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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, -against- PFIZER INC., HENRY A. McKINNELL, JEFFREY B. KINDLER, FRANK D'AMELIO, DAVID L. SHEDLARZ, ALAN G. LEVIN and IAN C. READ, Defendants.	Civil Action No. 10-cv-03864-AKH JUDGE ALVIN K. HELLERSTEIN ECF Case

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION OF OKLAHOMA FIREFIGHTERS PENSION AND RETIREMENT SYSTEM AND UNION ASSET MANAGEMENT HOLDING AG FOR RECONSIDERATION OF APPOINTMENT OF LEAD PLAINTIFF AND LEAD COUNSEL

INTRODUCTION

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 reconsideration of the appointment of lead plaintiff and lead counsel in the above captioned action. A motion for reconsideration is appropriate when the moving party can demonstrate that the Court overlooked "factual matters that were put before it on the underlying motion," and which, had they been considered, "might have altered the result reached by the Court." Official Comm'n of Asbestos Claimants of G-I Holding, Inc. v. Heyman, No. 01 Civ. 8539 (RWS), 2006 U.S. Dist. LEXIS 73272, at *5 (S.D.N.Y. Oct. 13, 2006). While the standard for seeking reconsideration is strict, it is not insurmountable, and has been satisfied here. See, e.g., Cruz v. Barnhart, No. 04 Civ. 9794 (DLC), 2006 WL 547681, at *2 (S.D.N.Y. Mar. 7, 2006) ("[W]hile the decision whether to grant such a motion is left to the discretion of the district court, it may be an abuse of discretion to let stand an error of law brought to its attention in a timely manner.").

ARGUMENT

In its lead plaintiff ruling, the Court concluded that Stichting Philips Pensioenfonds ("Philips") and Oklahoma Firefighters/Union had "virtually the same" financial interests, see Transcript of Hearing, Nov. 3, 2010 ("Hr'g Tr.") at 20:3-4, and that there was "no point in making distinctions" because the difference between the movants "is not material" and "not meaningful," Hr'g Tr. at 20:3-4; 22:19-23:4.[1] But then the Court said it believed that Philips

[1] Philips claims that "the Court appeared to acknowledge that Philips Pensioenfonds possessed the largest financial interest under the original metrics used by both movants in their motions, but that the $2 million gap separating Philips Pensioenfonds's losses and Oklahoma/Union's losses was not 'material' or 'meaningful.'" Philips Br. at 2. However, the Court specifically agreed that the loss calculation method supported by Dura Pharmacueticals, Inc. v. Broundo, 544 U.S.

was ***"more typical"*** or "more characteristic" or "more like the other members of the class" than Oklahoma Firefighters/Union. See Hr'g Tr. at 28:6, 20; 35:10; 38:6-12 (emphasis added). Thus, the Court did not find that Oklahoma Firefighters/Union was atypical, but instead expressly compared the competing movants on their relative typicality, which is not the law.

The PSLRA does not provide for the type of comparative analysis that the Court undertook with regard to Oklahoma Firefighters/Union's typicality under Rule 23. See, e.g., In re Cavanaugh, 306 F.3d 726, 732 (9th Cir. 2002) ("[T]he Reform Act provides in categorical terms that the only basis on which a court may compare plaintiffs competing to serve as lead is the size of their financial stake in the controversy."). As the Cavanaugh court recognized:

> [t]hat the district court believes another plaintiff may be 'more typical' or 'more adequate' is of no consequence. So long as the plaintiff with the largest losses satisfies the typicality and adequacy requirements, he is entitled to lead plaintiff status, even if the district court is convinced that some other plaintiff would do a better job.

Id.; see also In re Cendant Corp. Litig., 264 F.3d 201, 268 (3d Cir. 2001) ("Once the [most adequate plaintiff] presumption is triggered, the question is not whether another movant might do a better job . . . instead, the question is whether anyone can prove that the presumptive lead plaintiff will not do a 'fair[] and adequate[]' job. We . . . stress that the inquiry is not a relative one.") (emphasis in original).

Here, once the Court determined that Philips and Oklahoma Firefighters/Union had, for all practical purposes, identical financial interests in the litigation, and did not find that Oklahoma Firefighters/Union was atypical, it should have appointed both movants lead plaintiff and their counsel lead counsel. See Dolan v. Axis Capital

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336 (2005), under which in-and-out trades cannot be considered, was the correct methodology. Hr'g Tr. at 11:12-15. Under Dura, Oklahoma Firefighters/Union's losses are greater than Philips. See Oklahoma Firefighters/Union Reply Mem. of Law at 5-6 (Dkt. #23).

Holdings Ltd., No. 04 Civ. 8564 (RJH), 2005 WL 883008, at *5 (S.D.N.Y. Apr. 13, 2005) ("Having reviewed the record, the Court is unable to find a principled reason to choose one [movant] over the other. Thus, . . . the Court will appoint [both movants] as co-lead plaintiffs.").

Philips incorrectly asserts that "[t]he Court found [Oklahoma Firefighters/Union] did not [make the required typicality showing]," Philips' Br. 3 (Dkt. #47), and further that "the Court found that Union was atypical," id. at 10. Oklahoma Firefighters/Union respectfully submit that the Court did not find Union was "atypical." Unsurprisingly, Philips wholly ignores that several other courts have found that Union satisfies the typicality and adequacy requirements of Rule 23. See, e.g., Hill v. State Street Corp., No. 1:09-cv-12146-NG, slip op. at 3 (D. Mass. May 5, 2010) (appointing Union co-lead plaintiff); Minneapolis Firefighers' Relief Ass'n v. Medtronic, Inc., No. 08-6324 (PAM/AJB), slip op. at 2 (D. Minn. May 26, 2009) (appointing Union co-lead plaintiff); Wesner v. UBS, No. 1:07-cv-112255-RJS, slip op. at 2 (S.D.N.Y. Mar. 6, 2008) (appointing Union co-lead plaintiff); In re Dell Inc., Sec. Litig., No. A-06-CA-726-SS, slip op. at 14 (W.D. Tex. Apr. 9, 2007) (appointing Union lead plaintiff and noting that "Union Asset Management Holding AG . . . satisfies the typicality and adequacy requirements of Rule 23").[2, 3]

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[2] Oklahoma Firefighters/Union are submitting copies of these slip opinions simultaneously with this memorandum of law.

[3] Philips misrepresents the holdings of two cases it cites, In re IMAX Securities Litigation, No. 06 Civ 6128 (NRB), 2009 WL 1905033, at *2-3 (S.D.N.Y. June 29, 2009) and In re SLM Corp. Securities Litigation, No. 08 Civ. 1029 (WHP), 258 F.R.D. 112, 116 (S.D.N.Y. 2009). See Philips Br. at 5 n.5. Both of those cases stand for the proposition that a lead plaintiff movant who does not have Article III standing (such as through an assignment of claims) at the time it is appointed lead plaintiff does not satisfy the adequacy or typicality requirement. See SLM Corp., 258 F.R.D. at 116 ("Huff makes clear that Westchester Capital did not have Article III standing at the time this Court appointed it lead plaintiff" because it did not have an assignment of claims until after it was appointed); IMAX, 2009 WL 1905033, at *3 (likewise holding that Westchester Capital did not meet the adequacy and typicality requirements because it did not have an

Concerning the issue of the class being represented by only one lead plaintiff, which is foreign, Philips suggests that it could add the domestic named plaintiff to the leadership structure as a co-lead plaintiff. Philips' Br. at 10 n.8. This maneuver rings hollow. First, Oklahoma Firefighters is a U.S. institutional investor whose typicality and adequacy is beyond dispute, and the Court should not consider an unknown class member as a possible lead plaintiff at this stage. See Baydale v. Am. Express Co., No. 09 Civ. 3016 (WHP), 2009 WL 2603140, at *4 (S.D.N.Y. Aug. 14, 2009) ("[T]his is not a motion for class certification. The Court cannot consider some unknown class member at [the lead plaintiff stage]."). Second, this suggestion directly contradicts Philips' position that the appointment of co-lead plaintiffs "lacks statutory support." Philips' Br. at 8 & n.6. The Court is free to appoint movant Oklahoma Firefighters/Union as co-lead plaintiff with Philips, even though they did not move for lead plaintiff with Philips. See, e.g., Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. LaBranche & Co., 229 F.R.D. 395, 419-20 (S.D.N.Y. 2004) (Sweet, J.) ("[c]ourts have determined that the interests of a proposed class will be served best by the appointment of co-lead plaintiffs or multiple lead plaintiffs who did not move initially as a group") (collecting cases); In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42, 45 (S.D.N.Y. 1998) (Brieant, J.) (appointing three competing movants as co-lead plaintiffs because such a structure "provides the proposed class with the substantial benefits of joint decision-making and joint funding and is consistent with the language of the PSLRA and the purpose of Congress in enacting it.").

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assignment of claims at the time it was appointed lead plaintiff). Therefore, these cases actually support the view that Union is adequate and typical; it did have the assignments of claims when it moved for lead plaintiff with Oklahoma Firefighters, and, as noted above, has been appointed lead or co-lead plaintiff in at least four other securities fraud cases.

Finally, Philips contends that "Oklahoma/Union's sole basis for urging the Court to reconsider its Order appears to boil down to the fact that their counsel would like to be designated lead counsel." Philips Br. at 11. But, as Oklahoma Firefighters/Union's counsel made clear in its letter to Philips' counsel, the clients – Oklahoma Firefighters and Union – "actively desire to play a lead role in prosecuting this action." Philips Br. Ex. 2 (Dkt. #47-2). Oklahoma Firefighters/Union, therefore, did not withdraw their motion for reconsideration because they do not believe that Philips has provided them with "an appropriate, and clearly defined, role in the prosecution of this action." Id. Although, during the period this motion has been sub judice, counsel for Oklahoma Firefighters/Union and counsel for Philips have been working together on the amended complaint, efficiently and without duplication of efforts or problems, Oklahoma Firefighers and Union still do not have a specifically defined role.

For all of the above reasons, and the reasons advanced in their initial reconsideration memorandum, Oklahoma Firefighters and Union respectfully request that the Court reconsider the appointment of Lead Plaintiff in the this action and appoint Oklahoma Firefighters and Union as Lead or Co-Lead Plaintiffs and appoint Motley Rice LLC and Abraham, Fruchter & Twersky, LLP as Lead or Co-Lead Counsel.

Respectfully submitted December 1, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 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
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