial interest of all competing movants. Oklahoma Firefighters and Union prevail by a wide margin when applying the straight-forward "Purchased Shares," "Net Shares," and "Net Funds Expended" factors. Furthermore, Oklahoma Firefighters and Union prevail on the fourth factor, "Approximate Losses," which were calculated utilizing the preferred "LIFO" method of calculation and accounting for non-recoverable losses in accordance with the Supreme Court's decision in Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 344-47 (2005). See Twersky Opp. Decl. Ex. 7.

2. Courts in This District Overwhelmingly Favor the "LIFO" Method of Calculating Losses Over the "FIFO" Method

The PSLRA does not address which method of loss calculation should be employed in assessing losses for purposes of lead plaintiff. See Hartford, 2010 WL 2816797, at *4. In the

[2] A detailed calculation of the approximate losses is attached as Exhibit 7 to the Declaration of Mitchell M.Z. Twersky in Further Support of the Motion of Oklahoma Firefighters Pension and Retirement System and Union Asset Management Holding AG for Appointment as Lead Plaintiff and Approval of Their Selection of Counsel, and in Opposition to All Competing Motions ("Twersky Opp. Decl.").

past, courts have used either the "first-in, first-out," or "FIFO" analysis, whereby the first shares to be sold are assumed to be the first shares that were purchased, or a "last-in, first-out," or "LIFO" analysis, whereby the first shares to be sold are assumed to be the last shares that were purchased immediately prior to the sale. However, "[c]ourts in this district and others have stated a preference for use of LIFO over FIFO in assessing loss for purposes of the appointment of lead plaintiff." Id. (collecting cases); see also Kuriakose v. Federal Home Loan Mortgage Co., No. 1:08-cv-7281 (JFK), 2008 WL 4974839, at *3 (S.D.N.Y. Nov. 24, 2008) ("To calculate losses, courts favor the LIFO accounting method over FIFO.") (citation omitted); Vladimir v. Bioenvision, Inc., No. 07 Civ. 6416 (SHS) (AJP), 2007 WL 4526532, at *5 (S.D.N.Y. Dec. 21, 2007).

As Judge Buchwald stated in Hartford, "[t]he main advantage of LIFO is that, unlike FIFO, it takes into account gains that might have accrued to plaintiffs during the class period due to inflation of the stock price. FIFO . . . may exaggerate losses." Hartford, 2010 WL 2816797, at *4 (quoting In re eSpeed, Inc. Sec. Litig., 232 F.R.D. 95, 101 (S.D.N.Y. 2005) (Scheindlin, J.)); see also Kaplan v. Gelfond, 240 F.R.D. 88, 94 n.7 (S.D.N.Y. 2007) (Buchwald, J.) ("As a result, FIFO may overstate actual losses suffered by stockholders, whereas LIFO takes into account these gains.").

Indeed, in order to account for all shares that are sold during the class period at artificially inflated prices, some courts have applied LIFO in a manner that accounts for the benefits obtained from the sale of all shares during the class period by "match[ing] the last purchases made during the class period with the first sales made during the class period." In re eSpeed, Inc. Sec. Litig., 232 F.R.D. at 102. This method, referred to below as "Alternative LIFO," seeks to reduce any losses attributed to class period purchases by the gains obtained from

all of the class period sales.[3] Id.; see also In re NTL, Inc. Sec. Litig., No. 02 Civ. 3013 (LAK) (AJP), 2006 U.S. Dist. LEXIS 5346, at *39 n.16 (S.D.N.Y. Feb. 14, 2006) (LIFO matches sales against the last shares purchased to off-set all class period gains); Johnson v. Dana Corp., 236 F.R.D. 349, 352 (N.D. Ohio 2006) ("[U]nder LIFO a plaintiff's sales of defendant's shares during the class period are matched first against the plaintiff's most recent purchase of defendant's shares and gains or losses from those transactions are considered in damage calculations."); cf Arenson v. Broadcom Corp., No. SA CV 02-301-GLT (MLGx), 2004 U.S. Dist. LEXIS 27522, at *8 (C.D. Cal. Dec. 6, 2004) ("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.") (citations omitted).

3. Loss Calculations Should Consider Recoverable Losses, Consistent with the Supreme Court's Holding in Dura

In Dura, the Supreme Court held that in "fraud-on-the-market" cases such as this, plaintiffs can recover damages only if a specific loss was proximately caused by a defendant's misrepresentations. 544 U.S. at 344-47. In so ruling, the Court held that a plaintiff cannot prove loss causation merely by establishing that the stock price was artificially inflated on the date of the purchase; rather, a plaintiff also must prove that the stock price later declined – and caused

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[3] Under the LIFO analysis described above, which matches sales only to prior purchases, gains from the sales of inflated shares in the class period that occur prior to any class period purchases are not accounted for in determining losses. See generally Raymund Wong, Purchase-Sale Matching in Securities Litigation: FIFO, LIFO, and Offsets, NERA Economic Consulting available at www.nera.com, at 9-11 (October 9, 2008) (describing need to account for all shares sold during class period even if sold prior to class period purchases in order to account for gains on those sales at artificially inflated prices).

plaintiff's shares to be worth less – immediately following a disclosure of the wrongful conduct to the public. Id. Accordingly, it is clear under Dura and its progeny that losses incurred on shares purchased in an inflated market and then sold prior to the disclosure of wrongful conduct are not recoverable because those losses cannot be proximately linked to the alleged misconduct. See In re Comverse Tech., Inc. Sec. Litig., No. 06 Civ. 1825 (NGG)(RER), 2007 WL 680779, at *4 (E.D.N.Y. Mar. 2, 2007) (Garaufis, J.).

As a consequence of Dura, courts have held that any such non-recoverable losses "must not be considered" when determining competing movants' loss calculations in the lead plaintiff context. Id. (citing Kops v. NVE Corp., No. Civ. 06-574 (MJD/JJG), 2006 U.S. Dist. LEXIS 49713 (D. Minn. July 19, 2006) (refusing to credit competing plaintiff's in-and-out losses despite the allegation that a partial disclosure occurred before some of the sales);[4] see also Police & Fire Ret. Sys. of Detroit v. SafeNet, Inc., No. 06 Civ. 5797 (PAC), 2007 U.S. Dist. LEXIS 97959, at *6-7 (S.D.N.Y. Feb. 21, 2007) (noting that the "lion's share" of movant's claimed losses may be uncollectable or at least subject to unique defenses because movant sold most of its shares before the wrongful conduct was disclosed). Indeed, "[t]he exclusion of in-and-out transactions follows directly from the underlying holding in Dura." Comverse, 2007 WL 680779, at *6.

Applying Dura to the lead plaintiff context, the district court in Comverse reversed a magistrate judge's appointment of a movant who claimed a $2.93 million loss and appointed instead a competing movant who had a recoverable loss of $343,202. Id. at *7. In reversing the appointment, the Comverse court held, "[i]t is clear that courts cannot include non-recoverable losses in a calculation of each litigant's financial interest. . . . Before calculating a plaintiff's

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[4] "In and out" transactions are transactions that take place during the class period, "but before the misconduct identified in the complaint was ever revealed to the public." Comverse, 2007 WL 680779, at *3.

financial interest, the court must first determine what portion, if any, of a plaintiff's losses constitute potential recoverable losses for purposes of the necessary PSLRA/Olsten-Lax analysis." Id. at *5 n.6.

Similarly, numerous other courts have held that losses incurred before the first disclosure alleged in the action must, pursuant to Dura, be excluded from the PSLRA financial interest analysis. See, e.g., Eichenholtz v. Verifone Holdings, Inc., No. C 07-06140 MHP, 2008 WL 3925289, at *3 (N.D. Cal. Aug. 22, 2008) ("When calculating the greatest financial interest, the court adopts the retained share methodology, which primarily looks to shares bought during the class period that are retained at the end of the class period."); Boyd v. NovaStar Fin., Inc., No. 07-0139-CV-W-ODS, 2007 WL 2026130, at *3 (W.D. Mo. July 9, 2007) ("However, [the financial interest] analysis should be modified to reflect the Supreme Court's decision in Dura Pharmaceuticals, Inc. v. Broudo.").

4. Oklahoma Firefighters and Union Properly Exclude Non-Recoverable Losses When Calculating Comparative Losses

In accordance with the Supreme Court's ruling in Dura, Oklahoma Firefighters and Union properly exclude in-and-out transactions when calculating herein the approximate losses suffered by each movant. See Twersky Opp. Decl. Ex. 7. Under this method of calculating losses – utilizing LIFO and excluding non-recoverable losses – Oklahoma Firefighters and Union's losses ($14,705,809) were greater than those of Stichting Philips ($14,430,804).[5]

[5] To account for Dura, these calculations exclude in-and-out transactions by matching an equal number of shares purchased to shares sold prior to any corrective disclosure. We recognize, however, that an alternative method of LIFO matching may be used to exclude such in-and-out transactions. Under that alternative method for accounting for Dura, a sale may only be matched to the most recent purchase of shares occurring prior to the sale. Sales matched to pre-class period holdings are excluded from the calculations because those purchases are not eligible to recover damages. As more class period purchases are made, they will, in turn, become the most recent purchase to be matched against the next sale. Once all sales are matched, unmatched

Furthermore, pursuant to the Alternative LIFO method adopted by some courts (discussed supra), Oklahoma Firefighters and Union's approximate losses would be ($18,063,908), far exceeding Stitching Philip's approximate losses of ($15,635,790). See Twersky Opp. Decl. at Exh. 8.

As in Comverse, this action alleges loss causation based on only one disclosure and the resulting stock price drop, which occurred at the end of the class period. See Am. Compl., Jones v. Pfizer, Inc. (Dkt. #2). Specifically, the complaint alleges that on January 26, 2009, Pfizer announced that it had reached an agreement with the United States Attorney for the District of Massachusetts to pay $2.3 billion to resolve several ongoing investigations concerning the Company's off-label promotional practices and payment of illegal kickbacks. Following this announcement, the price of Pfizer common stock declined from $17.45 per share on January 23, 2009, to close at $15.65 per share on January 26, 2009, a decline of over 10%.[6] In light of Dura, the losses on shares purchased and sold before the January 26, 2009 end-of-class period disclosure are not compensable and should not figure into the lead plaintiff financial interest analysis. See Comverse, 2007 WL 680779, at *5 (holding that the court would be "abdicating its responsibility under the PSLRA" if it were to ignore the issue when "it is clear from the face of

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purchases are considered held. Applying Dura, the matched purchases and sales are excluded from the calculation when determining losses. Under that method, Oklahoma Firefighters and Union's approximate losses would be ($15,447,306), and Stichting Philips' approximate losses would be ($15,458,804) – a difference of $11,498, or less than one-tenth of one percent (0.07%). As this Court and others have recognized, approximate losses separated by this type of nominal difference are to be treated as "basically equal" for purposes of appointing the lead plaintiff. See, infra, at II. A. 5., citing Elan, 2009 WL 1321167, at *1; SafeNet, 2007 U.S. Dist. LEXIS 97959, at *6.

[6] Id. Moreover, it should be noted that counsel for Stichting Philips was responsible for investigating and drafting the allegations in the Amended Complaint in this action.

the pleadings" that a substantial portion of movant's losses were suffered before any alleged corrective disclosure).

5. Oklahoma Firefighters and Union Also Prevail on the Other Lax/Olsten Factors

Oklahoma Firefighters and Union recognize that this Court and other courts in this District have treated approximate losses that are fairly close as "basically equal." See, e.g., Elan, 2009 WL 1321167, at *1; SafeNet, 2007 U.S. Dist. LEXIS 97959, at *6. To the extent the competing movants' losses in this action are similarly viewed, Oklahoma Firefighters and Union would still have the largest financial interest in the relief sought by the class by virtue of prevailing by wide margins on the three other Lax/Olsten factors. See SafeNet, 2007 U.S. Dist LEXIS 97959, at *6.

Oklahoma Firefighters and Union purchased by far the most net shares. The Oklahoma Firefighters and Union Group had net purchases of 2,668,915 inflated shares, which is more than twice as many as Stichting Philips, and more than 143 times greater than the Meister Group. Oklahoma Firefighters and Union also purchased approximately twice as many shares as Stichting Philips and a hundred times as many as the Meister Group; and spent $14 million more on their shares than Stichting Philips did, and $51 million more than the Meister Group did. Oklahoma Firefighters and Union thus have the largest financial interest in the outcome of this litigation and are, therefore, the presumptive "most adequate plaintiffs." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

B. Oklahoma Firefighters And Union Are An Appropriate Group Under PSLRA

The express language of the PSLRA permits the appointment of a group of class members as the Lead Plaintiff, as courts in this District have recognized. See 15 U.S.C. § 78u-4(a)(3)(B) (iii)(I); see also, e.g., In re Bank of Am. Corp. Sec., Derivative & ERISA Litig., 258

F.R.D. 260, 270 (S.D.N.Y 2009) (Chin, J.); Varghese v. China Shenghuo Pharm. Holdings, Inc., 589 F. Supp. 2d 388, 392 (S.D.N.Y. Dec. 10, 2008) (Marrero, J.); Reimer v. Ambac Fin. Group, Inc., No. 08 Civ. 411(NRB), 2008 WL 2073931, at *2-3 (S.D.N.Y. May 9, 2008) (Buchwald, J.).

These holdings are in accord with the majority view in courts throughout the country, which permit appointment of a lead plaintiff group if the group has demonstrated that it will fairly and adequately protect the interests of the class. See, e.g., In re Cendant Corp. Litig., 264 F.3d 210, 267 (3d Cir. 2001); In re Network Assocs., Inc., Sec. Litig., 76 F. Supp. 2d 1017, 1025 (N.D. Cal. 1999). Here, as set forth in detail in the their initial memorandum, and as further evidenced by their submitted Joint Declaration (Dkt. #13-5) and through their existing relationship as lead plaintiff in Medtronic, Oklahoma Firefighters and Union clearly have demonstrated that they are a proper group which will adequately protect the interest of the class. See In re McDermott Int'l, Inc. Sec. Litig., No. 8 Civ. 9943, 2009 WL 579502, at *2 (S.D.N.Y. Mar. 6, 2009); Varghese, 589 F. Supp. 2d at 391-92. Accordingly, the financial interests of Oklahoma Firefighters and Union are properly aggregated for lead plaintiff consideration.[7]

C. Stichting Philips Cannot Be Appointed Lead Plaintiff Because It Does Not Satisfy The Rule 23 Requirements

Stichting Philips has been entangled in a fraud scandal of its own. In 2007 – during the alleged class period in this action – a scandal of mammoth proportion came to light when it emerged that a director at Philips pension fund was taking bribes in return for passing on confidential information regarding real estate investments. See Mark Colby, Philips funds wins

[7] Indeed, in Hartford, Stichting Philips moved as a group to be appointed lead plaintiff, arguing that appointing two investors to serve as lead plaintiff would allow the two investors to act as a check on one another. See Hartford, 2010 WL 2816797, at *3 n.5.

back millions in Dutch property fraud, Fin. News, June 30, 2010 ("Fin. News");[8] Property developer agrees to pay €40m to settle fraud case, DutchNews.nl, June 26, 2010.[9] The fraud had been under way since at least 1995. See Fin. News. The now infamous fraud case has been nicknamed Klimop, Dutch for "ivy," because of the number of branches to which the fraud extended and how difficult it was to eradicate. See Fin. News.

Like its impact on the real estate investment market in the Netherlands, the type of unscrupulous conduct at issue may cast a dark cloud over the current litigation. Defendants may argue that the Stichting Philips scandal begs the question whether the entity is currently able to perform its fiduciary obligations to the class. Furthermore, there are no assurances that additional bad conduct will not be revealed as further investigations proceed. Courts facing similar circumstances have determined that such conduct is debilitating to a movant's adequacy as lead plaintiff. See, e.g., In re Surebeam Corp. Sec. Litig., No. 03 CV 1721 JM (POR), 2003 U.S. Dist. LEXIS 25022, at *21-22 (S.D. Cal. Dec. 31, 2003) (refusing to appoint lead plaintiff movant when the representative of movant was the subject of numerous complaints to securities regulators); Newman v. Eagle Bldg. Techs., 209 F.R.D. 499, 504-05 (S.D. Fla. 2002) (rejecting lead plaintiff movant who received two public citations for violations of SEC and NASD rules because of concerns about potential defenses and movant's moral character); Network Assocs., 76 F. Supp. 2d at 1029 (declining to appoint an institution as lead plaintiff because two of its affiliates were under investigation for fraud).

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[8] Available at http://www.efinancialnews.com/story/2010-06-30/philips-pensioenfonds-property-victory.

[9] Available at http://www.dutchnews.nl/news/archives/print/022817.php.

D. The Court Should Approve Oklahoma Firefighters' And Union's Choice Of Counsel

As Oklahoma Firefighters and Union demonstrated in their opening papers, their choice of counsel have a great deal of experience in litigating securities fraud class actions under the PSLRA. See Opening Mem. of Law 11-12 (Dkt. #12); Abraham Fruchter & Twersky LLP Resume (Dkt. # 13-6); Motley Rice LLC Shareholder & Securities Fraud Resume (Dkt. No. 13-7). Therefore, the Court should approve Oklahoma Firefighters and Union's choice of counsel.

III. CONCLUSION

For the reasons set forth above, as well as in its moving papers, the Court should grant Oklahoma Firefighters' and Union's motion to be appointed lead plaintiff and for approval of their selection of lead counsel, and should deny all competing motions.

Dated: July 29, 2010

ABRAHAM, FRUCHTER & TWERSKY, LLP

By: */s/ Mitchell M.Z. Twersky*

Mitchell M.Z. Twersky (MT-6739)
mtwersky@aftlaw.com
Lawrence D. Levit (LL-9507)
llevit@aftlaw.com
One Penn Plaza, Suite 2805
New York, NY 10119
Tel: (212) 279-5050
Fax: (212) 279-3655

MOTLEY RICE LLC
William H. Narwold (WN-1713)
bnarwold@motleyrice.com
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
Tel: (860) 882-1676
Fax: (860) 882-1682

MOTLEY RICE LLC
Joseph F. Rice
jrice@motleyrice.com
James M. Hughes
jhughes@motleyrice.com
William S. Norton
bnorton@motleyrice.com
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
Tel: (843) 216-9000
Fax: (843) 216-9450

MOTLEY RICE LLC
Donald A. Migliori
dmigliori@motleyrice.com
321 South Main St.
Providence, RI 02903
Tel: (401) 457-7700
Fax: (401) 457-7708

[Proposed] Co-Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2010, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List:

/s/ Mitchell M.Z. Twersky
Mitchell M.Z. Twersky