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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY 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

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Oklahoma Firefighters Pension and Retirement System ("Oklahoma Firefighters") and Union Asset Management Holding AG ("Union") respectfully submit this reply memorandum of law in further support of their motion for appointment as lead plaintiff and approval of their selection of counsel.[1]

I. INTRODUCTION

Oklahoma Firefighters and Union have the largest financial interest in the relief sought by the class under the four-factor test employed by this Court and the courts in this District. Faced with this obvious result, Stichting Philips attempts to inflate the results of the only "close" factor – the approximate losses suffered – by including non-recoverable in-and-out transactions in its loss calculations. But the U.S. Supreme Court's decision in Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 343 (2005), and its progeny establish that non-recoverable losses should not be considered when determining financial interests in the lead plaintiff context. When Dura is applied, Oklahoma Firefighters and Union's approximate losses exceed Stichting Philips's approximate losses, and Oklahoma Firefighters and Union prevail on all four-factors.

In addition, Oklahoma Firefighters and Union have submitted ample evidence to show that they are an appropriate lead plaintiff group. Oklahoma Firefighters and Union are sophisticated institutional investors with substantial experience serving as lead plaintiff, individually and together. There is no doubt that Oklahoma Firefighters and Union will continue to direct counsel to prosecute this action vigorously and efficiently, in the best interests of the putative class.

[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"). Notably, the Meister Group failed to file a memorandum in opposition to competing motions.

Accordingly, as the movant with the greatest financial interest who otherwise satisfies the requirements of Rule 23, Oklahoma Firefighters and Union are together entitled to the presumption of being the most adequate plaintiff. Stichting Philips has presented no "proof" to rebut this presumption. See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). Instead, Stichting Philips resurrects defeated arguments questioning Union's standing in this action and attempts to distract the Court with red-herring arguments regarding the application of a potential judgment to foreign absent class members – an issue that would apply equally to Stichting Philips.

Therefore, and for the reasons set forth below, 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 And Are The Presumptive Lead Plaintiffs

1. Oklahoma Firefighters and Union Prevail on All Four Factors of the Four-Factor Test To Determine Financial Interest

It is well-established that courts in this District employ a four-factor test to determine which lead plaintiff movant has the largest financial interest in the relief sought by the class, considering: (1) the number of shares purchased during the class period; (2) the number of net shares purchased during the class period; (3) total funds expended during the class period; and (4) the approximate losses suffered during the class period. See, e.g., 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); 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); Police & Fire Ret. Sys. of Detroit v. SafeNet, Inc., No. 06 Civ. 5797 (PAC), 2007 U.S. Dist. LEXIS 97959, at *5 (S.D.N.Y. Feb. 21, 2007) (Crotty, J.).

Competing movants cannot and do not dispute that three of the four factors used to compare financial interests – shares purchased, net shares purchased, and net funds expended – show unambiguously that Oklahoma Firefighters and Union have the largest financial interest in the relief sought by the class, by a wide margin. Rather, the only point of contention is whether Oklahoma Firefighters and Union prevail over Stichting Philips on the fourth factor, the approximate loss suffered. Under prevailing law, however, it is clear that they do.

2. Stichting Philips Attempts To Exaggerate Its Losses Due to Fraud by Including Non-Recoverable Losses

Stichting Philips improperly exaggerates its purported losses by failing to apply LIFO in combination with Dura to include in its loss calculation only those losses that are recoverable because of the alleged fraud. As Stichting Philips recently argued in Hartford, "it is axiomatic that one's financial interest is directly tied to what one can expect to recover should the litigation be successful." See Philips Hartford Br. 8.[2] Following that logic, the court in Hartford determined that LIFO is indeed the appropriate measure of recovery and thus the appropriate measure of financial interest for purposes of appointing the lead plaintiff. 2010 WL 2816797, at *4; see also In re eSpeed, Inc. Sec. Litig., 232 F.R.D. 95, 101 (S.D.N.Y. 2005) (noting that LIFO is used for lead plaintiff calculations and "to determine compensation amounts for stockholders suffering losses due to securities fraud").

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[2] See Mem. of Law in Further Support of the Mot. of Stichting Philips Pensioenfonds & State Univs. Ret. Sys. of Ill. for Appointment as Lead Pl. and Approval of Selection of Lead Counsel and in Opp'n to the Competing Mots. ("Philips Hartford Br."), attached as Exhibit 9 to the Declaration of Mitchell M.Z. Twersky in Reply and 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 ("Twersky Reply Decl.").

Perhaps in recognition of the Hartford decision, Stichting Philips appears to have reversed its position that application of LIFO is somehow "irrational," 2010 WL 2816797, at *3 n.6, and now baldy submits that it suffered LIFO losses of approximately $19.1 million (as compared to Oklahoma Firefighters and Union's supposed LIFO losses of $17.4 million). See Philips Opp. Br. at 3(Dkt. #20). Although Stichting Philips fails to provide any calculations in support of its purported losses, it is obvious from the transactions it provided in its Certification that Stichting Philips, at the very least, failed to exclude non-recoverable losses. See Stichting Philips's Certification (Dkt. #17) Ex. 2.

Moreover, as the U.S. Supreme Court established firmly in Dura, to recover under §10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), as alleged here, a plaintiff must be able to demonstrate loss causation. 544 U.S. at 343. Accordingly, under Dura and its progeny, 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. 18255 (NGG)(RER), 2007 WL 680779, at *4 (E.D.N.Y. Mar. 2, 2007) (Garaufis, J.); see also In re Cornerstone Propane Partners, No. C 03-2522 MHP, 2006 U.S. Dist. LEXIS 25819, at *27-28 (N.D. Cal. May 3, 2006) ("under Dura there can be no loss causation for plaintiffs who purchased and sold stock at inflated share prices prior to that disclosure").

Thus, "[i]t is clear that courts cannot include non-recoverable losses in a calculation of each litigants' financial interest" for purposes of appointing a lead plaintiff. Comverse, 2007 WL 680779, at *5 n.6; see also SafeNet, 2007 U.S. Dist. LEXIS 97959, at *6-7 (noting that "lion's share" of movant's claimed losses may be uncollectable or at least subject to unique defenses because movant sold before the wrongful conduct was revealed); Kops v. NVE Corp.,

No. 06-574, 2006 U.S. Dist. LEXIS 49713, at *14 (D. Minn. July 17, 2006) ("Under Dura, the Court only calculates losses incurred from sales occurring after the disclosure . . . .").[3]

Following Dura and as set forth in their previous memorandum (Dkt. #18), Oklahoma Firefighters and Union properly excluded non-recoverable losses when calculating the approximate loss of each movant. The Complaint filed in this action, which was filed by Stichting Philips's counsel, alleges loss causation based on only one disclosure on January 26, 2009, and the resulting stock drop. See Am. Compl., Jones v. Pfizer, Inc. (Dkt. #2). Therefore, based on Dura and its progeny, any losses suffered from buying and selling Pfizer stock prior to January 26, 2009, cannot be included when calculating the movants' financial interests. 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 the pleadings" that a substantial portion of movant's losses were suffered before any alleged corrective disclosure).

Accordingly, under the proper method of calculating approximate losses – using LIFO and excluding non-recoverable losses – Oklahoma Firefighters and Union's approximate losses

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[3] See also Eichenholtz v. Verifone Holdings, Inc., No. C 07-06140 MHP, 2008 WL 3925289, at *3 (N.D. Cal. Aug. 22, 2008) (excluding losses recognized on shares sold prior to any disclosure, stating "it is difficult, if not impossible, to demonstrate loss causation for shares bought and sold before the disclosure of the misstatements or omissions.") (emphasis in original); 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."); Durgin v. Tousa, Inc., No. 06 Civ. 61844, 2008 U.S. Dist LEXIS 76315, at *6 (S.D. Fla. July 15, 2008) ("courts routinely analyze the loss calculation in lead plaintiff applications in terms of trading and remove losses suffered prior to a corrective disclosure"); Kratz v. Beazer Homes USA Inc., No. 1:07-CV-00725-CC, at 2 (N.D. Ga. Aug. 8, 2007) (stating that under Dura, "[a]n investor must have held shares of a corporate defendant's stock until some corrective disclosure caused a drop in the company's stock price" and that courts have "[a]pplied Dura by removing proposed lead plaintiffs' losses that occurred before any corrective disclosure was made"), attached to Twersky Reply Decl. as Exhibit 24.

of $14,705,809 are greater than Stichting Philip's approximate losses of $14,430,804.[4] See Twersky Opp. Decl. Ex. 7 (Dkt. #19).[5] Oklahoma Firefighters and Union, therefore, prevail on all four factors of the four-factor test and without question have the greatest financial interest in the relief sought by the class.

3. Stichting Philips's Actual Recoverable Losses Due to Fraud Cannot Be Ascertained

Oklahoma Firefighters and Union's financial interest calculations presuppose that Stichting Philips transacted all of its shares in Pfizer stock on the New York Stock Exchange (NYSE), although there is no evidence to that effect in the record. Under the U.S. Supreme Court's recent decision in Morrison v. National Australia Bank, 130 S. Ct. 2869 (2010), trades must be transacted on a U.S. securities exchange to reap recoverable damages under § 10(b) of the Exchange Act. In its previous memoranda, Stichting Philips affirms its standing to bring an action stating, "evidence submitted with [Stichting Philips's] motion indicates that it traded on the [NYSE], an **American** exchange" (Philips Opp. Br. 5), and that "it purchased Pfizer securities on a U.S. exchange during the Class Period . . . ." (Philips Br. 5).[6]

At face value, these carefully worded statements affirm that Stichting Philips transacted some shares on a U.S. exchange and thus presumably has standing in this action; however, these statements do not avow that Stichting Philips transacted all of its shares on a U.S. exchange,

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[4] In addition, under Alternative LIFO, which also applies Dura, as described in their previous memorandum (Dkt. #18), Oklahoma Firefighters and Union have approximate losses of $18,063,908, compared to Stichting Philips's approximate losses of $15,635,790.

[5] Stichting Philips's counsel has used and advocated this exact same method of calculating approximate losses in other cases. See Stichting Philips's counsel's lead plaintiff opposition brief in Macomb County Employees' Ret. Sys. v. Massey Energy Co., No. 10-00689-ICB (S.D. W. Va.) (Dkt. #32), attached as Exhibit 11 to the Twersky Reply Decl.

[6] See Mem. of Law in Support of Stichting Philips Pensioenfonds's Mot. for Appointment as Lead Pl. & Approval of Lead Pls.' Selection of Lead Counsel (Dkt. #16) ("Philips Br.").

which is the only way to ensure that all of its transactions are properly considered when calculating its true financial interest. Without more, competing movants and the Court are unable to ascertain the true financial interest of Stichting Philips in the relief sought by the class. In contrast, Union certified that it "purchased all of its [Pfizer] common stock on the NYSE exchange." See Union Certification ¶ 9, Twersky Decl. Ex. 1 (Dkt. #13).[7]

B. Oklahoma Firefighters And Union Are An Appropriate Group To Be Appointed Lead Plaintiff

Consistent with the express language of the PSLRA, this Court has appointed co-lead plaintiffs in multiple securities class actions. See In re Vodafone Group, PLC Sec. Litig., No. 02 Civ. 7592-AKH (S.D.N.Y.) (Dkt. #32); Lowinger v. Pzena Inv. Mgmt., No. 07 Civ. 10524-AKH (S.D.N.Y) (Dkt. #9); Munoz v. China Expert Tech., Inc., No. 07 Civ. 10531-AKH (S.D.N.Y.) (Dkt. #18).[8] "[T]he majority of courts, including those in this District . . . permit [] unrelated investors to join together as a group seeking lead-plaintiff status. . . ." In re McDermott Int'l, Inc. Sec. Litig., No. 08 Civ. 9943, 2009 WL 579502 at *2 (S.D.N.Y. Mar. 6, 2009) (Cote, J.) (quoting Varghese v. China Shenghuo Pharm. Holdings, Inc., 589 F. Supp. 2d 388, 391-92 (S.D.N.Y. 2008)).[9] In fact, Stichting Philips recently argued the superiority of appointing two investors to serve as lead plaintiff, contending that such a circumstance "would allow the two investors to act as a check on one another." Hartford, 2010 WL 2816797, at *3 n.5.

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[7] Oklahoma Firefighters also transacted all of its Pfizer securities on the NYSE. See Oklahoma Firefighters Pension and Retirement System's Declaration in Further Support of Lead Plaintiff Motion, attached as Twersky Reply Decl. Exhibit 12.

[8] These Orders are attached together as Exhibit 13 to the Twersky Reply Decl.

[9] See also In re Bank of Am. Corp. Sec., Derivative & ERISA Litig., 258 F.R.D. 260, 270 (S.D.N.Y 2009) (Chin, 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.); City of Brockton Ret. Sys. v. Shaw Group, Inc., No. 06 Civ. 8245(CM)(MHD), 2007 WL 2845125, at *3 (S.D.N.Y. Sept. 26, 2007) (Dollinger, M.J.).

Courts in this District have identified several elements to be considered in determining whether a given Lead Plaintiff group is acceptable: "(1) the existence of a pre-litigation relationship between group members; (2) involvement of the group members in the litigation thus far; (3) plans for cooperation; (4) the sophistication of its members; and (5) whether the members chose outside counsel, and not vice versa." McDermott, 2009 WL 579502, at *2 (quoting Varghese, 589 F. Supp. 2d at 392).

Oklahoma Firefighters and Union more than satisfy this test. They are two sophisticated institutional investors with considerable experience serving as lead plaintiff on behalf of a class, separately and together as current co-lead plaintiffs in the securities class action Minneapolis Firefighters' Relief Association v. Medtronic, Inc., No. 08-6324 (PAM/AJB) (D. Minn.). Moreover, Oklahoma Firefighters and Union have provided evidence that they made the decision to seek appointment as lead plaintiff independent of their attorneys, and that they have conferred to propose a unified and cohesive plan to prosecute this action vigorously and efficiently. This evidence includes the submitted Joint Declaration, which documents the discussions held between Oklahoma Firefighters and Union concerning their decision to act jointly in this case and their plans for joint oversight of the prosecution of the litigation.[10]

Such declarations and intra-group discussions are widely accepted as adequate evidence in support of a lead plaintiff group. See Varghese, 589 F. Supp. 2d at 392 (citing Ambac, 2008 WL 2073931, at *3); In re Nature's Sunshine Prods., Inc., No. 2:06-CV-267 TS, 2006 WL 2380965, at *1 (D. Utah Aug. 16, 2006); Local 144 Nursing Home Pension Fund v. Honeywell Int'l, Inc., No. 00-3605, 2000 WL 33173017, at *4 (D.N.J. Nov. 16, 2000). Furthermore,

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[10] See Joint Decl. of Okla. Firefighters Pension & Ret. Sys. & Union Asset Mgmt. Holding AG in Support of Their Mot. for Appointment as Lead Pl. & Approval of Their Selection of Counsel ("Joint Decl."), attached as Exhibit 4 to the Twersky Decl. (Dkt. #13-5).

Oklahoma Firefighters and Union directed their counsel to enter into a Joint Prosecution Agreement to ensure a unified strategy to promote the efficient representation of the putative class without duplication of efforts and personnel.

Stichting Philips's arguments to the contrary are not only misplaced and inherently inconsistent, but also contradict the position it took less than two months ago when moving as part of a group for appointment as lead plaintiff in Hartford. See, e.g., Philips Hartford Br. 3 (arguing that when two institutional investors "have sufficiently demonstrated their ability to work together as Lead Plaintiff consistent with the intent of the PSLRA, [] their combined financial interest is properly considered in the aggregate") (citation omitted).[11]

As Stichting Philips recognizes, Oklahoma Firefighters and Union have a pre-existing relationship as co-lead plaintiffs in Medtronic, which continually requires them to communicate and work together to oversee counsel in the prosecution of that action. Also, it is important to note that Oklahoma Firefighters is represented by different counsel in the Medtronic action, which undermines any contention that Oklahoma Firefighters and Union were "cobbled together at the last minute by counsel" retained in this action. Philips Opp. Br. 7.

Despite Oklahoma Firefighters and Union's pre-existing relationship, Stichting Philips maintains that there is "no rationale for [their] grouping other than to manufacture the greatest financial interest . . . ." Id. at 9. Union alone, however, prevails over Stichting Philips on all four factors of the four-factor test. See Twersky Opp. Decl. Ex. 7; cf. Freudenberg v. E*Trade Fin. Corp., No 07 Civ. 8536, 2008 U.S. Dist. LEXIS 62767, at *13 (S.D.N.Y. July 17, 2008)

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[11] Notably, in Hartford, Stichting Philips argued that it sufficiently demonstrated its ability to work with its co-movant despite the fact that they did not submit a joint declaration, or any other evidence, explaining how and why the movants came together or how the movants intended to conduct discovery or coordinate their litigation efforts.

(Sweet, J.) (finding appointment of group appropriate when one member alone would qualify as party with the largest financial interest); Barnet v. Elan Corp., 236 F.R.D. 158, 162 (S.D.N.Y. 2005) (Howell, J.) (finding no evidence of bad faith in forming group when one member would still have the largest financial interest).

Stichting Philips also tries to make much of the fact that Union executed its Certification on Friday July 9, 2010, and Oklahoma Firefighters executed its Certification the next business day on Monday, July 12, 2010 – which is the same day that Oklahoma Firefighters and Union held a conference call to discuss the benefits of working together to jointly prosecute this action. See Philips Opp. Br. 8-9; Joint Decl. ¶ 5. But this course of events shows that Oklahoma Firefighters and Union began working together immediately after deciding to seek appointment as lead plaintiff. And, as Stichting Philips argued in Hartford, "where there are two institutional investors seeking to be appointed as Lead Plaintiff, each with substantial losses and who collectively represent the largest financial interest, their appointment as Lead Plaintiff would certainly 'realize the larger goals of the PSLRA.'" Philips Hartford Br. 3-4 (citing Weltz v. Lee, 199 F.R.D. 129, 132 (S.D.N.Y. 2001); Bank of Am., 258 F.R.D. at 274).

C. The Statutory Presumption In Favor Of Oklahoma Firefighters And Union Has Not Been Rebutted

The statutory presumption in favor of Oklahoma Firefighters and Union can only be rebutted upon proof that Oklahoma Firefighters and Union will not fairly and adequately protect the interests of the class or are subject to unique defenses rendering them incapable of representing the class. 15 U.S.C. §78u-4(a)(3)(B)(iii)(II); see also In re Cavanaugh, 306 F.3d 726, 729 n.5 (9th Cir. 2002); Levitt v. Rogers, 257 F. App'x 450, 452 (2d Cir. 2007). Here, the competing movants do not contest that Oklahoma Firefighters will fairly and adequately protect the interests of the class and is not subject to any unique defenses. Likewise, it is uncontested

that Union will fairly and adequately protect the interests of the class. Although Stichting Philips tries to distract the Court with defeated, red-herring arguments that fall well short of "proof," it is also clear that Union has standing to bring this action and is not subject to any unique defenses. As such, the presumption in favor of Oklahoma Firefighters and Union has not been rebutted and Oklahoma Firefighters and Union should be appointed lead plaintiff.

1. Union Has Demonstrated Its Standing

a. Union's investment management companies have standing to sue on behalf of their funds

Stichting Philips argues that Union has not provided evidence of its Article III standing to pursue claims on behalf of their funds. Philips Opp. Br. 10-15. Stichting Philips is incorrect. Under German law "[i]nvestment companies have the exclusive right to bring legal claims, in their own name, for damage to the funds' assets." In re Vivendi Universal, S.A. Sec. Litig., 605 F. Supp. 2d 570, 578 (S.D.N.Y. 2009) (Holwell, J.); see also Decl. of Rolf Stürner ¶ 10 (citing the German Investment Companies Act § 9), attached as Twersky Reply Decl. Ex. 14. The German investment companies (called "KAGs") have statutory authority under German law to sue on behalf of their funds. See Vivendi, 605 F. Supp. 2d at 578; Stürner Decl. ¶ 10. Here, Union's German investment companies – Union Investment Privatfonds GmbH and Union Investment Institutional GmbH – are KAGs.[12]

The law governing Luxembourgian funds and their investment management companies is similar. In Luxembourg, funds similar to U.S. mutual funds are called "fonds common de placement," or FCPs. Vivendi, 605 F. Supp. 2d at 579. FCPs cannot act on their own because

[12] See Decl. of Simone Lang in Support of the Mot. of Okla. Firefighters & Union Asset Mgmt. Holding AG for Appointment as Lead Pl. & Approval of Their Selection of Counsel ("Lang Decl.") ¶¶ 4-5, attached as Exhibit 15 to the Twersky Reply Decl.

they do not have any legal personality. Id. (citing legal expert decls.). Designated management companies act for the FCPs. Id. Here, Union Investment Luxembourg S.A. is the management company for the Luxembourgian funds. Lang Decl. ¶ 3.

Stichting Philips relies on W.R. Huff Asset Management Co., LLC v. Deloitte & Touche LLP, 549 F.3d 100 (2d Cir. 2008) to question the investment management companies' standing to sue on behalf of their funds. But the Vivendi court thoroughly analyzed this exact issue and determined that they did have standing. Concerning German KAGs, the Vivendi court found "a close relationship between the KAGs and the funds investors as well as a barrier to the investors bringing suit" brought plaintiffs within an exception to Huff. Vivendi, 605 F. Supp. 2d at 578. Likewise, concerning Luxembourgian management companies, the Vivendi court "conclude[d] that the FCP management companies . . . have standing to bring suit on behalf of their investors under the Huff exception." Id. at 579. The Vivendi court noted that "[t]he relationship between a management company and an FCP appears to be similar to that of trustee to beneficiary." Id. This constitutes one of the primary exceptions to Huff, which held that the entity bringing suit must have an "injury in fact" unless it has been assigned the claims of an entity that did suffer an injury in fact. See Huff, 549 F.3d at 109-110 (recognizing that "courts historically have permitted '[t]rustees [to] bring suits to benefit their trusts'") (quoting Sprint Commc'ns Co. v. APCC Servs., Inc., 128 S. Ct. 2531, 2542-44 (2008)).

Therefore, Vivendi makes it unquestionably clear that Union's management companies have Article III standing to bring suit on behalf of their funds and their funds' investors.

b. Union's management companies have assigned their claims to Union

Union stated in its certification that "Union has received assignments of the claims from the Funds' investment companies." (Dkt. #13-2.) These assignments are attached as Exhibit 10

to the Lang Declaration, which is Exhibit 15 to the Twersky Reply Declaration. The Funds' investment companies assigned their claims to Union on July 9, 2010, three days before Oklahoma Firefighters and Union jointly moved for appointment as lead plaintiff. See Lang Decl. ¶ 6. The Declarations of Assignment state that the Funds' investment companies are:

> assigning, transferring, and setting over to Union all rights, title, and interest of [the Funds' investment companies] in any and all claims, demands and causes of action of any kind whatsoever that [the Funds' investment companies] had or may have arising from violations of the United States federal securities laws in connection with the purchase of the publicly traded securities of Pfizer, Inc.

Twersky Reply Decl., Ex. 10 ¶ 3. These assignments from Union's management companies to Union are valid under German law. "Under German substantive law, a person to whom a claim has been assigned is considered the full owner of such claim, regardless of whether the assignment is executed for security purposes or the purpose of facilitating enforcement only. Thus, by virtue of an assignment, the assignee acquires authority to sue even in the latter cases." See Stürner Decl. ¶ 16. Thus, by virtue of the assignments from the funds' management companies to Union, Union has standing to bring these claims on behalf of the funds.

A plaintiff or lead plaintiff movant who has been assigned claims, before bringing suit, from the assignor who owns the claims does have Article III standing. See, e.g., Huff, 549 F.3d at 108 ("[A]n assignment of claims transfers legal title or ownership of those claims and thus fulfills the constitutional requirement of an 'injury-in-fact.'"); see also In re IMAX Sec. Litig., No. 06 Civ. 6128(NRB), 2009 WL 1905033, at *3 (S.D.N.Y. June 29, 2009) (replacing lead plaintiff who lacked Article III standing when appointed and ruling that defect in standing could not be cured through subsequently executed assignments); In re SLM Corp. Sec. Litig., 258 F.R.D. 112, 116 (S.D.N.Y. 2009) (replacing current lead plaintiff because "Huff now makes clear that [the current lead plaintiff] did not have Article III standing at the time this Court appointed it lead plaintiff") (emphasis added). But see Medtronic, 2009 WL 1458234, at *2

(ruling that competing movant had not demonstrated that any standing defenses applied after movant represented to the court at the lead plaintiff hearing that it had received effective assignments of claims); Northstar Fin. Advisors, Inc. v. Schwab Invs., 609 F. Supp. 2d 938, 942 (N.D. Cal. 2009) (holding that an assignment made even after the lead plaintiff was appointed cures any standing deficiency it may have had).[13] Union received valid assignments from the Funds' investment companies before Oklahoma Firefighters and Union filed their lead plaintiff motion, and has demonstrated their validity. Therefore, Union has standing to sue on behalf of its management companies and the funds.

2. Stichting Philips's "Res Judicata" Argument is a Red Herring

Stichting Philips claims that Union may be subject to the unique defense that German courts will not recognize the res judicata effect of a judgment in this action. See Philips Opp. Br.

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[13] Stichting Philips cites In re Bard Associates, Inc., No. 09-6243, 2009 WL 4350780 (10th Cir. Dec. 2, 2009) for the proposition that a lead plaintiff may not tender assignments of claims after the 60-day lead plaintiff deadline. Philips Opp. Br. 13 n.8. In Bard, the Tenth Circuit upheld 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." Bard, 2009 WL 4350780, at *3. The district court concluded that "the PSLRA's strict time limits precluded it from considering assignments made after the filing of [the movant's] lead plaintiff motion." Id. (emphasis added). This decision is irrelevant here because the assignments were executed (i.e., made) before Oklahoma Firefighters and Union filed their lead plaintiff motion, and notification of the assignments was provided in Union's Certification.

Stichting Philips also argues that the Court should reject "any attempt by [Union] to belatedly substantiate the validity of its claimed assignments and to evidence its attorney-in-fact status and decision-making authority" (Philips Opp. Br. 13 n.8.), relying on In re Telxon Corp. Securities Litigation, 67 F. Supp. 2d 803, 818 (N.D. Ohio 1999). Telxon is readily distinguishable because there the issue was whether the court should consider a lead plaintiff movant's amended complaint – based on an expanded class period that increased the movant's losses by 532% – and which was filed a month after lead plaintiff motions were filed. Id. at 818. The Telxon court refused to consider the new, much higher losses contained in the amended complaint at that late date, reasoning that "'[i]n some cases, appointment of lead counsel could be delayed indefinitely if new complaints alleging earlier starting dates for the class periods were filed.'" Id. at 819. Here, Oklahoma Firefighters and Union are simply providing to the Court with further documentary evidence, consistent with Union's certification, of assignments made before any lead plaintiff motions were filed.

15-18. But the res judicata issue in the context of transnational class actions is whether the judgment of a United States court will be afforded preclusive effect in the courts of absent foreign class members' home countries, thereby ensuring compliance with Rule 23's requirement that a class action be superior to multiple individual litigations. See In re Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76, 92-93 (S.D.N.Y. 2007). Union, however, is present and voluntarily bound by the Court's judgments. The argument also fails because the res judicata defense is not unique to Union; it is common to the Class and will confront any lead plaintiff in the Action, regardless of its nationality.

The fact that Union is a foreign investor has no bearing on its adequacy or ability to serve as lead plaintiff, particularly because Union purchased shares of a U.S. company on the New York Stock Exchange, a U.S. exchange. See In re NPS Pharms., Inc. Sec. Litig. , No. 2:06-cv-00570-PGG-PMW, 2006 U.S. Dist. LEXIS 87231, at *13 (D. Utah Nov. 17, 2006) (rejecting argument that foreign institutional investor who bought shares of a U.S. company on a U.S. exchange may be subject to the unique defenses of subject matter jurisdiction and res judicata). As Stichting Philips's counsel argued just months ago in supporting the appointment of a foreign lead plaintiff movant, "'[C]ourts routinely appoint . . . foreign investors . . . as lead plaintiffs,' as this Court recently recognized." See Stichting Philips's counsel's lead plaintiff reply brief in Sgalambo v. McKenzie, No. 1:09-cv-10087-SAS (S.D.N.Y. filed Mar. 8, 2010) (Dkt. #29) at 7, Twersky Decl. Ex. 16. Stichting Philips's counsel is correct: courts across the country frequently have appointed foreign investors, including German investors, as lead plaintiffs in securities fraud class actions.[14]

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[14] See, e.g., Medtronic, 2009 WL 1458234 (appointing group comprising German fund manager, Danish fund manager, and two U.S. pension funds lead plaintiff); Bank of Am. Corp., 258 F.R.D. 260 (appointing group of domestic and foreign pension funds as lead plaintiff); Keller v.

Stichting Philips's current argument that a lead plaintiff movant's nationality somehow saddles them with a "unique" res judicata defense repeatedly has been rejected by the courts. See, e.g., In re Molson Coors Brewing Co. Sec. Litig., 233 F.R.D. 147, 151, 153 (D. Del. 2005) (calling the res judicata issue a "red herring," observing, "many courts, including this one, have approved foreign investors as lead plaintiffs in cases such as this," and holding that a group of investors led by a European investment firm was entitled to appointment as lead plaintiff because it had the largest financial interest of any movant, was otherwise adequate and typical, and would not be subject to unique defenses because of its foreign status) (collecting cases).[15]

Courts also have rejected similar res judicata arguments as "speculative" and "not sufficient" to exclude a foreign lead plaintiff applicant. See, e.g., Mohanty v. BigBand Networks, Inc., No. C 07-5101 SBA, 2008 WL 426250, at *8 (N.D. Cal. Feb. 14, 2008) (recognizing that the res judicata concern "is insufficient to rebut the presumption that [the foreign investor] is the most adequate lead plaintiff"); Marsden v. Select Med. Corp., 246 F.R.D. 480, 486 (E.D. Pa. 2007) (stating that the res judicata argument "is simply not sufficient to

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First Marblehead Corp., No. 08-10612-JLT (D. Mass. Aug. 28, 2008) (appointing group comprising German fund manager and U.S. pension fund lead plaintiff); Mass. Laborers' Annuity Fund v. Encysive Pharms. Inc., No. H-06-3022 (S.D. Tex. Mar. 20, 2007) (appointing Luxembourgian fund manager lead plaintiff); Welmon v. Chi. Bridge & Iron Co. N.V., No. 06-CV-01283 (JES) (S.D.N.Y. May 11, 2006) (appointing group comprising German and Belgian fund managers as lead plaintiff); In re GMC Sec. Litig., No. 05-CV-8088 (RMB) (S.D.N.Y. Feb. 6, 2006) (appointing group comprising German and Luxembourgian fund managers lead plaintiff); Cox v. Delphi Corp., No. 1:05-CV-2637(NRB) (S.D.N.Y. June 27, 2005) (appointing group comprising a German and a Dutch fund manager and two U.S. pension funds lead plaintiff). The unreported, unpublished orders cited in this footnote are attached as Exhibit 17 to the Twersky Reply Decl.

[15] As one court explained in appointing Union lead plaintiff, "[t]here is neither a bar nor a presumption against appointing foreign entities as lead plaintiff, particularly where, as here, the defendant is a U.S. company and the foreign entities bought their shares in the United States." In re Dell Inc., Sec. Litig. , No. A-06-CA-726-SS (W.D. Tex. Apr. 9, 2007), attached as Exhibit 18 to the Twersky Reply Decl.

support the exclusion of [the foreign plaintiff]"); see also Takeda v. Turbodyne Techs., Inc., 67 F. Supp. 2d 1129, 1139 (C.D. Cal. 1999) (noting that "[c]oncerns respecting the res judicata impact of any judgment in favor of defendants . . . are not an issue with respect to the selection of Lead Plaintiffs").

The cases Stichting Philips relies on in support of its argument to exclude Union have involved factors that are completely absent here: foreign plaintiffs who purchased stock of foreign defendants that was traded only on foreign markets. See, e.g., Borochoff v. GlaxoSmithKline PLC, 246 F.R.D. 201 (S.D.N.Y. 2007); In re Royal Ahold N.V. Sec. & ERISA Litig., 219 F.R.D. 343 (D. Md. 2003); Vivendi, 242 F.R.D. at 76 (S.D.N.Y. 2007). Here, by contrast, Pfizer is a United States company, and Union purchased its shares on a United States exchange. Consequently, any "concerns over . . . res judicata . . . are not present in this case." In re NPS Pharms., 2006 U.S. Dist. LEXIS 87231, at *13.

Finally, a res judicata defense could not be asserted against Union because it has consented to the jurisdiction of this Court. See Union Certification ¶ 4, Twersky Decl. Ex. 4 (Dkt. #13-2) ("Union also understands that, if appointed lead Plaintiff in this action, 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."). This eliminates the possibility that a foreign court might refuse to enforce this Court's judgment as to Union. See Encysive Pharms., No. H-06-3022, slip op. at 10 (S.D. Tex. Mar. 20, 2007) (rejecting res judicata argument in lead plaintiff context because foreign movant affirmed it would be bound by any judgment in the case), attached as Twersky Reply Decl. Ex. 19.[16]

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[16] Also, the purpose of the res judicata defense is to protect defendants against subsequent actions and the cost and vexation of multiple lawsuits. See, e.g., Drummond v. Comm'r of Soc. Sec., 126 F.3d 837, 840 (6th Cir. 1997); Chase Manhattan Bank, N.A. v. CVE, Inc., 206 F. Supp.

3. Any "Res Judicata" Issues Apply Equally to Stichting Philips

To the extent that any issues of res judicata would prohibit Union from being appointed lead plaintiff, those issues would equally prohibit the appointment of Stichting Philips. Based on the marketing materials of counsel to an interested party, which reports on one recent judgment of the Amsterdam District Court ("ADC"), Stichting Philips leaps to the untenable conclusion that Netherlands courts will certainly recognize a judgment in this action. See Philips Opp. Br. 5; Rosenfeld Opp. Decl. Ex. A.[17] A reading of the actual ADC Judgment, as well as even a cursory review of Dutch law, however, affirms that is not the case.[18]

On June 23, 2010, the ADC precluded an action against Royal Ahold brought under the Dutch Act on Collective Settlement of Mass Claims (the "WCAM" Act), based on the fact that the parties were bound by the settlement in the U.S. Royal Ahold securities class action, No. 03 MDL 1539 (D. Md.). In reaching its decision, the ADC conducted a case-specific fact analysis and concluded that the class action settlement procedures in the U.S. Royal Ahold action were similar to the collective settlement procedures under the WCAM Act. Under both settlement

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2d 900, 907 (M.D. Tenn. 2002). Therefore, Stichting Philips's res judicata argument also is undermined by the fact that absolutely no reasons exist to believe that a German court could assert jurisdiction over a U.S. defendant for claims of fraud occurring in the U.S. involving shares traded on a U.S. exchange governed by a U.S. regulatory agency. Nor has Stichting Philips provided any reasons, let alone proof, supporting its implication that Germany could assert jurisdiction over Pfizer in connection with these claims. See Cromer Fin. Ltd. v. Berger, 205 F.R.D. 113, 135 n.35 (S.D.N.Y. 2001) (noting that "many events would have to occur," including the establishment of jurisdiction over the defendant in the foreign court, before a class action defendant would be prejudiced by an inability to assert the res judicata defense successfully).

[17] See Decl. of David A. Rosenfeld in Support of Stichting Philips Pensioenfonds' Mem. of Law in Opp'n to Competing Mots. for Appointment as Lead Pl. ("Rosenfeld Opp. Decl.") (Dkt. #21).

[18] A copy of the ADC's Judgment concerning recognition of the Royal Ahold action (the "Judgment" or "ADC Judgment"), in English, is attached as Exhibit 20 to the Twersky Reply Declaration. See also Decl. of Jacob Cornegoor ("Cornegoor Decl."), attached as Exhibit 21 to the Twersky Reply Decl.

procedures, current and former shareholders received a letter notifying them of the settlement and had the opportunity to object to, or opt-out of, the settlement. See ADC Judgment, § 6.5.3. Accordingly, in that case, the "rights and entitlements" of notice of the judgment and the opportunity to opt-out that are afforded under the WCAM Act were "adequately safeguarded." Id. § 6.5.4. It must be noted, however, that the ADC provided an explicit exception for any individual investor able to prove that the above-mentioned rights – i.e., notice of the action and the opportunity to opt-out – were not adequately safeguarded. Id. § 6.5.6.

Although the rights afforded under the WCAM act were held to be adequately safeguarded in the U.S. Royal Ahold class action settlement, there is no certainty that those rights will be deemed sufficiently safeguarded in this or any other action, particularly with regard to the specific efforts taken to notify Dutch investors. Importantly, under the WCAM Act, class members are notified both of the pendency of the action and then separately upon judgment of the court, including an opt-out option. See Cornegoor Decl. ¶ 11. Furthermore, the Dutch WCAM Act applies only to collective settlements, and the comparison drawn in the Royal Ahold action involved the similarities between the WCAM Act and U.S. class action settlement procedures. In the event of a judgment on the merits in a U.S. class action, those similarities, and the rights and entitlements afforded under the WCAM Act, would not exist. See Cornegoor Decl. ¶ 15.

Furthermore, recognition of a foreign judgment in the Netherlands does not constitute a formal bar to commencing new litigation by the party who lost the prior litigation. Id. ¶ 4. Rather, the res judicata effect of a judgment is considered only as a defense on the merits of the case. Id. Because there is no specific law treaty or directive that formally requires courts in the Netherlands to recognize U.S. judgments, which would give such judgments full force and effect

as if issued by a Dutch court, a U.S. judgment can only be recognized informally. Id. There is no jurisprudence by the Supreme Court regarding the subject scope of res judicata if a judgment is informally recognized. Id. ¶ 13. Although some lower courts have established a three-condition inquiry – the type of which was used by the ADC Judgment – there is no direct Supreme Court precedent stating that if these three conditions are met the Dutch court shall recognize a foreign judgment. Id. ¶ 6. Rather, in the case of informal recognition, the lower court has discretion to attach authority to a foreign judgment, with the three-condition test serving as a minimum standard. Id.

A judgment rendered in a U.S. class action marks a definitive departure from the Dutch WCAM Act. A judgment under the WCAM Act operates only as precedent in subsequent individual cases, without the court being required to follow it. Id. ¶ 8 n.8. Accordingly, Dutch courts would be reluctant to recognize a U.S. judgment without giving Dutch investors the opportunity to present their own case. Id. ¶¶ 9-10, 15. Thus, it remains "unclear if this litigation would be given res judicata effect" in the Netherlands. Philips Opp. Br. 17 (quoting In re Discovery Labs Sec. Litig., No. 06 Civ. 1820-SD, slip. op. at 2 (E.D. Pa. Aug 21, 2006)), Rosenfeld Opp. Decl. Ex. E; see also Cornegoor Decl. ¶¶ 15, 16. Stichting Philips therefore would be subject to its own res judicata attack and is in no better position than Union or any other non-U.S. investor seeking appointment as lead plaintiff.[19]

D. Oklahoma Firefighters And Union's Selection Of Counsel Should Be Approved

This Court and courts in this District routinely appoint two (or more) firms as lead counsel, provided there are adequate assurances that there will be no duplication of efforts. See

[19] We note that Oklahoma Firefighters would not be subject to any such res judicata attack.

Pzena, No. 07 Civ. 10524-AKH (Dkt. #9) (appointing co-lead counsel including Abraham, Fruchter & Twersky, LLP, provided there would be no duplication of efforts); Vodafone, No. 02 Civ. 7592-AKH (S.D.N.Y.) (Dkt. #32) (appointing three firms co-lead counsel); China Expert Tech., No. 07 Civ. 10531-AKH (Dkt. #18) (appointing co-lead counsel and ordering co-lead counsel to avoid duplicative or unproductive activities); see also Sofran v. Labranche & Co., 220 F.R.D. 398, 404 (S.D.N.Y. 2004) (appointing co-lead counsel provided no duplication of attorneys' services); Elan Corp., 236 F.R.D. at 163 (same).

Here, Oklahoma Firefighters and Union already have taken measures to ensure that their selection of counsel, Abraham, Fruchter & Twersky, LLP ("Abraham, Fruchter & Twersky") and Motley Rice, LLC ("Motley Rice"), will prosecute this action efficiently and without duplication of efforts or causing increased costs to the class. These efforts include affirming and communicating their "directive that this action be prosecuted efficiently and without duplication of work," and directing Abraham, Fruchter & Twersky and Motley Rice to enter into a joint prosecution agreement towards that end. Joint Decl. ¶ 8 (Dkt. #13-5). Moreover, the Court is familiar with Abraham, Fruchter & Twersky and Motley Rice, and knows that both firms will prosecute this action effectively and efficiently, without additional cost to the class.

Stichting Philips's concern that Abraham, Fruchter & Twersky and Motley Rice will "seize control of the litigation" if appointed co-lead counsel is misplaced. Philips Opp. Br. 19 n.19; see also In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42, 49 (S.D.N.Y. 1998) ("It is unclear to this Court why the appointment of more than one lead plaintiff will limit the ability of each plaintiff to control its own chosen counsel."). Unlike Stichting Philips, Oklahoma Firefighters and Union have experience serving as lead plaintiff and directing lead counsel, and have selected counsel who will "ensure that the litigation will proceed expeditiously against

[Pfizer]" and "who will work together to maximize the recovery for the proposed class." Oxford Health, 182 F.R.D. at 50.

In light of its acknowledgement that multiple law firms "may be beneficial to the litigation of a class action," it is troubling that Stichting Philips believes the "parameters of **this** case" make it less important than the multitude of cases in which its selected counsel, Robbins Geller Rudman & Dowd LLP ("Robbins Geller") serves (and has served) as co-lead counsel. Philips Opp. Br. 17, 20 n.13.[20]

E. Stichting Philips Is Inadequate To Protect The Interests Of The Class

"It is axiomatic, and the parties here do not dispute, that the lead plaintiff provisions of the PSLRA were intended to curtail the vice of "lawyer-driven" litigation, i.e. lawsuits that . . . were initiated and controlled by the lawyers and appeared to be litigated more for their benefit than for the benefit of the shareholders they ostensibly represented." Iron Workers Local No. 25 Pension Fund. v. Credit-Based Asset Servicing & Securitization, 616 F. Supp. 2d 461, 463 (S.D.N.Y. 2009) (Rakoff, J.) (collecting cases).

Here, Stichting Philips has adopted a series of positions that contradict positions it took less than two months ago in Hartford, its only other (failed) attempt to be appointed lead plaintiff. See, e.g., supra Parts II.A.2 at 3-4, II.B. at 7-10. The only explanation for these reversals is that they best serve its counsel's chances of being appointed lead counsel in this action. Such inconsistencies indicate that Stichting Philips, which "seems to have little real

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[20] See, e.g., Sgalambo, 2010 U.S. Dist. Lexis 30625, at *2 (Robbins Geller serving as co-lead counsel on behalf of one client); Lowrey v. Toll Bros. Inc., No. 07 Civ. 1513, 2007 U.S. Dist. LEXIS 99501, at *12 (E.D. Pa. June 29, 2007) (Robbins Geller serving as co-lead counsel); Cornwell v. Credit Suisse Group, No. 08 Civ. 0378-VM (S.D.N.Y) (Dkt. #5) (same), attached as Exhibit 22 to the Twersky Reply Decl.; Norfolk County Ret. Sys. v. Usitan, No. 07 Civ. 7014 (N.D. Ill.), (Dkt. #60) (same), attached as Exhibit 23 to the Twersky Reply Decl.

experience in handling such cases," is in no position to adequately monitor its counsel or the conduct of this complex litigation. See Credit-Based Asset, 616 F. Supp. 2d at 466-67 (finding that movant is "no position to monitor the conduct of complex litigation when it has not even taken the necessary steps to assure itself that the advice it is getting [from counsel] is disinterested). For this reason alone, Stichting Philips should be found inadequate to be appointed lead plaintiff, and its motion denied.

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: August 9, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 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