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' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR APPOINTMENT AS LEAD PLAINTIFF

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I. INTRODUCTION

The Private Securities Litigation Reform Act of 1995 ("PSLRA") "sets up a rebuttable presumption that the plaintiff with the largest stake in the controversy will be the lead plaintiff." *In re Cavanaugh*, 306 F.3d 726, 729 n.2 (9th Cir. 2002). Stichting Philips Pensioenfonds ("Philips Pensioenfonds") is the PSLRA's presumptively "most adequate" plaintiff here because it alone possesses the "largest financial interest" pursuant to all ***recognized*** methods of calculating financial interest and "otherwise satisfies the requirements of Rule 23." 15 U.S.C. §78u-4(a)(3)(B)(iii)(I).

Importantly, "[t]hat the presumption is rebuttable does not mean that it may be set aside for any reason." *Cavanaugh*, 306 F.3d at 729 n.2. "Rather, the statute provides that the presumption 'may be rebutted ***only*** upon proof . . . that the presumptively most adequate plaintiff' does not satisfy the adequacy or typicality requirements of Rule 23." *Id.*; 15 U.S.C. §78u-4(a)(3)(B)(iii)(II).[1] Here, ***no facts*** have been (or could be) proffered to demonstrate that Philips Pensioenfonds is anything but adequate and typical. "In the absence of any such evidence, the Court [should] decline[] to impose a duty on [Philips Pensioenfonds] to refute [UAM AG's and OKFPRS'] speculation." *Seidel v. Noah Educ. Holdings, Ltd.*, 2009 U.S. Dist. LEXIS 25949, at *13 (S.D.N.Y. 2009) (Sullivan, J.).

Philips Pensioenfonds' motion should be granted.

II. ARGUMENT

The "goal of the Reform Act's lead plaintiff provision is to locate a person or entity whose sophistication and interest in the litigation are sufficient to permit that person or entity to function as an active agent for the class." *In re Cendant Corp. Litig.*, 264 F.3d 201, 266 (3d Cir. 2001). Here, that entity is Philips Pensioenfonds.

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[1] All emphasis is added and all citations are omitted unless otherwise noted.

A. The Presumption in Favor of Appointing Philips Pensioenfonds as Lead Plaintiff Has Not Been Rebutted

1. Philips Pensioenfonds Has the Largest Financial Interest

As Judge Kram insightfully observed, "[d]etermining the method of analysis is ***especially important*** in the context of lead plaintiff selection because prospective lead plaintiffs may manipulate their analysis in order to inflate their measure of damages, giving them an advantage over movants that calculate damages according to a different methodology." *In re AOL Time Warner, Inc. Sec. & ERISA Litig*., 2006 U.S. Dist. LEXIS 17588, at *62 (S.D.N.Y. 2006). This is ***precisely*** what UAM AG/OKFPRS did here in its ***opposition brief*** by inventing an "Alternative LIFO" test to leapfrog Philips Pensioenfonds as the movant with the largest financial interest under the well-established FIFO and LIFO methods.

Indeed, as the movants stated in their ***opening*** motions, "[i]n this District, both FIFO and LIFO have been used to calculate the financial stake of movants for lead plaintiff status in securities class actions." *AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *61; *Kuriakose v. Fed. Home Loan Mortg. Co*., 2008 U.S. Dist. LEXIS 95506, at *9 (S.D.N.Y. 2008) (Keenan, J.).[2] Philips Pensioenfonds has the largest financial interest under these methods:

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[2] "Under LIFO, the most recently-acquired shares are assumed to be sold first for loss calculation purposes. Under FIFO, shares that were acquired first are assumed to be sold first." *Id.* (citing *In re Veeco Instruments, Inc.*, 233 F.R.D. 330, 333 (S.D.N.Y. 2005) (McMahon, J.) (applying FIFO), and *In re eSpeed, Inc. Sec. Litig*., 232 F.R.D. 95, 100-02 (S.D.N.Y. 2005) (Scheindlin, J.) (applying LIFO)).

	FIFO Losses	*LIFO Losses*
Philips Pensioenfonds	**$21.1 million**	**$19.1 million**
UAM AG	$16.5 million	$16.6 million
OKFPRS	$2.3 million	$834,611
Total:	$18.8 million	$17.4 million

See Docket #12 at 1 n.3 (noting that UAM AG's and OKFPRS' losses were computed using FIFO and LIFO); Docket #16 at 4; Docket #20 at 3.

Because UAM AG and OKFPRS did ***not*** possess the largest financial interest under ***either*** of these methods, their counsel deftly switched gears and instead urges the Court to now abandon these methods and embrace something dubbed "Alternative LIFO." *See* Docket #18 at 4. The fact that UAM AG and OKFPRS "changed their method of valuation upon realizing their defeat under the traditional" methods is telling. *In re Ribozyme Pharms.*, 192 F.R.D. 656, 661 (D. Colo. 2000) (rejecting movant's post-filing attempt to change how losses should be calculated).[3]

Indeed, ***only*** by inventing this new method in its opposition brief was UAM AG and OKFPRS able to argue that they possess the largest financial interest. *See* Docket #18 at 3. Unfortunately, the "plain language of the [PSLRA] precludes consideration of a financial loss asserted for the first time in . . . any other pleading . . . filed ***after*** the sixty (60) day window has closed." *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 818 (N.D. Ohio. 1999) (emphasis in

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[3] *See also Cendant*, 264 F.3d at 266-67 (noting that maneuvers meant to ensure counsel's appointment demonstrate a group's inadequacy); *Bhojwani v. Pistiolis*, 2007 U.S. Dist. LEXIS 52139, at *21 (S.D.N.Y. 2007) (Fox. J.) (noting that lawyer "machinations" were "precisely what PSLRA was enacted to restrict"); *In re Oppenheimer Rochester Funds Group Sec. Litig*., 2009 U.S. Dist. LEXIS 113555, at *14 (D. Colo. 2009) (noting the PSLRA was passed to "redeem the 'lawyer-driven' aspects of modern securities fraud class action litigation, where counsel for a putative class seek to realize substantial recoveries for themselves at the expense of their clients"); *In re XM Satellite Radio Holdings Sec. Litig*., 237 F.R.D. 13, 18 (D.D.C. 2006) (describing, and rejecting, counsel's "unseemly jockeying for position"); *Maiden v. Merge Techs., Inc.*, 2006 U.S. Dist. LEXIS 85635, at *10-*11 (E.D. Wis. 2006) (noting that "[t]he Court will not sanction or award a strategy so clearly designed to thwart" the purposes of the PSLRA).

original). This makes sense. "[I]f persons seeking appointment as lead plaintiff were allowed to manipulate the size of their financial loss" by inventing new loss calculations mid-briefing as UAM AG and OKFPRS attempt to do here, "the consequent greater loss asserted would invite additional briefing by the other persons seeking appointment as lead plaintiff, which, in turn, would necessitate responses by the person or group of persons seeking to enlarge their losses." *Id.* at 819. "This would effectively render the strict timeliness set forth in the PSLRA meaningless . . . ." *Id.* Ultimately, counsels' attempt to introduce a new method ***after*** the 60-day deadline is nothing other than "a crass attempt to manipulate the size of [their] losses based on information available to it at the time of its original lead plaintiff motion." *Id.*; *Juliar v. SunOpta, Inc.*, 2009 U.S. Dist. LEXIS 58118, at *7-*9 (S.D.N.Y. 2009) (Crotty, J.) (rejecting group's attempt to convince the court that "it would have the greater losses" if the court ignored hundreds of thousands of dollars worth of losses suffered by the presumptive lead plaintiff).

Motley Rice (UAM AG's counsel here) recently attempted this same ploy in *Garden City Employees' Ret. Sys. v. Psychiatric Solutions, Inc.*, 2010 U.S. Dist. LEXIS 42915, at *13 (M.D. Tenn. 2010). There, like here, Motley Rice used one method in its opening motion and promptly jettisoned that method on opposition after realizing that its clients' losses could only be characterized as larger if it utilized a different method. The court rejected this maneuver, specifically "not[ing] that this method was not argued by the Group ***until*** its response" to the presumptive lead plaintiff's motion was filed. *Id.* (finding that "[o]ther courts have rejected this method of calculating plaintiffs' losses to further the appointment of the group and its counsel") (citing cases).[4] Like Philips

[4] *See, e.g.*, *Steiner v. Frankino*, 1998 WL 34309018 (N.D. Ohio 1998) (rejecting counsel's attempt to modify movant's losses after the 60-day deadline); *Ferrari v. Gisch*, 225 F.R.D. 599, 604 (S.D. Cal. 2004) (same); *Schriver v. Impac Mortg. Holdings, Inc.*, 2006 U.S. Dist. LEXIS 40607, at

Pensioenfonds here, because there was a single institution with the largest individual losses in *Garden City*, the court did "not ascertain any practical need for an alternate method for determining the largest financial interest nor for the appointment of co-lead plaintiffs." *Id.* at *12.

Nonetheless, even if the Court were to give UAM AG/OKFPRS the benefit of the doubt and adopt their new argument that LIFO and FIFO are suddenly inadequate methods to assess a movant's loss (which they are not), UAM AG/OKFPRS' "Alternative LIFO" method is seriously flawed. First, "Alternative LIFO" is not even LIFO – ***it's a derivation of FIFO***.[5] UAM AG and OKFPRS likely chose the name in light of this District's stated preference for LIFO. However, simply calling a method LIFO does not make it so.[6] UAM AG's and OKFPRS' attempt to manipulate LIFO in their favor is stark. Indeed, they acknowledge that under ***yet another*** alternative LIFO method, Philips Pensioenfonds' loss is ***greater*** than theirs. *See* Docket #18 at 7-8 n.5. Second, and more importantly, UAM AG/OKFPRS ***cite no authority*** from any other district court adopting their so-called "Alternative LIFO" test. This was not an oversight. ***None exists***.

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*13, *21-*31 (C.D. Cal. 2006) (same); *In re Vaxgen Sec. Litig.*, 2004 U.S. Dist. LEXIS 29812, at *16 (N.D. Cal. 2004) (declining to consider "greater loss asserted by [group] late in the briefing" in part because it "invited additional rounds of replies and sur-replies up to and even following the Hearing").

[5] Essentially, what UAM AG and OKFPRS appear to have done in concocting their "Alternative LIFO" method was match the ***first*** purchase with the ***first*** sale (*i.e.*, first in, first out) after the purchase date and excluded them. *See* Docket #19-1 (ignoring 195,800 shares OKFPRS purchased/sold). If there was no corresponding sale after a purchase, UAM AG and OKFPRS entirely ignored those as well. *Id.* (ignoring 32,500 shares OKFPRS sold). After ignoring all those transactions, the shares remaining were valued. *Id.* (valuing 39,100 shares OKFPRS had left).

[6] *See United States v. Pacheco*, 225 F.3d 148, 149 (2d Cir. 2000) ("'When ***I*** use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'") (quoting Lewis Carroll, *Through the Looking Glass*) (emphasis in original).

What ***does*** exist (primarily outside this District) and what was ***cited by*** UAM AG and OKFPRS, are a handful of decisions utilizing a "retention value methodology" to calculate losses in accord with *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005).[7] *See Eichenholtz v. Verifone Holdings, Inc.*, 2008 U.S. Dist. LEXIS 64633, at *11 (N.D. Cal. 2008); *In re Comverse Tech., Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 14878 (E.D.N.Y. 2007). This method is designed to identify "recoverable losses," *i.e.*, losses suffered on "shares retained as of the date of the corrective disclosure." *Eichenholtz*, 2008 U.S. Dist. LEXIS 64633, at *11; *Comverse*, 2007 U.S. Dist. LEXIS 14878, at *22. Under this method, all intra-class period trades are ignored because "'under *Dura* there can be no loss causation for plaintiffs who purchased and sold stock at the inflated share price prior to that disclosure.'" *Eichenholtz*, 2008 U.S. Dist. LEXIS 64633, at *11. Instead, the court "looks to shares bought during the class period that are retained at the end of the class period" and determines the losses suffered on those shares only. *Id.* at *10.[8] If the Court employs this method here, once ***again Philips Pensioenfonds has the largest financial interest***:

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[7] As a purported justification for concocting "Alternative LIFO," UAM AG and OKFPRS argue that there is only one disclosure in this action. *See* Docket #18 at 7. UAM AG's and OKFPRS's argument runs counter to the duty owed to the class to "maximize the inflation from [the existence and materiality of defendants' misrepresentations] at ***every point in the class period***, both to demonstrate the *sine qua non* – liability – and to maximize his own potential damages – the more the stock is inflated, the more every class member stands to recover." *Blackie v. Barrack*, 524 F.2d 891, 909-10 (9th Cir. 1975). Importantly, if the Court appointed them as lead plaintiff, UAM AG and OKFPRS would be foreclosed from pleading any partial disclosures, if they exist, in the amended complaint. *See N.H. v. Maine*, 532 U.S. 742, 749 (2001) ("'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position'").

[8] This method is calculated as follows: the court first "looks to shares bought during the class period that are retained at the end of the class period," *i.e.*, the net shares purchased. *Eichenholtz*, 2008 U.S. Dist. LEXIS 64633, at *10. "The amount paid for the shares retained as of [the last day of the class period] are calculated according to the price paid for the shares bought most recently in time . . . ." *Id.* at *14. "The losses on the retained shares are calculated according to the following

	Losses on Retained Shares
Philips Pensioenfonds	**$14.4 million**
UAM AG	$13 million
OKFPRS	$24,917
Total:	$13 million

See Declaration of David A. Rosenfeld in Support of Stichting Philips Pensioenfonds' Reply Memorandum of Law in Further Support of Its Motion for Appointment as Lead Plaintiff ("Rosenfeld Decl."), Exs. 5, 6. It is quite telling that while UAM AG and OKFPRS cited both *Eichenholtz* and *Comverse* to support their newly-adopted argument that only recoverable losses matter, UAM AG and OKFPRS ***ignored*** the "retained share methodology" employed in *Eichenholtz* and *Comverse* to actually calculate financial interest. *See* Docket #18 at 6-7. The reason is obvious: they do not possess the largest financial interest even under that method.

In sum, Philips Pensioenfonds has the largest financial interest under FIFO, LIFO, the retained share methodology and UAM AG's and OKFPRS's second "Alternative LIFO" method. The ***only*** method under which UAM AG and OKFPRS prevail is a hybrid method that no court has ever adopted. While it is true that the PSLRA does not define "largest financial interest," neither does it allow a movant which lacks the largest financial interest to concoct a self-serving metric to engineer a bigger loss number. Rather, courts are compelled to "select accounting methods that are both ***rational and consistently applied***." *Cavanaugh*, 306 F.3d at 730 n.4. "Alternative LIFO" is neither.

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formula: if a share was not sold within 90 days subsequent to [the end of the class period], the loss is to be measured using an average of the daily closing price of [Pfizer] stock during the 90-day period beginning [the day after the class period ends]. If a share was sold within 90 days subsequent to [the end of the class period], the loss is to be measured using the higher of the actual sale price or an average of the daily closing price from [the day after the class period ends] to the date of sale." *Id.*

Although creative, UAM AG's and OKFPRS's newly-formulated method is not supported by the facts or the law. It was designed for one purpose: to create an illusion that UAM AG and OKFPRS possessed the largest financial interest. They do not. Their motion should be denied.

2. Philips Pensioenfonds Will Fairly and Adequately Protect the Class's Interests

Once the Court determines which movant is the presumptive lead plaintiff, the "other plaintiffs may present ***evidence*** that disputes the lead plaintiff's prima facie showing of typicality and adequacy." *Cavanaugh*, 306 F.3d at 730; 15 U.S.C. §78u-4(a)(3)(B)(iii)(II) (presumption rebuttable only upon "***proof***"). "[C]onclusory assertions of inadequacy," however, are "insufficient to rebut the statutory presumption under the PSLRA without specific support in evidence of the existence of an actual or potential conflict of interest." *Sczesny Trust v. KPMG LLP*, 223 F.R.D. 319, 324-25 (S.D.N.Y. 2004) (Stein, J.).

With respect to adequacy, UAM AG/OKFPRS misleadingly states that "Stichting Philips has been entangled in a fraud scandal of its own." Docket #18 at 10-11. In fact, Philips Pensioenfonds was ***awarded millions of euros in compensation*** as a result of a ***settlement*** obtained in a ***case against an entity that defrauded the pension fund***. *See* Rosenfeld Decl., Exs. 7-8. Hyperbole aside, UAM AG/OKFPRS "has not met its burden of showing 'upon proof' that [Philips Pensioenfonds] will not adequately represent the class." *Reimer v. Ambac Fin. Group, Inc.*, 2008 U.S. Dist. LEXIS 38729, at *13 (S.D.N.Y. 2008) (Buchwald, J.).

This is not the first time OKFPRS has exaggerated the relevance of conduct by ***former*** employees of a competing lead plaintiff applicant. For example, in *Ferrari v. Impath, Inc.*, 2004 U.S. Dist. LEXIS 13898 (S.D.N.Y. 2004) (Batts, J.), OKFPRS attempted to rebut the presumption in favor of a movant (the SoCal pension funds) by claiming that the Chairman of the SoCal pension funds "breached his fiduciary duty by engaging in securities fraud against the very funds over which

he presides." *Id.* at *21. Judge Batts called this attempt to rebut the presumption a "***red herring***" because the "boards of each fund control the litigation rather than [the individual]," "and there is ***no affirmative evidence of wrongdoing*** on his part." *Id.* at *21-*22.

Just like in *Ferrari*, the very "evidence" OKFPRS and UAM AG rely on to support their argument actually undermines it. Indeed, the titles of the articles – which OKFPRS and UAM AG curiously did not attach for the Court's review – themselves demonstrate the weakness of OKFPRS' and UAM AG's position. *See* Docket #18 at 10-11 ("Philips funds ***wins back millions*** in Dutch property fraud" and "Property developer ***agrees to pay €40m to settle fraud case***"). The articles explain that a property developer and his company "were accused by the public prosecutor of having paid a bribe to a director at Philips' ***former*** in-house ***real estate fund manager*** in exchange for a low price for a property." *See* Rosenfeld Decl., Ex. 7. As a preliminary matter, OKFPRS/UAM AG does not even attempt to explain how an investigation of or misconduct by a ***former*** in-house ***real estate fund manager*** in any way relates to Philips Pensioenfonds' investment in ***Pfizer securities***. It does not. Nor is the investigation likely to be a distraction going forward considering that, as OKFPRS/UAM AG's own article confirms, ***it has been concluded***. *Id.*

More to the point, however, as the article explains, Philips Pensioenfonds conducted "an internal investigation," "mothballed" the unit responsible for the fraud and "has been participating in the criminal cases, seizures of suspects' property, and the initiation of civil proceedings." *Id.* In other words, Philips Pensioenfonds rooted out a fraud perpetrated on it and sought to hold the perpetrators both civilly and criminally responsible. These actions are ***perfectly aligned*** with Philips Pensioenfonds' duties as a lead plaintiff here: namely, to vigorously prosecute claims against those who perpetrate fraud. If relevant at all, the articles cited by UAM AG and OKFPRS confirm that Philips Pensioenfonds is committed to vigorously pursuing any misconduct perpetrated against the

Fund. OKFPRS/UAM AG might have had cause for concern if Philips Pensioenfonds had turned a blind eye to an individual's misconduct. Philips Pensioenfonds did not. Nor will it here.

Tellingly, OKFPRS and UAM AG have "not identified ***any*** specific defense that may arise as a result" of the ***settled*** allegations against Philips Pensioenfonds' ***former*** employee in a real estate ***subdivision***. *Doral Bank Puerto Rico v. WaMu Asset Acceptance Corp.*, 2010 WL 1180359, at *2 (W.D. Wash. 2010). "Simply asserting" that one ***former*** Philips Pensioenfond employee engaged in misconduct in an entirely unrelated matter "is not enough to actually indicate any specific defense may apply." *Id.* Indeed, there "is no indication in the record [Philips Pensioenfonds] may be subject to a defense on any of the claims advanced in the complaint." *Id.* (finding that then-pending private securities fraud case against movant and criminal indictment of one of its officers for securities fraud was insufficient to rebut presumption of adequacy in different securities fraud action).[9]

Ultimately, as it did in the *Ferrari* case, OKFPRS and UAM AG "rely solely on innuendo and inferences rather than established fact." 2004 U.S. Dist. LEXIS 13898, at *23. They "cite no case law in which such a paucity of evidence sufficiently rebutted the PSLRA presumption." *Id.* at *22. "Such conclusory assertions of inadequacy are, however, insufficient to rebut the statutory presumption under the PSLRA without specific support in evidence of . . . a defense to which [Philips Pensioenfonds] would be uniquely subject." *Sczesny Trust*, 223 F.R.D. at 324-25. As such,

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[9] *See also Baughman v. Pall Corp.*, 250 F.R.D. 121, 127 (E.D.N.Y. 2008) (court disregarded challengers' allegation that pension fund was "involved in its own internal fraud investigation" because "there [was] no evidence that [the pension fund] ***itself*** [was] being investigated for fraud"); *Kuriakose*, 2008 U.S. Dist. LEXIS 95506, at *17 (finding that consent decree arising from prior allegations of corruption and mismanagement at a pension fund did "not place any restrictions whatsoever on [the pension fund's] conduct of litigation or ability to serve as lead plaintiff" nor was there "any way" that the consent decree "realistically might affect [the pension fund's] ability to represent the class").

the Court should "not [be] persuaded that [Philips Pensioenfonds'] typicality or adequacy to serve the best interests of the class has been compromised by mere allegations against" a director at Philips' former in-house real estate fund manager. *Ferrari*, 2004 U.S. Dist. LEXIS 13898, at *22.

B. UAM AG and OKFPRS Have Not Triggered the PSLRA Presumption

Not only do UAM AG and OKFPRS ***not*** have the largest financial interest, but they still have "not provided any authority or rationale for [their] decision to combine [their] losses" other than a conclusory statement that they "'conferred and agreed that it would be beneficial to have a joint prosecution of this action by [UAM AG and OKFPRS], both of which are . . . institutions with many shared interest[s] and with substantial losses.'" *In re Peregrine Sys. Sec. Litig.*, 2002 U.S. Dist. LEXIS 27690, at *52 (S.D. Cal. 2002) (rejecting motion by two institutional investors); *In re Silicon Storage Tech.*, 2005 U.S. Dist. LEXIS 45246, at *33 (N.D. Cal. 2005) (noting that "[a]ny subsequent relationship that the members of these groups may have developed, after being introduced to each other by their lawyers, is insufficient in the court's view to qualify them as 'most adequate' lead plaintiff"). Because no rationale was proffered, the Court should "assume[] that the consolidation was for no other purpose than to gain appointment over another movant." *Peregrine*, 2002 U.S. Dist. LEXIS 27690, at *52 (noting that "nothing in the PSLRA authorizes institutional plaintiffs to consolidate their losses for the sole purpose of leapfrogging other movants"); *City of Monroe Employees' Ret. Sys. v. Hartford Fin. Servs. Group, Inc.*, 2010 WL 2816797, at *3 (S.D.N.Y. 2010) (Buchwald, J.) (there is "no reason that joint lead plaintiffs would serve [the PSLRA's] interest any greater than the appointment of a single" lead plaintiff). Nor have UAM AG and OKFPRS provided a "justification as to why more than one firm is required in order to serve the best interests of the class." *Id.* at *6; *see also* Docket #20 at 6-10.

UAM AG also "'faces unique legal issues that other class members do not'" because of the questions about the validity and propriety under German and Second Circuit law of its purported assignments. *In re IMAX Sec. Litig.*, 2009 U.S. Dist. LEXIS 58219, at *8 (S.D.N.Y. 2009) (Buchwald, J.); *see also* Docket #20 at 10-18. UAM AG has now had two opportunities to provide its purported assignments to the Court. *See* Docket #20 at 10-15. UAM AG has not done so. As such, the Court should decline to consider its motion. *See Friedman v. Quest Energy Partners LP*, 261 F.R.D. 607, 612 (W.D. Okla. 2009) (declining to consider assignments proffered after the 60-day deadline expired); *In re Bard Assocs., Inc.*, 2009 U.S. App. LEXIS 26289, at *8 (10th Cir. 2009) (finding no abuse of discretion in district court's decision to adopt a "bright line rule requiring lead plaintiff movants to establish Article III standing by the time the lead plaintiff motions are due").

Were the Court to appoint UAM AG "as lead plaintiff, it is possible that these issues could ultimately severely prejudice the class, either at the class certification stage or on some subsequent appeal." *IMAX*, 2009 U.S. Dist. LEXIS 58219, at *11; *see also In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig.*, 209 F.R.D. 353, 358 (S.D.N.Y. 2002) (Buchwald, J.) (declining to certify as class representative an investment advisor that "was not the legal purchaser of Turkcell stock"). Here, because Philips Pensioenfonds has a larger financial interest and is typical and adequate, "[t]here seems little reason for [the Court] to subject the class members to such a risk." *IMAX*, 2009 U.S. Dist. LEXIS 58219, at *11; *Peregrine*, 2002 U.S. Dist. LEXIS 27690, at *56 (declining to appoint investment advisor as lead plaintiff).

Consequently, the Court should decline to appoint UAM AG and OKFPRS as lead plaintiff.

III. CONCLUSION

Philips Pensioenfonds is the presumptive lead plaintiff. It possesses the largest financial interest under ***four*** methods (including one of UAM AG's and OKFPRS's "alternatives"). Philips

Pensioenfonds also satisfies the Rule 23 requirements. Ultimately, UAM AG's and OKFPRS' attempt to use speculation and innuendo to wrest the presumption from Philips Pensioenfonds fails.

Philips Pensionfonds' motion should be granted.

DATED: August 9, 2010

Respectfully submitted,

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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, 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 August 9, 2010.

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