UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. PFIZER INC., et al., Defendants.	Civil Action No. 1:10-cv-03864-AKH CLASS ACTION STICHTING PHILIPS PENSIOENFONDS' MEMORANDUM OF LAW IN OPPOSITION TO COMPETING MOTIONS FOR APPOINTMENT AS LEAD PLAINTIFF

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I. INTRODUCTION

The Private Securities Litigation Reform Act of 1995 ("PSLRA") provides that the "court shall adopt a presumption that the most adequate plaintiff" is the person that "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)(I). Stichting Philips Pensioenfonds ("Philips Pensioenfonds") is the only proposed lead plaintiff that satisfies ***both*** prongs of the PSLRA's test.

Not only do the other movants have ***smaller individual losses*** than Philips Pensioenfonds, but their ***aggregated loss is also smaller*** than Philips Pensioenfonds' loss. The other movants also fail to satisfy the PSLRA's typicality and adequacy requirements. For example, the joint motion by Union Asset Management AG ("UAM AG") and Oklahoma Firefighters Pension and Retirement System ("OKFPRS") "appears to be nothing more than a lawyer-created group of unrelated investors who were cobbled together 'in the hope of thereby becoming the biggest loser for PSLRA purposes.'"[1] Not surprisingly, this is "a tactic disapproved of by this Court." *Id*. In addition, UAM AG is a German investment manager subject to unique standing and res judicata defenses. *See infra* §II.B.2. Finally, UAM AG and OKFPRS inexplicably "retain[ed] two law firms to represent [them], either of which would appear to be sufficient in itself."[2] The remaining movant, the Meister Family, are individual investors with a dramatically smaller financial interest.

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[1] *Glauser v. EVCI Career Colls. Holding Corp.*, 236 F.R.D. 184, 190 (S.D.N.Y. 2006) (McMahon, J.). Unless otherwise noted, all emphasis is added and citations are omitted.

[2] *Schriver v. Impac Mortgage Holdings, Inc.*, 2006 U.S. Dist. LEXIS 40607, at *27 (C.D. Cal. 2006).

Because none of the other movants satisfy the PSLRA's requirements, none are entitled to the "most adequate plaintiff" presumption. Each of their motions should be denied. Philips Pensioenfonds should be appointed Lead Plaintiff.

II. ARGUMENT

"In appointing a lead plaintiff, the court's first duty is to identify the movant that is presumptively entitled to that status." *In re Cendant Corp. Litig.*, 264 F.3d 201, 262 (3d Cir. 2001). The "process begins with the identification of the movant with 'the largest financial interest in the relief sought by the class.'" *Id.*; *In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002) ("the district court must consider the ***losses*** allegedly suffered by the various plaintiffs"). "Once the court has identified the movant with 'the largest financial interest in the relief sought by the class,' it should then turn to the question whether ***that movant*** 'otherwise satisfies the requirements of Rule 23' . . . and is thus the presumptively most adequate plaintiff." *Cendant*, 264 F.3d at 262; *Cavanaugh*, 306 F.3d at 730 (same). In the final step, "other plaintiffs [have] an opportunity to rebut the presumptive lead plaintiff's showing that it satisfies Rule 23's typicality and adequacy requirements." *Id.*; 15 U.S.C. §78u-4(a)(3)(B)(iii)(II).

Philips Pensioenfonds is the only movant entitled to the PSLRA's most adequate plaintiff presumption.

A. Philips Pensioenfonds Is the "Most Adequate Plaintiff"

1. Philips Pensioenfonds Has the Largest Financial Interest

The "'district court must consider the losses allegedly suffered by the various plaintiffs before selecting as the "presumptively most adequate plaintiff" – and hence the presumptive lead plaintiff – the one 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."'" *In re*

AOL Time Warner, Inc. Sec. & "ERISA" Litig., 2003 U.S. Dist. LEXIS 145, at *4 (S.D.N.Y. 2003) (Kram, J.) (quoting *Cavanaugh*, 306 F.3d at 729-30). That movant is Philips Pensioenfonds:

	FIFO Losses[3]	*LIFO Losses*
Philips Pensioenfonds	**$21.1 million**	**$19.1 million**
UAM AG	$16.5 million	$16.6 million
DEVIF-Fonds Nr. 450	$210,202	$173,284
UniNordamerika	$4.9 million	$4.9 million
UniFavorit:Aktien	$1.5 million	$1.5 million
UniDividendenAss	$6.3 million	$6.3 million
UniDoubleChance	$125,623	$125,623
UniValueFonds: Global	$3.4 million	$3.4 million
OKFPRS	$2.3 million	$834,611
Meister Family	$175,697	$175,697

Even if the six UAM AG funds' and OKFPRS' loss is viewed collectively (which it should not be as discussed *infra*, §II.B.1.), Philips Pensioenfonds' loss is ***still*** larger:

	FIFO Losses	*LIFO Losses*
Philips Pensioenfonds	**$21.1 million**	**$19.1 million**
UAM AG/OKFPRS	$18.8 million	$17.4 million
Meister Family	$175,697	$175,697

Despite these facts, UAM AG and OKFPRS may attempt to exaggerate the importance of certain other "factors" to create the illusion that UAM AG's and OKFPRS' aggregated interest is greater than Philips Pensioenfonds' individual interest. Not only is such an aggregation improper, but even when other "factors" are considered, most district courts, including this Court, "***place the most emphasis on the last of the four factors: the approximate loss suffered*** by the movant." *Kaplan v. Gelfond*, 240 F.R.D. 88, 93 (S.D.N.Y. 2007) (Buchwald, J.); *see also In re Bally Total*

[3] "Under FIFO, stocks which were acquired first are assumed to be sold first for loss calculation purposes." *Vladimir v. Bioenvision, Inc.*, 2007 WL 4526532, at *5 (S.D.N.Y. 2007) (Peck, J.). "Under LIFO, stocks which were acquired most recently are assumed to be sold first." *Id.*

Fitness Sec. Litig., 2005 U.S. Dist. LEXIS 6243, at *14 (N.D. Ill. 2005) ("some of the lead plaintiff candidates who are in the middle of the pack in terms of losses . . . contend that we should also examine factors such as the number of shares purchased," but "[w]e believe that the best yardstick by which to judge 'largest financial interest' is the amount of loss, ***period***").[4]

Because Philips Pensioenfonds suffered the largest losses as a result of defendants' misconduct, it has the largest financial interest in the relief sought by the class.

2. Philips Pensioenfonds Satisfies the Rule 23 Requirements

Philips Pensioenfonds, with approximately €13 billion in assets under management, is one of the largest and among the oldest existing corporate pension funds in the Netherlands. *See* Docket #16 at 5. Its history dates back to 1913 and it has approximately 110,000 active employees and members and provides retirement benefits to approximately 60,000 retirees. *Id.*

And unlike UAM AG and OKFPRS, Philips Pensioenfonds satisfies the Rule 23 requirements at this stage. Indeed, Philips Pensioenfonds is typical of other class members because it purchased Pfizer securities on a U.S. exchange during the Class Period, the price of which was artificially inflated as a result of defendants' false and misleading statements, and suffered damages when the truth was revealed. *See* Docket #16 at 5. In addition, Philips Pensioenfonds is not subject to unique defenses and no evidence can be proffered that Philips Pensioenfonds seeks anything other than the greatest recovery for the class consistent with the merits of the claims. *Id.*

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[4] *See also In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 437 (S.D.N.Y. 2008) (Sullivan, J.) (same); *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 395 (S.D.N.Y. 2008) (Marrero, J.) ("The fourth factor, however, is the ***most important*** . . . ."); *Reimer v. Ambac Fin. Group, Inc.*, 2008 WL 2073931, at *3 (S.D.N.Y. 2008) (Buchwald, J.) ("The fourth factor is viewed as the ***most important***."); *Kuriakose v. Federal Home Loan Mortg. Co.*, 2008 WL 4974839 (S.D.N.Y. 2008) (Keenan, J.) (same); *Weiss v. Friedman, Billings, Ramsey Group, Inc.*, 2006 WL 197036, at *1 (S.D.N.Y. 2006) (Holwell, J.) (same).

Importantly, Philips Pensioenfonds' motion is bolstered by the Supreme Court's recent decision in *Morrison v. Nat'l Austl. Bank Ltd.*, __ U.S. __, 2010 U.S. LEXIS 5257 (U.S. June 24, 2010). Indeed, the "evidence submitted with [Philips Pensioenfonds'] motion indicates that [it] traded on the [NYSE], an ***American*** exchange." *Sgalambo v. McKenzie*, 2010 U.S. Dist. LEXIS 30625, at *13 (S.D.N.Y. 2010) (Scheindlin, J.); *see also* Docket #16 at 5; Docket #17-3. And, the "prices in [Philips Pensioenfonds'] schedule of transactions and losses during the class period are delineated in United States dollar amounts." *Sgalambo*, 2010 U.S. Dist. LEXIS 30625, at * 13; Docket #17-2. "Such evidence is more than sufficient at this stage to demonstrate purchases on an American exchange." *Sgalambo*, 2010 U.S. Dist. LEXIS 30625, at *13; *Morrison*, 2010 U.S. LEXIS 5257, at *39-*40 (§10(b) applies if "purchase or sale is made in the United States, or involves a security listed on a domestic exchange").

Second, and perhaps most importantly, there can be ***no*** dispute that the Netherlands will recognize a judgment in this action. Indeed, the Amsterdam District Court "***recognised the judgment by a U.S. court approving a worldwide class action settlement under U.S. law***." *See* Declaration of David A. Rosenfeld in Support of Stichting Philips Pensioenfonds' Memorandum of Law in Opposition to Competing Motions for Appointment as Lead Plaintiff ("Rosenfeld Decl."), Ex. A. The Dutch court found that "the proceedings for a class action settlement in the U.S. are very similar to the Netherlands' system for collective settlements" and that "the interests of the injured parties were adequately safeguarded by the U.S. system since investors belonging to the Class can object to, and opt-out from, a collective settlement." *Id.* at 2.

In short, because Philips Pensioenfonds purchased Pfizer stock on the NYSE – an American exchange – and the Netherlands recognizes and enforces U.S. class action judgments, Philips Pensioenfonds is not subject to any Rule 23 concerns. These facts, coupled with the fact that Philips

Pensioenfonds also has the largest financial interest, demonstrate that Philips Pensioenfonds is entitled to the "most adequate plaintiff" presumption.

B. UAM AG and OKFPRS Cannot Trigger the "Most Adequate Plaintiff" Presumption

The PSLRA's lead plaintiff process is a sequential one. *Cavanaugh*, 306 F.3d at 730; *Cendant*, 264 F.3d at 268. Thus, the district court should not consider UAM AG's and OKFPRS' motion because Philips Pensioenfonds has the largest financial interest and is "both willing to serve and satisfies the requirements of Rule 23." *Cavanaugh*, 306 F.3d at 730. Moreover, even if the Court were to consider UAM AG's and OKFPRS' motion, these movants are subject to challenges which preclude their appointment as lead plaintiff.

1. UAM AG and OKFPRS Are an Improper Grouping

UAM AG and OKFPRS seek appointment jointly as a "group." Although the PLSRA "states that the lead plaintiff may be a 'group of persons,' this does not mean that the Court must accept as a 'group' any number and assortment of persons proposed." *In re Baan Co. Sec. Litig.*, 186 F.R.D. 214, 222 (D.D.C. 1999). In order to assess whether a "person or group of persons" is capable of "otherwise satisf[ying] the requirements of Rule 23" (15 U.S.C. §78u-4(a)(3)(B)(iii)(I)), district courts assess whether "the way in which a group seeking to become lead plaintiff was formed or the manner in which it is constituted would preclude it from fulfilling the tasks assigned to a lead plaintiff." *Cendant*, 264 F.3d at 266. Notably, if the "court were to determine that the movant 'group' with the largest losses had been created by the efforts of lawyers hoping to ensure their eventual appointment as lead counsel, it could well conclude, based on this history, that the members of that 'group' could not be counted on to monitor counsel in a sufficient manner," and "the court should disqualify that movant." *Id.* at 266-67.

Here, "[n]othing before the Court indicates that this aggregation is anything other than an attempt to create the highest possible 'financial interest' figure under the PSLRA." *In re Pfizer Inc. Sec. Litig.*, 233 F.R.D. 334, 337 (S.D.N.Y. 2005) (Owen, J.). Indeed, it is curious how or why UAM AG (a German asset-manager based in Frankfurt which claims a $16.5 million loss) would join with OKFPRS (a pension fund for retired firefighters based in Oklahoma City, Oklahoma whose losses are only ***one-seventh*** the size of UAM AG's claimed losses) ***unless*** their lawyers were attempting to "'designate unrelated plaintiffs as a "group" and aggregate their financial stakes.'" *Id.*; *Bhojwani v. Pistiolis*, 2007 U.S. Dist. LEXIS 96246, at *11 (S.D.N.Y. 2007) (McMahon, J.) (noting that court was "left with the firm conviction that [a group was] a 'lawyer driven' plaintiff engineered for the sole purpose of maintaining this lawsuit and attaining lead plaintiff status" in part because of the relative "insignificance of what [one group member] brings to the table in terms of holdings").

The likelihood that this concern is justified is confirmed by UAM AG's own certification designating "Motley Rice LLC as proposed lead counsel," without mentioning ***either*** OKFPRS ***or*** UAM AG's other proposed co-lead counsel, Abraham Fruchter & Twersky. *See* Docket #13-1. Further, the Joint Declaration was signed on July 12, 2010 – ***the same day motions were due***. These facts, coupled with the vast disparity between UAM AG's and OKFPRS's losses, indicates that UAM AG and OKFPRS were cobbled together at the last minute by counsel in "an effort to achieve the highest possible 'financial interest' figure." *In re Doral Fin. Corp. Sec. Litig.*, 414 F. Supp. 2d 398, 401 (S.D.N.Y. 2006) (Owen, J.); *In re Donnkenny Inc. Sec. Litig.*, 171 F.R.D. 156, 157 (S.D.N.Y. 1997) (Cedarbaum, J.) ("To allow an aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff.").

And while UAM AG and OKFPRS submitted a joint declaration with their motion, they "have not shown ***how*** and ***when*** they were joined together, ***how*** they intend to conduct discovery or

how they will coordinate litigation efforts and strategy." *Eichenholtz v. Verifone Holdings, Inc.*, 2008 U.S. Dist. LEXIS 64633, at *26, *28 (N.D. Cal. 2008) (noting that "conclusory declaration has little or no substance"). "They simply claim they are 'sophisticated institutional investors' with the 'capability and experience to oversee this litigation' and 'ample resources' that have 'significant interest in the outcome of this action' which is why they are 'committed to working closely with class counsel.'" *Compare id.* at *26-*27 *with* Docket #13-4 at ¶¶3-9 ("sophisticated institutional investors" who "shared common goals" and have the "resources and desire to ensure active oversight" discussed the "benefits of working together" and that they will "remain actively involved"). As one court noted, "[t]hese or similar representations could be made by virtually any combination of investors." *Stengle v. Am. Ital. Pasta Co.*, 2005 U.S. Dist. LEXIS 43816, at *15 (W.D. Mo. 2005) (rejecting motion by group of institutions). Because UAM AG/OKFPRS neglect to elucidate about their formation, "one cannot but suspect that the Group – comprised, as it is, of disparate and apparently unrelated plaintiffs – is itself the result of the type of lawyer-driven action that the PSLRA eschews." *Goldberger v. PXRE Group, Ltd.*, 2007 U.S. Dist. LEXIS 23925, at *14 (S.D.N.Y. 2007) (Karas, J.) (rejecting a so-called "group" cobbled together by its lawyers); *Steinberg v. Ericsson LM Tel. Co.*, 2008 U.S. Dist. LEXIS 29836, at *1 (S.D.N.Y. 2008) (Patterson, J.) (denying motion for reconsideration of order declining to appoint a group of institutions as lead plaintiff due to "concerns about the circumstances surrounding the group's formation indicating that it was attorney driven").

Indeed, ***how*** did a German investor with a $16 million loss which, as of ***July 9th*** (the date UAM AG signed its certification), had retained only "Motley Rice LLC as proposed lead counsel," come to learn about a U.S. firefighter pension fund more than 5,000 miles and seven time zones away with a $2 million loss on ***July 12th*** (the date OKFPRS signed its certification) in sufficient

time to reach a deliberate and considered decision to make a joint motion later that same day? *See In re Able Labs. Sec. Litig.*, 425 F. Supp. 2d 562, 569 (D.N.J. 2006) (declarations confirmed that "it was the institutional investors themselves who decided to work together," "***not their counsel***"). UAM AG's and OKFPRS's declaration is notably silent in this regard. *See Steinberg*, 2008 U.S. Dist. LEXIS 29836, at *4 (noting that subsequent affidavit addressing the group's formation did not "alter[] the conclusion reached by the Court at the hearing that counsel was instrumental in forming the group for the purpose of the lead plaintiff motion"). As such, there simply is "no rationale for this grouping other than to manufacture the greatest financial interest in order to be appointed lead plaintiff." *Eichenholtz*, 2008 U.S. Dist. LEXIS 64633, at *28; *Tsirekidze v. Syntax-Brillian*, 2008 WL 942273, at *3 (D. Ariz. 2008) ("when unrelated investors are cobbled together, the clear implication is that counsel, rather than the parties, are steering the litigation"); *Crawford v. Onyx Software Corp.*, 2002 U.S. Dist. LEXIS 1101, at *4-*5 (W.D. Wash. 2002) (rejecting "loose group of investors whose relationship was forged only in an effort to win appointment as lead plaintiff").[5]

Ultimately, there is "no clear or persuasive reason why [UAM AG] and [OKFPRS] have joined together to apply for Lead Plaintiff in this litigation other than an effort to amalgamate their losses to be greater than their competitors' or to detract from obstacles that [UAM AG] would face

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[5] UAM AG and OKFPRS make much of their mutual litigation experience in *Minneapolis Firefighters' Relief Assoc. v. Medtronic, Inc.*, No. 08-cv-6324 (D. Minn.). *See* Docket #13-4 at ¶3. In doing so, however, they neglect to inform the Court that there are four entities serving as lead plaintiff in *Medtronic*, each of whom abandoned their original group members and were hand-picked by their respective counsel via a post-60-day-deadline "stipulation" filed with the court. *See* Rosenfeld Decl., Ex. B. Such post-filing regroupings like the one engineered by UAM AG's and OKFPRS's lawyers in *Medtronic* are routinely rejected in this District. *See, e.g., In re McDermott Int'l, Inc. Sec. Litig.*, 2009 U.S. Dist. LEXIS 21539, at *16 (S.D.N.Y. 2009) (Chin, J.) (rejecting post-60-day regrouping that was "an entirely lawyer-driven arrangement" and "goes against one of the principal legislative purposes of the PSLRA").

as a single applicant." *In re Enron, Corp., Sec. Litig.* 206 F.R.D. 427, 455 (S.D. Tex. 2002) (Harmon, J.). As such, their last minute alliance formed on the same day that motions were due should be disregarded.

2. As a German Investment Advisor, UAM AG Is Subject to Unique Standing and Res Judicata Defenses

It is axiomatic that a lead plaintiff candidate must "make a threshold showing of typicality [and] adequacy." *Cendant*, 264 F.3d at 267; 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc). UAM AG has not evidenced its ability to meet these requirements. Indeed, UAM AG is plagued by ***two*** disabling defects: (1) it is an investment manager that lacks standing; ***and*** (2) it is subject to unique res judicata defenses as it is formed under and governed by German law. As Judge Pauley recognized in a similar situation, appointing an entity like UAM AG would result in "a ***needless litigation sideshow***" that "can be circumvented at this early stage by selecting another lead plaintiff." *Baydale v. Am. Express Co*., 2009 U.S. Dist. LEXIS 71668, at *9 (S.D.N.Y. 2009).

a. UAM AG's Standing Has Not Been Evidenced

Investment managers like UAM AG must demonstrate Article III standing to pursue claims on behalf of the funds they manage. *See W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100 (2d Cir. 2008). UAM AG's certification identifies ***six separate funds*** that purportedly purchased Pfizer stock:

DEVIF-Fonds Nr. 450	UniNordamerika
UniFavorit:Aktien	UniDividendenAss
UniDoubleChance	UniValueFonds: Global

And while UAM AG's certification conclusorily states that "Union has received assignments of the claims from the Funds' investment companies" (*see* Docket #13-1 at 6, ¶2), UAM AG has ***not*** established the validity of these assignments under German law. Indeed, UAM AG offers no evidence or legal analysis to allow the Court to independently confirm that these assignments "from

the Funds' investment companies" are valid or that such assignments are even proper under German law. And, without such authority, the Court cannot determine whether UAM AG's "assignments" are sufficient under Second Circuit law which required the ***clients*** to "transfer[] ownership of, or title to, their claims" to UAM AG, not the investment managers. *W.R. Huff*, 549 F.3d at 109. This determination is essential to the Court's ability to assess whether UAM AG "otherwise satisfies the requirements of Rule 23." 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc).

UAM AG not only failed to timely substantiate the validity of its purported assignments, but also declined to even attach the investment companies' assignments to its motion. UAM AG's inability (or unwillingness) to evidence ***both*** the factual ***and*** legal soundness of its assignments prevents the Court's independent analysis required by the Second Circuit concerning the assignments.[6] In *Advanced Magnetics v. Bayfront Partners*, 106 F.3d 11, 18 (2d Cir. 1997), the Second Circuit reviewed assignments that "merely conferred on [the asset manager], with respect to the individual selling shareholders' claims, 'the power to commence and prosecute to final consummation or compromise any suits, actions or proceedings.'" *Id.* The Second Circuit explained that while these "writings thereby arguably gave [the asset manager] power of attorney to bring suit

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[6] UAM AG appears to be some sort of holding company with at least six different divisions: Union Investment Privatfonds GmbH, Union Investment Institutional GmbH, Quoniam Asset Management GmbH, Union Investment Real Estate GmbH, Union Investment Luxembourg S.A., and BEA Union Investment Management Ltd. apparently organized under the laws of Germany, Luxemburg and Hong Kong. *See* Rosenfeld Decl., Ex. C. It is not clear which of these divisions under the larger UAM AG umbrella serviced the six sub-funds whose financial interest is at issue here. Nonetheless, depending on which of UAM AG's divisions purportedly assigned the claims to UAM AG on behalf of the six sub-funds, the multiple layers of assignments would also have to be valid under ***that*** nation's laws as well. Here, however, because UAM AG has not timely provided ***any*** of the various assignments, the Court is left entirely in the dark on these fundamental issues. *See, e.g., In re Spectranetics Corp. Sec. Litig.*, 2009 U.S. Dist. LEXIS 54809, at *15 (D. Colo. 2009) (finding that "[a]bsent sufficient evidence to demonstrate" one of the PSLRA's requirements, movant was "not entitled to the benefit of the rebuttable presumption").

in the names of the individual selling shareholders," they "***did not purport to transfer title or ownership***" to the asset manager. *Id.* And although assignment "also gave [the asset manager] authority to conduct an action on behalf of [the clients] without naming [the clients] as a plaintiff, ***that authorization was in no way a transfer of ownership***." *Id.* "Rather, in that [assignment], not only did [the clients] retain the right to receive [their] pro rata share of the proceeds of litigation, [they] also ***retained the right to terminate*** [the asset manager's] authority to pursue [the clients'] claims . . . ." *Id.* (noting that assignment contained clause providing that the client "'reserves the right to terminate its participation if it later concludes that, based on the results of discovery or the general course of the litigation, it is in its best interests to do so'"). "Plainly, none of these provisions constituted assignments to [the asset manager] of ownership of the shareholders' claims; nor did any other part of the proffered writings indicate that the shareholders were transferring title or ownership." *Id.*

Here, because UAM AG failed to provide the Court with the assignments from the sub-funds' investment companies, the Court cannot conduct the *Advanced Magnetics* analysis required by the Second Circuit. As such, the Court has no ability to determine their validity under ***either*** Second Circuit law ***or*** German law. This is not unlike *Baydale* where, after the hearing before Judge Pauley on the lead plaintiff motions, a foreign asset manager submitted an expert opinion which stated that the asset manager was "not only permitted to bring suit on behalf of its funds but also has sole authority to sue for them." 2009 U.S. Dist. LEXIS 71668, at *8. Judge Pauley explained that "even if this Court credited that opinion, [the foreign asset manager's] status raises complex and novel issues of law which would require extensive factual and foreign legal analysis. ***Such a diversion would be a needless litigation sideshow***. In contrast to *Vivendi*, where the parties were on

the cusp of trial, that ancillary issue, now revealed, can be circumvented at this early stage by selecting another lead plaintiff." *Id.* at *9.[7]

Assuming *arguendo* that UAM AG had timely evidenced that its assignments were legally valid (which it did not), UAM AG has not demonstrated the requisite elements of statutory standing as a "purchaser" under §10(b) because it failed to evidence that it has (1) "'unrestricted decision making authority' to invest the securities at issue"; and that it is (2) the "attorney-in-fact" for the sub-funds. *W.R. Huff*, 549 F.3d at 106 (quoting *Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 255 (S.D.N.Y. 2003 (Conner, J.)). Consequently, UAM AG "will be subject to a unique defense regarding its standing to assert securities fraud claims on behalf of its clients because it has no proof that it is the clients' attorney-in-fact." *In re Cardinal Health, Inc. Sec. Litig.*, 226 F.R.D. 298, 311 (S.D. Ohio 2005); *Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 634-36 (D.N.J. 2002) (rejecting investment advisor as lead plaintiff).[8]

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[7] It is possible that UAM AG's lawyers "attempt[ed] to assuage any fears relating to its standing to sue" by grouping UAM AG with OKFPRS at the outset. *Baydale*, 2009 U.S. Dist. LEXIS 71668, at *10. As a preliminary matter, the "purpose of grouping Lead Plaintiffs is not to balance out each other's deficiencies." *Enron*, 206 F.R.D. at 457. More to the point, if the Court were to appoint UAM AG and OKFPRS as lead plaintiff and conclude that UAM AG does not possess the requisite standing, an entity with the ***smallest*** financial interest here – OKFPRS – would be serving as lead plaintiff. Such a result would be antithetical to the PSLRA's purpose to appoint the movant with the "***largest*** financial interest" that is not "subject to unique defenses." 15 U.S.C. §78u-4(a)(3)(B)(iii).

[8] Any attempt by UAM to belatedly substantiate the validity of its claimed assignments and to evidence its attorney-in-fact status and decision-making authority should be rejected. *See In re Bard Assocs., Inc.*, 2009 U.S. App. LEXIS 26289, at *8-*9 (10th Cir. 2009) (finding no error in the district court's adoption of a "bright line rule requiring lead plaintiff movants to establish Article III standing by the time the lead plaintiff motions are due, that is, 'not later than 60 days after the date on which [] notice is published'"); *see also In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 818 (N.D. Ohio 1999) ("[t]he PSLRA is unequivocal and allows for no exceptions" and "precludes consideration of . . . any other pleading . . . filed ***after*** the sixty (60) day window has closed") (emphasis in original).

Moreover, even if the Court allowed UAM AG to ***un***timely establish the validity of its assignments under Second Circuit and German law, UAM AG ***still*** could not be appointed as lead plaintiff. The reason is simple: the mere fact that UAM AG needs assignments of claims renders it subject to unique defenses and inadequate to serve as lead plaintiff. In *In re IMAX Sec. Litig.*, 2009 WL 1905033 (S.D.N.Y. 2009), Judge Buchwald initially appointed an asset manager like UAM AG as lead plaintiff. *Id.* at *1. Following the Second Circuit's decision in *Huff*, Judge Buchwald was forced to replace the asset manager as lead plaintiff ***despite*** the fact that the asset manager subsequently obtained assignments from the funds on whose behalf it had moved as lead plaintiff. *Id.* at *2. In so holding, Judge Buchwald recognized that despite the assignments, the asset manager now "'faces unique legal issues that other class members do not.'" *Id.* at *2-*3 (noting that such issues "could ultimately severely prejudice the class, either at the class certification stage or on some subsequent appeal"); *see also In re SLM Corp. Sec. Litig.*, 258 F.R.D. 112, 116 (S.D.N.Y. 2009) (Pauley, J.) (holding that because of *Huff*, asset manager should be replaced as lead plaintiff even though it received belated assignments of claims since it would be subject to unique defenses). Saddling the class with such risks at the outset of the litigation is not warranted here where there is another movant (*i.e.,* Philips Pensioenfonds) which not only has a larger financial interest in the relief sought by the class but is willing and able to serve as lead plaintiff.[9]

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[9] In the unlikely event that the "most adequate presumption" in favor of Philips Pensioenfonds is somehow rebutted and the Court is forced to consider UAM AG's and OKFPRS' motion, the Court should first permit limited discovery regarding UAM AG's purported assignments to determine their validity under Second Circuit and German law. *See In re Network Assocs. Sec. Litig.*, 76 F. Supp. 2d 1017, 1027 (N.D. Cal. 1999) (discovery "prove[d] illuminating" in assessing the viability of a foreign investment advisor as lead plaintiff); 15 U.S.C. §78u-4(a)(3)(B)(iv) (permitting discovery into the adequacy of other movants).

In sum, UAM AG has not timely demonstrated the propriety of its standing to pursue the claims it wishes to assert. And, because this standing defect is not curable by *ex post facto* assignments, UAM AG cannot serve as lead plaintiff.

b. UAM AG Is Subject to Res Judicata Defenses

Even ignoring UAM AG's fundamental standing defects, as a German entity, UAM AG is "subject to unique defenses that render [it] incapable of adequately representing the class." 15 U.S.C. §78u-4(a)(3)(B)(iii)(II)(bb). Specifically, there is a real and present "risk that [German] courts would not give the Court's judgment res judicata effect." *Steinberg*, 2008 U.S. Dist. LEXIS 29836, at *1 (declining to reconsider order denying lead plaintiff status to group of institutional investors, one of which was a German entity).

Judge Friendly's seminal opinion in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), directed the district court on remand to "eliminate from the class action all purchasers other than persons who were residents or citizens of the United States" because "***Germany*** . . . ***would not recognize a United States judgment*** in favor of the defendant as a bar to an action by their own citizens . . . ." *Id.* at 996-97. Similarly, at the class certification stage in *Vivendi*, Judge Holwell analyzed whether a foreign judgment would be recognized in Germany. *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76 (S.D.N.Y. 2007). The experts in *Vivendi* agreed "that there is no decision by a German court as to whether a judgment in a U.S. class action would be recognized" under the German procedures. *Id.* at 103-04. As such, Judge Holwell excluded German investors from the class because "***the formalities of German law may well preclude the recognition of a judgment in the instant case***." *Id.* at 105.

Vivendi was applied at the lead plaintiff stage in *Borochoff* where Judge Stanton rejected a lead plaintiff motion filed by a group of German investors, reasoning that "[i]f this Court's judgment

on the merits" does not "protect[] a prevailing defendant against relitigation in Germany," "then for those litigants a class action is not 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Borochoff v. Glaxosmithkline PLC*, 246 F.R.D. 201, 203 (S.D.N.Y. 2007).[10] "Rather, it is a waste," and the presence of German investors in the class "may inflict burdens on the administration of the action." *Id.* While acknowledging that the lead plaintiff stage was "not the proper occasion to determine whether German [investors] will be in the class," "***prudence cautions that the arguments for its exclusion are substantial***, and in light of that risk it would be improvident to appoint the German Institutional Investor Group as lead plaintiff at this point." *Id.* at 205; *see also In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291, 301 (D. Del. 2003) (noting that class certification may be inappropriate where "obstacles" exist due to the inclusion of foreign class members).[11]

Indeed, UAM AG is well-aware of this risk, as it was previously rejected as a lead plaintiff on the same grounds in *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 219 F.R.D. 343, 351-52 (D. Md. 2003). Indeed, the court in *Royal Ahold* determined that "[f]oreign courts might not recognize or

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[10] UAM AG's statement that it "will be subject to the jurisdiction of the Court and will be bound by all rulings by the Court, including rulings regarding any judgments" does not mitigate this res judicata risk. *See* Docket #13-1 at 6, ¶4. Indeed, Judge Stanton found that a virtually identical sentence by a group of German investors in *Borochoff* "***does not (nor could it) even purport to bind unrelated German" investors "where their court may not enforce a United States class action judgment***." *See* Rosenfeld Decl., Ex. D.

[11] "[W]hether these defenses will be successful is of no matter. The fact that plaintiffs will be subject to such defenses renders their claims atypical of other class members." *Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 476 (S.D.N.Y. 1989) (Edelstein, J.). Indeed, courts regularly refuse to appoint a lead plaintiff movant when "there is at least a potential that [the movant] will be subject to unique defenses." *In re Surebeam Corp. Sec. Litig.*, 2003 U.S. Dist. LEXIS 25022, at *22 (S.D. Cal. 2004); *Bally*, 2005 U.S. Dist. LEXIS 6243, at *19 ("the PSLRA . . . provides that we ask simply whether [a movant] is likely to be 'subject to' [unique defenses] . . . [not that] the defense is likely to succeed").

enforce such a decision from an American court, which would allow foreign plaintiffs in the class to file suit against the defendant again in those foreign courts." *Id.* "A strong possibility or near certainty that a foreign court will not recognize a judgment in favor of the defendant as a bar to the action of its own citizens may be the basis for eliminating foreign purchasers from the class." *Id.* (citing *Bersch*, 519 F.2d at 996). And while "[n]o specific evidence has been produced thus far regarding which foreign courts may or may not recognize a decision of this court," it "is possible, however, ***that Union and other foreign purchasers might be eliminated from the class at the certification stage because a judgment would not be enforceable***." *Id.* "In light of the above considerations," particularly the "possibility that foreign courts will not enforce a decision in favor of Royal Ahold against foreign plaintiffs in the class –the court finds that Union/Detroit General's status as presumptive lead plaintiff is rebutted." *Id.* at 353.

"It appears there is no formal treaty between [Germany] and the United States requiring either jurisdiction to recognize and enforce judgments. Thus, entrusting [UAM AG] with the responsibility of prosecuting a case where the lead plaintiff might be plagued with res judicata issues jeopardizes the interests of the entire class if Defendants res judicata arguments prevail." *Buettgen v. Harless*, 263 F.R.D. 378, 382-83 (N.D. Tex. 2009). In addition, like many other foreign countries, Germany does not "have its own class action equivalent." *Eichenholtz*, 2008 U.S. Dist. LEXIS 64633, at *30-*31 n.8 (rejecting Israeli movant as lead plaintiff). As such, "it is unclear if this litigation would be given res judicata effect" in Germany. *Id.*; *see also In re Discovery Labs. Sec. Litig.*, No. 06-cv-1820-SD, slip op. at 2 (E.D. Pa. Aug. 21, 2006) (denying reconsideration of lead plaintiff motion of Luxembourgian movant that did not "alla[y] our concerns that a judgment in its favor could be of questionable res judicata effect in foreign courts") (Rosenfeld Decl., Ex. E). Tellingly, UAM AG has not even attempted to provide ***any*** evidence, let alone "definitive authority,"

that German courts would give res judicata effect to a judgment in this case. *See, e.g.*, *Eichenholtz*, 2008 U.S. Dist. LEXIS 64233, at *30-*31 (rejecting Israeli movant as lead plaintiff because although Israel has a class action equivalent, there was no "definitive authority" demonstrating that Israel would give res judicata effect to any judgment in the court); *Buettgen*, 263 F.R.D. at 382-83 (where there is no evidence that foreign country would recognize res judicata effect of United States judgment, entrusting a citizen of that country "with the responsibility of prosecuting a case where the lead plaintiff might be plagued with res judicata issues jeopardizes the interests of the entire class").

In light of UAM AG's res judicata problem, "it would be improvident to appoint [UAM AG] as lead plaintiff at this point." *Borochoff*, 246 F.R.D. at 205.

3. UAM AG's and OKFPRS's Selection of Multiple Lead Counsel Is Yet Another Symptom of Their Inadequacy

"Before lead counsel can be approved under the PSLRA, a lead plaintiff must prove capable of directing the litigation and handling law firms with potentially disparate and competing interests." *In re Milestone Sci. Sec. Litig.*, 187 F.R.D. 165, 177 (D.N.J. 1999). "Rather surprisingly," UAM AG and OKFPRS "seek to appoint as lead counsel [***two***] separate law firms." *In re Reliant Sec. Litig*, 2002 U.S. Dist. LEXIS 27777, at *10-*11 (S.D. Tex. 2002). "Although appointment of multiple law firms as lead counsel in certain circumstances may be beneficial to the litigation of a class action, appointment of co-counsel more commonly will create needless complications, administratively and otherwise, substantial multiplicity of effort, and materially increased litigation costs and expenses." *Id.* at *11. "Thus, district courts have declined to appoint co-lead counsel in securities fraud class actions absent a showing that co-counsel will better protect the interests of the plaintiff class." *Id.* (citing cases).

Furthermore, concerns about a group's cohesiveness are underscored when "the lead plaintiff group is unable to agree on one law firm to serve as lead counsel." *Friedman v. Rayovac Corp.*, 219

F.R.D. 603, 606-07 (W.D. Wis. 2002). "[T]his would be an indication that the group cannot function as a unit and that a single lead plaintiff should be appointed, not that multiple lead counsel are necessary to serve the best interests of the class." *Id.* (rejecting group's request to approve three firms as lead counsel). In addition, the selection of multiple firms "suggests the group was merely a diverse collection of plaintiffs assembled by these . . . firms for the purpose of winning the lead plaintiff role." *In re MicroStrategy Inc. Sec. Litig.*, 110 F. Supp. 427, 437 (E.D. Va. 2000).[12]

That the balance of control between counsel and client has tipped decidedly in favor of counsel is virtually undeniable. One need only consider that UAM AG's certification inexplicably authorizes ***only*** Motley Rice as lead counsel, ***not*** the two firms proffered. *See* Docket #13-1 at 6, ¶1. Moreover, UAM AG and OKFPRS "have made no showing that the controversy in this case requires the retention of [multiple] separate law firms as lead counsel, nor have they made any effort to explain why any one of the law firms suggested is incapable of serving as sole lead counsel for the class." *Reliant*, 2002 U.S. Dist. LEXIS 27777, at *11-*12.

UAM AG's and OKFPRS's mere "belie[f]" that multiple sets of counsel "can work together efficiently and effectively" is a hollow and insufficient justification for what common sense tells us is, by its very nature, duplicative and inefficient. *See* Docket #13-4 at ¶9.[13] UAM AG and OKFPRS

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[12] *See also Baan*, 186 F.R.D. at 235; *Milestone*, 187 F.R.D. at 177 ("where several lead counsel are appointed, there is the potential they may ultimately seize control of the litigation, an occurrence the PSLRA intended to foreclose"); *Schriver*, 2006 U.S. Dist. LEXIS 40607, at *27 (court concerned that "multiplicity of counsel could impede the progress of the litigation, complicate discovery and communication among the parties, and increase the potential for conflict among the plaintiff class").

[13] Employing the latest fad developed by multi-plaintiff/multi-counsel amalgamations hoping to lend credence to their unlikely unions, UAM AG and OKFPRS state that their counsel entered into something called a "joint prosecution agreement." *See* Docket #13-4 at ¶8. In doing so, UAM AG and OKFPRS seemingly fail to appreciate that the very need to create a "joint prosecution agreement" highlights the inefficiencies inherent in their co-lead plaintiff/co-lead counsel

failed to explain ***why*** multiple lead counsel are necessary here, other than a single statement that both firms "are highly qualified to act as class counsel and can work together efficiently and effectively." *See* Docket #13-4 at ¶9. UAM AG's and OKFPRS' statement begs an obvious question: "[i]f, as argued, 'each attorney . . . has significant experience prosecuting class action and other complex litigation,' then why are so many of them necessary?" *In re Faro Techs. Sec. Litig.*, 2006 U.S. Dist. LEXIS 23500, at *6 n.1 (M.D. Fla. 2006). "[I]s more necessarily better?" *Id.*[14] Common sense tells us the answer is "no." Indeed, such a structure "could cause exactly the kind of duplication of effort, increased attorneys' fees, friction or lack of coordination among counsel, and concomitant delay in the litigation which the PSLRA was enacted to combat in the first place." *Weltz v. Lee*, 199 F.R.D. 129, 134 (S.D.N.Y. 2001) (Batts, J.).

It is true that the "PSLRA does not expressly prohibit the lead plaintiff from selecting more than one law firm to represent the class." *Milestone*, 187 F.R.D. at 176. But "consistent with the PSLRA, [a] Lead Plaintiff should act reasonably to minimize the incurrence of needless attorneys' fees and expenses in prosecuting their case." *Reliant*, 2002 U.S. Dist. LEXIS 27777, at *16. As Judge Owen duly noted in an earlier securities case against Pfizer, "I do not see the need for two law firms." *Pfizer*, 233 F.R.D. at 338. Rather, one firm serving as lead counsel "avoids the danger of

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arrangement. *See, e.g., Bally*, 2005 U.S. Dist. LEXIS 6243, at *8 (expressing concern over "flurry of otherwise pointless activity that adds nothing to the prompt and fair resolution of disputes" caused by some groups' activities). Nor do UAM AG and OKFPRS explain why the parameters of ***this*** case require such a grandiose arrangement. It does not.

[14] Notably, the largest securities fraud class action recovery in U.S. history – *In re Enron Corp.* – was obtained by a lead plaintiff utilizing a streamlined ***single*** lead counsel structure like that proffered by Philips Pensioenfonds here. And the last securities fraud class action trial to yield a favorable plaintiff's verdict – *Jaffe v. Household Int'l* – similarly had ***one*** lead counsel.

unnecessarily duplicative attorney work and, ultimately, a lower recovery for the class." *Id.* UAM AG and OKFPRS failed to articulate a reason why two firms are necessary here. They are not.

C. The Meister Family Has the Smallest Financial Interest

The remaining movant, the Meister Family, claims a ***smaller*** loss than Philips Pensioenfonds by at least $20 million. Consequently, the Court may only consider its motion "***if and only if*** [Philips Pensioenfonds] is found inadequate or atypical." *Cavanaugh*, 306 F.3d at 732. Because Philips Pensioenfonds is "both willing to serve and satisfies the requirements of Rule 23," however, the Meister Family's motion should be denied. *Id*. at 730.

III. CONCLUSION

UAM AG and OKFPRS have smaller individual and collective losses than Philips Pensioenfonds, did not sufficiently demonstrate that their grouping was not lawyer-driven and selected multiple lead counsel without any justification. Further, group member UAM AG is subject to standing and res judicata defenses. Likewise, the Meister Family claims a significantly smaller financial interest. Consequently, neither the UAM AG/OKFPRS nor Meister Family can trigger the "most adequate plaintiff" presumption and their motions should be denied.

In contrast, Philips Pensioenfonds has satisfied all of the PSLRA's requirements and is entitled to the presumption that it is the "most adequate plaintiff." Philips Pensioenfonds' motion should be granted.

DATED: July 29, 2010

Respectfully submitted,

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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, and to:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 29, 2010.

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