UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| MARY K. JONES, Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff<br><br>vs.<br><br>PFIZER INC., et al.,<br><br>Defendants. | Civil Action No. 1:10-cv-03864-AKH<br><br>CLASS ACTION<br><br>LEAD PLAINTIFF STICHTING PHILIPS PENSIOENFONDS' MEMORANDUM OF LAW IN OPPOSITION TO OKLAHOMA FIREFIGHTERS' AND UNION'S MOTION FOR RECONSIDERATION |

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## I. INTRODUCTION

"A motion for reconsideration may be granted to (1) correct clear error; (2) prevent manifest injustice; or (3) consider newly-available evidence." *WTC Captive Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 537 F. Supp. 2d 619, 623 (S.D.N.Y. 2008) (Hellerstein, J.); *see also* Local Civil Rule 6.3 (directing party to "set[] forth concisely the matters or controlling decisions which counsel believes the court has overlooked"). "Generally, motions for reconsideration are not granted unless 'the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" *Thompson v. United States*, 2010 U.S. Dist. LEXIS 93174, at *2-*3 (S.D.N.Y. 2010) (Hellerstein, J.) (quoting *Shrader v. CSX Transp.*, 70 F.3d 255, 257 (2d Cir. 1995)).

Oklahoma Firefighters Pension and Retirement System and Union Asset Management Holding AG ("Oklahoma/Union") offer no such authority or data in support of their motion for reconsideration. It is respectfully submitted that their motion for reconsideration should be denied.

## II. ARGUMENT

"A motion to reconsider 'is not favored and is properly granted only upon a showing of exceptional circumstances.'" *Id.* at *3 (quoting *Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004)). As such, "[r]econsideration should be granted where necessary to correct for 'clear error' or to 'prevent manifest injustice.'" *Id.* (quoting *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004)). Most importantly, however, a "motion for reconsideration is not an opportunity to reargue that which was previously decided." *Id.*

### A. Oklahoma/Union Did Not – and Cannot – Identify Any "Overlooked" Facts or Law that Would Alter the Court's Order

"The standard for granting such a motion [for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the

court overlooked . . . [and which] might reasonably be expected to alter the [court's] conclusion." *Shrader*, 70 F. 3d at 257; *In re Enron Creditors Recovery Corp.*, 2007 U.S. Dist. LEXIS 91414, at *5 (S.D.N.Y. 2007) (Hellerstein, J.) ("The standard for a motion for reconsideration is that the moving party must demonstrate that the court did not consider 'controlling decisions or factual matters that were put before it on the underlying motion,' and which, had they been considered, ***might reasonably have led to a different result***."); Local Civil Rule 6.3 (requiring movant to "set[] forth concisely the matters or controlling decisions which counsel believes the court has overlooked").[1] Tellingly, Oklahoma/Union did not identify ***any*** controlling decisions or factual matters that were overlooked by the Court. To the contrary, Oklahoma/Union's motion is replete with citations to the arguments the Court ***did*** consider at the hearing. *See* Docket #41 at 1-6. It is respectfully submitted that Oklahoma/Union's inability to identify any facts or law that the Court disregarded alone compels the denial of their motion.

Even if Oklahoma/Union had pointed out the controlling law or facts that the Court supposedly ignored in reaching its decision (which they did not), Oklahoma/Union similarly failed to demonstrate that any purportedly ignored law or facts might reasonably have led to a different result. Indeed, at the hearing, 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." *See* November 3, 2010 Hearing Transcript ("Tr.") at 21:25-23:4.[2]

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[1] Unless otherwise noted, all emphasis is added and citations are omitted.

[2] For the reasons articulated in its opposition and reply briefs, as well as at the hearing, Philips Pensioenfonds respectfully maintains that Oklahoma/Union do not possess the largest financial interest in the relief sought by the class. *See* Docket #20, Docket #25; Tr. at 21:1-23:4. However, as

Treating the movants' losses as essentially the same, the Court then continued its analysis of the Fed. R. Civ. P. 23 ("Rule 23") factors, namely, typicality and adequacy. 15 U.S.C. §78u-4(a)(3)(B)(iii). And regardless of which movant ultimately possessed the largest financial interest, when the PSLRA's Rule 23 requirements were applied, the Court "decid[ed] in favor of an entity that is more like the other members of the class" and appointed Philips Pensioenfonds as lead plaintiff. Tr. at 38:9-14. As such, Oklahoma/Union's motion was properly denied. Tr. at 35:13-14; *Cendant*, 264 F.3d at 267.

Indeed, throughout the briefing and at the hearing, Oklahoma/Union were clearly afforded the opportunity to make the required typicality showing. *See* Docket #12; Tr. at 27:11-35:14. The Court found they did not do so. Tr. at 28:16-21, 35:7-14; *see also* 15 U.S.C. §78u-4(a)(3)(B)(iii)(II); *Cendant*, 264 F.3d at 265 ("in inquiring whether the movant has preliminarily satisfied the typicality requirement," the court "should consider whether the circumstances of the movant with the largest losses 'are markedly different'" from "'the claims of other class members'"). Despite three attempts by counsel for Oklahoma/Union to alter this decision at the hearing, the Court remained steadfast in its ruling that Philips Pensioenfonds was appointed lead plaintiff. Tr. at 35:13-14, 39:19-20, 41:8 (noting three times that the Court had "made [its] ruling").

Disappointed that they were not found to be typical of the other class members, Oklahoma/Union now ask the Court to grant them yet another opportunity to convince the Court it

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explained herein, this does not alter the propriety of the Court's Order appointing Philips Pensioenfonds as lead plaintiff. *See* Tr. at 32:7-10 ("Our position is if [Oklahoma/Union] did have the largest financial interest, which they clearly don't under any recognized rubric, . . . the Rule 23 issues would preclude their appointment anyway."); 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(bb) and (II)(aa); *In re Cendant Corp. Litig.*, 264 F.3d 201, 267 (3d Cir. 2001); *In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002); *In re Bard Assocs., Inc.*, 2009 U.S. App. LEXIS 26289, at *6-*7 (10th Cir. 2009).

made a clear error. Docket #41 at 1. But the Court did not clearly err in denying Oklahoma/Union's lead plaintiff motion, and Oklahoma/Union offer no new law or facts that would alter the Court's Order. Thus, it is respectfully submitted that Oklahoma/Union's reconsideration motion should be denied.

### B. Oklahoma/Union Cannot Raise New Issues in Support of Its Bid to Amend the Court's Order

A court's reconsideration of a previous order "'is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.'" *In re Health Mgmt. Sys., Sec. Litig.*, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) (Berman). Consequently, a "motion for reconsideration does not provide the parties with an opportunity to reargue issues that have already been decided just because a party is displeased with the original outcome." *In re World Trade Ctr. Disaster Site Litig.*, 2008 U.S. Dist. LEXIS 52674, at *2 (S.D.N.Y. 2008) (Hellerstein, J.). Yet this is precisely what counsel for Oklahoma/Union has done here.

In their motion for reconsideration, Oklahoma/Union appear to argue that the Court erred by failing to formally award Oklahoma/Union the "presumption of 'most adequate plaintiff.'" Docket #41 at 2. Not so. Oklahoma/Union ignore the fact that the Court first concluded that the $2 million difference separating Philips Pensioenfonds' losses and Oklahoma/Union's losses was "not meaningful." Tr. at 23:3-4. Following the PSLRA's sequential process, the Court next considered whether there was any reason why Oklahoma/Union or Philips Pensioenfonds would "not fairly and adequately protect the interests of the class." 15 U.S.C. §78u-4(a)(3)(B)(iii)(II); Tr. at 23:5-41:8. This was entirely proper because before a movant is entitled to the PSLRA's "most adequate plaintiff" presumption, it must first make a threshold showing of typicality. 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc); *Cendant*, 264 F.3d at 267. And, even if the movant with the largest loss makes

a *prima facie* showing of typicality and adequacy and is designated the "presumptive" lead plaintiff, this presumption is ***rebuttable***. 15 U.S.C. §78u-4(a)(3)(B)(iii)(II).

Recognizing that the PSLRA requires courts to "find typicality," this Court noted that Union (a German investment advisor) had "a separation between what we would analogize to as a legal ownership and beneficial ownership." Tr. at 27:25-28:4.[3] The Court then held that "a claimant without the separation between record and beneficial ownership is a more typical claimant than a claimant with that split." Tr. at 28:16-21.[4] Because it based its standing on assignments that it purportedly received (and whose validity must be assessed under German and Second Circuit law), Union did not meet the typicality showing required of it because it was not situated like the rest of the class members. This finding was entirely consistent with the PSLRA's mandate that the "most adequate plaintiff" must "otherwise satisf[y] the requirements of Rule 23." 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc).[5]

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[3] Union's status as a German investment advisor was not the only issue impacting Oklahoma/Union's typicality and adequacy. *See* Docket #20 and Docket #25 (discussing Oklahoma/Union's inability to satisfy the Rule 23 requirements).

[4] At the hearing, counsel for Oklahoma/Union stated that this issue "was not raised in the briefing." Tr. at 38:16-18. Mr. Narwold was mistaken. *See* Docket #20 at 10-18 (discussing the separation of interests between Union's clients and Union as a result of the assignments whose validity still has not been confirmed).

[5] As previously briefed, Judge Buchwald and Judge Pauley reached the same conclusion that this Court did. *See* Docket #20 at 14 (citing *In re IMAX Sec. Litig.*, 2009 WL 1905033, at *2-*3 (S.D.N.Y. 2009) (replacing investment advisor with a separation of legal and beneficial interests as lead plaintiff because it "'face[d] unique legal issues that other class members do not'")); *see also In re SLM Corp. Sec. Litig.*, 258 F.R.D. 112, 116 (S.D.N.Y. 2009) (same). It is not mere coincidence that three judges in this District have found foreign asset managers like Union to be atypical lead plaintiffs. In fact, the Stürner Declaration filed by Oklahoma/Union with their reply brief highlights the atypicality of foreign asset managers like Union. For example, Mr. Stürner attached a ***draft*** (and ***unofficial***) translation of the German Investment Act of 2003 which states that all "fund rules governing the legal relationship between the investment company and the investors ***shall be fixed in***

"If (for ***any*** reason) the court determines that" a movant "cannot make a threshold showing of typicality or adequacy, then the court should explain its reasoning on the record . . . and disqualify that movant from serving as lead plaintiff." *Cendant*, 264 F.3d at 267. This is precisely what this Court did. *See* Tr. at 35:7-14 ("a plaintiff that does not have a division between ownership and beneficial interest is a more typical claimant than an entity that does have such a distinction"). Thus, the Court found that Oklahoma/Union was not an appropriate candidate and appointed Philips Pensioenfonds as lead plaintiff. *Id.* This decision was entirely proper.

Importantly, the issue of Oklahoma/Union's typicality was fully briefed in Philips Pensioenfonds' opposition memorandum and Oklahoma/Union's reply memorandum, thoroughly considered at the hearing, and ultimately rejected by the Court. *See* Docket #23 at 10-18; Tr. at 23:5-41:8. In addition, at the hearing, after the Court appointed Philips as lead plaintiff, counsel for Oklahoma/Union attempted to reverse the Court's decision no less than three times ***and*** requested another round of briefing. *See* Tr. at 37:16-41:8. The Court reiterated the basis for its ruling (twice) and noted that, if "there needs to be some adjustment, I have the power to do it and I will do it." Tr. at 38:4-15; 39:6-20. Ultimately, the Court "made [its] ruling," numerous times, and Philips Pensioenfonds was appointed lead plaintiff. Tr. at 39:19-20; 41:8.

Despite the fact that Oklahoma/Union's atypicality was fully briefed and addressed at the hearing, Oklahoma/Union now rehash this identical argument in their reconsideration motion.

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***writing***." *See* Docket #24-7 at 36 of 49. While acknowledging this explicit and unambiguous statutory provision, Mr. Stürner opined – without citing any German authority, let alone Second Circuit authority – that "the formal requirement of written terms is a lex imperfecta" and assignments ***can be oral***. *See* Docket #24-6 at 16 of 127, ¶15. In other words, Mr. Stürner's opinion is that the German statute doesn't mean what it says. To say that the issues surrounding the propriety of Union's assignments render it atypical would be an understatement, at best.

Docket #41 at 3 (arguing, ***again***, that "[t]he fact that Union was granted an assignment of claims from three of its own subsidiaries does not support, let alone serve as 'proof,' that Union is atypical"). Repeating a (rejected) argument multiple times in the hopes that the Court may change its mind after four or five repetitions does not qualify as "overlooked." To the contrary, this is precisely what a motion for reconsideration may ***not*** do. *See Pontifex Partners, LLC v. Millennium Global Emerging Credit Fund, LP*, 2009 U.S. Dist. LEXIS 120843, at *2 (S.D.N.Y. 2009) (Hellerstein, J.) ("A motion for reconsideration may not rehash arguments already made or advance arguments not previously presented."). Indeed, the "purpose of a motion for reargument is to present facts or laws that the court previously did not consider, not to present old arguments in new clothing." *In re September 11 Litig*., 2009 U.S. Dist. LEXIS 37189, at *25-*28 (S.D.N.Y. 2009) (Hellerstein, J.).

"Displeasure with a result is not a basis for the motion; the motion is not intended to provide an opportunity to reargue issues that have already been decided." *WTC Captive Ins. Co.*, 537 F. Supp. 2d at 624. Oklahoma/Union "fail[ed] to identify any 'controlling decisions or data that the court overlooked.'" *Thompson*, 2010 U.S. Dist. LEXIS 93174, at *3-*4. Consequently, it is respectfully submitted that their motion for reconsideration should be denied.

### C. Oklahoma/Union's Request to Alter the Order to Appoint Them "Co-Lead" Plaintiff Lacks Support in Law or Fact

As a last resort, Oklahoma/Union offer two new suggestions in their reconsideration motion for how the Court should modify its Order: either appoint both funds as "Co-Lead Plaintiff with Philips" or just "appoint[] Oklahoma Firefighters as a co-lead plaintiff [to] better protect the class from attacks anticipated in Defendants' opposition to class certification." Docket #41 at 4. Neither of these alternatives is appropriate.

***First***, a "motion for reconsideration is not an opportunity for a losing party to reargue its case or to change its theories." *World Trade Ctr. Disaster Site Litig.*, 2008 U.S. Dist. LEXIS 52674, at *6. Indeed, a "motion to reconsider is not intended to give the losing party an opportunity to shift grounds from those advanced earlier, or introduce arguments . . . that could have been presented, but were not, in opposing the original motion." *September 11 Litig.*, 2009 U.S. Dist. LEXIS, at *26-*27; *see also Caribbean Trading & Fid. Corp. v. Nigerian Nat. Petroleum Corp.*, 948 F.2d 111, 115 (2d Cir. 1991) (finding that local "rule has been interpreted as precluding arguments raised for the first time on a motion for reconsideration"). Oklahoma/Union never requested appointment as "co-lead" plaintiff in its original motion and should not be allowed to do so now simply because it is disappointed with the Court's Order.

***Second***, the PSLRA speaks in terms of a "lead" plaintiff in the singular, not "***co-***lead" plaintiff***s*** in the plural. *See* 15 U.S.C. §78u-4(a)(3)(B) ("Appointment of lead plaintiff"). And, while the statute permits the Court to appoint a "person or group of persons" as the lead plaintiff, at least two circuit courts have questioned a district court's ability to appoint "***co-***lead plaintiff***s***." *See In re Cohen*, 586 F.3d 703, 711 n.4 (9th Cir. 2009) (noting that PSLRA's plain language "suggest[s] that the district court should appoint only one lead plaintiff, whether an individual or a group"); *see also Cendant*, 264 F.3d at 223 n.3 ("we agree with the Securities and Exchange Commission that 'there is one lead plaintiff under the Reform Act: an individual, an institution or a properly-constituted group'"). Thus, Oklahoma/Union's request lacks statutory support.[6]

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[6] Oklahoma/Union's reliance on *Dolan v. Axis Capital Holdings Ltd.*, 2005 U.S. Dist. LEXIS 6538 (S.D.N.Y. 2005) is unavailing. Most importantly, the two individuals appointed as lead plaintiff in *Dolan* filed an ***unopposed joint motion*** requesting their joint appointment. *Id.* at *2. Thus, the Court did not *sua sponte* create a group as Oklahoma/Union suggests. Moreover, Judge Howell granted the joint motion because, unlike here, "neither Dolan nor Schimpf [was] an

***Third***, there is no need to "appoint[] Oklahoma Firefighters as a co-lead plaintiff [to] better protect the class from attacks anticipated in Defendants' opposition to class certification." Docket #41 at 4. Presumably, this argument is premised on Oklahoma/Union's belief that an American investor is necessary to adequately protect the class's interests. *Id.* at 5.[7] Not so. As the Court confirmed, ***all*** of Philips Pensioenfonds' shares were purchased in the United States and there are no issues under *Morrison v. Nat'l Austl. Bank*. Tr. at 7:14-17. Nor did defendants' counsel identify any issues unique to Philips Pensioenfonds. *See* Tr. at 36:24-37:14. Thus, "there is no factual basis to conclude that the interests of the individual and institutional shareholders will be antagonistic, or that [Philips Pensioenfonds] will face unique defenses by Defendants." *Glauser v. EVCI Career Colls. Holding Corp*., 236 F.R.D. 184, 189 (S.D.N.Y. 2006) (McMahon, J.). "If it later turns out that their

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institutional investor; nor, for that matter, does either have a particularly large financial interest in the case," ***not*** because their financial interests were equal. *Id.* at *15. And, because of those concerns, the court reasoned that appointing both individuals as lead plaintiff would allow the individual investors to "pool financial resources, knowledge and experiences, and may also reap the 'benefits of joint decision-making' when pressed with difficult choices." *Id.* Here, in contrast, Philips Pensioenfonds ***is*** an institutional investor with ample resources, knowledge and experience to manage this litigation in accordance with the class's best interests.

[7] This argument is troubling for another reason. It appears Oklahoma – the movant with the smallest financial interest which the Court previously noted "[s]tanding alone, [was] not equal" (Tr. at 40:20) – is offering to now jettison its co-movant, Union, in an attempt to be appointed "co-lead" plaintiff solely based on its status as a domestic investor. Such an eagerness to disband the group to gain a perceived strategic advantage confirms Philips Pensioenfonds' suspicion that the "group" was not properly formed to begin with. *See* Docket #20 at 6-10; Docket #25 at 11. More importantly, however, Oklahoma's citation to *Baydale v. Am. Express Co.*, 2009 WL 2603140, at *3 (S.D.N.Y. 2009), for the proposition that the court preferred and appointed a domestic lead plaintiff is misleading. Docket #41 at 5. In *Baydale*, Judge Pauley did not ***prefer*** the domestic movant. Rather, the court found that the investor with the largest loss, a foreign asset manager like Union here, was "subject to unique defenses and suffers from other flaws that do not make it an adequate lead plaintiff." *Id.* at *2. After disqualifying the foreign asset manager, Judge Pauley appointed the only other investor seeking lead plaintiff status, which happened to be a domestic entity. *Id.* at *4.

interests are antagonistic, the Court will revisit the issue." *Id.*[8] Oklahoma/Union's "speculative and hypothetical argument that [Philips Pensioenfonds] ***might*** be subject to a later attack by Defendants is . . . [un]availing." *Id.* (emphasis in original). As such, Oklahoma "has not demonstrated the necessity or efficacy to the Class' benefit for such designation as co-lead plaintiff." *Janovici v. DVI, Inc.*, 2003 U.S. Dist. LEXIS 22315, at *41 (E.D. Pa. 2003).[9]

***Fourth***, and perhaps most importantly, neither Oklahoma nor Union was "entitled" to be appointed as co-lead plaintiff because the Court found that Union was atypical and "[s]tanding alone," Oklahoma was "not equal." Tr. at 38:4-15; 40:20. Even if Oklahoma/Union had satisfied the PSLRA's requirements (which they did not), there "is no presumption in the PSLRA that co-lead plaintiffs are better than one lead plaintiff." *In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 439 (S.D.N.Y. 2008) (Sullivan, J.). To the contrary, "rather than better serving the interests of individual class members, the appointment of a co-Lead Plaintiff would only serve to fracture the leadership and drive up attorneys fees." *Glauser*, 236 F.R.D. at 189 (noting that "[a]s a general rule," "the class

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[8] Even if it was desirable to have an American investor as a named plaintiff in this case, that decision is the lead plaintiff's to make, ***not*** counsel for Oklahoma/Union. *See Hevesi v. Citigroup Inc.*, 336 F.3d 70, 82-83 (2d Cir. 2003). And, any concern Oklahoma purports to have in this regard rings hollow because Philips Pensioenfonds' counsel also represents Ms. Jones, the named plaintiff in this action, who is a domestic investor. Moreover, the Court expressly reserved the right to make an "adjustment" if necessary to protect the class. *See* Tr. at 39:6-20. Oklahoma/Union did not identify ***any*** reason to make such an "adjustment" in their reconsideration motion which was filed a mere five days after the hearing. There simply is no legitimate basis to be concerned about Philips Pensioenfonds' leadership.

[9] *See also Cortese v. Radian Group, Inc.*, 2008 U.S. Dist. LEXIS 6958, at *16-*17 (E.D. Pa. 2008) (rejecting movant's bid to be appointed co-lead plaintiff); *Teamsters Local 617 Pension & Welfare Funds v. Apollo Group, Inc.*, 2007 U.S. Dist. LEXIS 67354, at *21 (D. Ariz. 2007) (same); *Kapur v. USANA Health Scis., Inc.*, 2007 U.S. Dist. LEXIS 77258, at *10-*11 (D. Utah 2007) (same); *Averdick v. Hutchinson Tech., Inc.*, 2006 U.S. Dist. LEXIS 47445, at *20-*21 (D. Minn. 2006) (same); *Ezra Charitable Trust v. Rent-Way, Inc.*, 136 F. Supp. 2d 435, 444-45 (W.D. Pa. 2001) (same).

is best served by having one Lead Plaintiff and one Lead Counsel to minimize legal fees"). As such, the Court should find "no need to complicate the proceedings with co-lead plaintiffs." *Tyler v. AstraZeneca, PLC*, 2006 U.S. Dist. LEXIS 6479, at *6 (S.D.N.Y. 2006) (Griesa, J.).[10]

Having failed to identify any law or fact that the Court ignored, 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. *See* Docket #41 at 5. However, as Judge Scheindlin recognized, the "purpose of the lead plaintiff section of the PSLRA . . . was to ensure that securities litigation was ***investor***-driven, as opposed to ***lawyer***-driven." *In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117, 123 (S.D.N.Y. 2002). And, "notwithstanding every plaintiff's undeniable interest in an outcome most favorable to his or her position, every warrior in this battle cannot be a general." *In re Cendant Corp. Litig.*, 182 F.R.D. 144, 148 (D.N.J. 1998).[11]

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[10] *Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 254 (S.D.N.Y. 2003) (Conner, J.) ("Designating multiple Lead Plaintiffs to represent each cause of action would fracture the litigation and 'obstruct any efficient and controlled progress'."); *Baughman v. Pall Corp.*, 250 F.R.D. 121, 129 (E.D.N.Y. 2008) (court was "not persuaded that a co-lead plaintiff should be appointed"); *see also Gluck v. CellStar Corp.*, 976 F. Supp. 542, 549 (N.D. Tex. 1997) ("[i]ncreasing the number of Lead Plaintiffs would detract from the Reform Act's fundamental goal of client control, as it would inevitably delegate more control and responsibility to the lawyers for the class and make the class representatives more reliant on the lawyers"); *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1151 (N.D. Cal. 1999) (splintering the class would frustrate the "statutory presumption that one lead plaintiff can vigorously pursue ***all*** available causes of action against ***all*** possible defendants under ***all*** available legal theories").

[11] Oklahoma/Union's counsel's bid to be appointed lead counsel also ignores the fact that the PSLRA "expressly provides that lead plaintiff" – Philips Pensioenfonds – "has the power to select lead counsel." *Cohen*, 586 F.3d at 709. The PSLRA does not "designate any other actor as authorized to select lead counsel or suggest that the district court may appropriate this authority." *Id.* Indeed, "[i]t would be difficult for the statute to be more clear that it is the lead plaintiff who selects lead counsel, not the district court" or counsel for another movant. *Id.*

Moreover, the Court already addressed the issue of the counsel structure when it asked whether it would be "inefficient" for the Court-appointed lead plaintiff's selected lead counsel, Robbins Geller Rudman & Dowd, to "incorporate in [their] litigating group some of the lawyers in Mr. Narwold's firm and Mr. Levit's firm[.]" Tr. 41:9-15.[12] With the caveat that Robbins Geller should not "just add unnecessary expense" simply to incorporate Mr. Narwold's firm and Mr. Levit's firm, the Court believed there could be "efficiencies that would help the case and would short-circuit problems amongst the three [firms]." Tr. at 42:6-9. ***All counsel agreed with this suggestion***. Tr. at 42:14-20.

Outside the courtroom following the hearing, Mr. Robbins informed Mr. Narwold that he would immediately confer with Philips Pensioenfonds regarding the hearing and the Court's stated preference that, where possible, Mr. Narwold's firm and Mr. Levit's firm be incorporated in a non-duplicative and efficient manner. Thereafter, Robbins Geller confirmed that "[l]ike the Court, Philips was concerned about preventing excess expenditures and avoiding duplication of effort, particularly in light of the fact that [Robbins Geller] has two offices in New York. However, after being advised of the Court's express qualification that any assistance provided by [their] firms would be conducted without any duplication of effort or undue expense, Philips has agreed to have your

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[12] Robbins Geller, a 175-lawyer firm with nationwide offices including two New York offices, "has been praised for the quality of its representation by several judges in various parts of the country." *In re Orion Sec. Litig*., 2008 U.S. Dist. LEXIS 55368, at *17 (S.D.N.Y. 2008) (Sullivan, J.). In fact, in approving a $7+ billion recovery for shareholders in *In re Enron Corp. Sec.*, 586 F. Supp. 2d 732 (S.D. Tex. 2008), Judge Melinda Harmon noted that the "experience, ability, and reputation of the attorneys of [Robbins Geller] is not disputed; it is one of the most successful law firms in securities class actions, if not the preeminent one, in the country." *Id.* at 797. Notably, Robbins Geller served as sole lead counsel in the *Enron* litigation. And this Court is also familiar with Robbins Geller's qualifications, as Robbins Geller attorneys are currently serving as lead counsel in *Kleiman v. RHI Entertainment, Inc.*, No. 09-cv-08634-AKH and *In re GlaxoSmithKline ERISA Litig.*, No. 10-cv-06419-AKH.

firms assist in the prosecution of this action under the direction of the lead plaintiff and lead counsel." *See* Ex. 1 attached hereto. Despite this fact, Mr. Levit and Mr. Narwold declined to withdraw their motion. *See* Ex. 2 attached hereto.[13]

A "court must be mindful that the lead plaintiff has significant responsibilities and duties, including the management of the direction of the case." *In re Milestone Scientific Sec. Litig.*, 187 F.R.D. 165, 176 (D.N.J. 1999). "Disputes concerning the direction of the case should be resolved by the lead plaintiff," and this "task can be complicated, or even thwarted, by pressure or input from several lead counsel." *Id.* Indeed, "the appointment of several firms as lead counsel can raise a number of concerns, including the hindrance of the ability of lead plaintiff to manage the case and supervise counsel, duplication of efforts, absence of coordination, delay and increased fees and costs." *Id.* Here, Oklahoma/Union's counsel's unwillingness to withdraw their motion has already resulted in increased fees and costs – expenses which have little to do with the merits of this case and should not have been incurred in light of counsels' concurrence on the record and the Court's admonishment not to "wast[e] money" and to "conserv[e] money for the class." Tr. at 39:6-20. Neither the class nor the Court is well-served by such a motion. *See Health Mgmt. Sys.*, 113 F. Supp. 2d at 614 (noting that reconsideration is an "extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources").

"More likely than not, the putative class in any large shareholder action" such as this "will be composed of plaintiffs whose portfolios differ in composition from one another. This, however,

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[13] Since the middle of November, and despite the fact that Mr. Levit and Mr. Narwold have not withdrawn their motion for reconsideration, Robbins Geller has continued to confer with counsel regarding the substance of the allegations in the amended complaint which will be filed on December 6, 2010. *See* Docket #44.

does not justify the appointment of potentially innumerable co-lead plaintiffs to ensure that each individualized interest is represented." *Cendant*, 182 F.R.D. at 148. To the contrary, "representation by a disparate group of plaintiffs, each seeking only the protection of its own interests, could well hamper the force and focus of the litigation. A balance must be struck." *Id.* "The Reform Act demands only that the interests of the class members be ***adequately*** represented by the lead plaintiff." *Id.* (emphasis in original). The Court's appointment of Philips Pensioenfonds as lead plaintiff does just that.

Oklahoma/Union failed to "point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader*, 70 F.3d at 257. Respectfully, their motion should be denied.

## III. CONCLUSION

"A party making a motion for reconsideration 'is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to advance new theories or adduce new evidence in response to the court's rulings,' . . . much less rehash arguments

already made and rejected."[14] That is precisely what Oklahoma/Union have done. As such, it is respectfully submitted that their motion for reconsideration should be denied.

DATED: November 29, 2010

Respectfully submitted,

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Lead Counsel for Plaintiffs

[14] *Pfizer, Inc. v. Stryker Corp.*, 2005 U.S. Dist. LEXIS 6109, at *1-*2 (S.D.N.Y. 2005) (Kaplan, J.).

CERTIFICATE OF SERVICE

I hereby certify that on November 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.

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

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# EXHIBIT 1

Robbins Geller Rudman & Dowd LLP

Atlanta Boca Raton Melville New York Philadelphia San Diego San Francisco Washington, DC

Darren J. Robbins
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November 8, 2010

VIA E-MAIL

Mitchell M.Z. Twersky
Lawrence D. Levit
ABRAHAM, FRUCHTER & TWERSKY, LLP
One Pennsylvania Plaza, Suite 2805
New York, NY 10119

William H. Narwold
MOTLEY RICE LLC
20 Church Street, 17th Floor
Hartford, CT 06103

Re: *Jones v. Pfizer, Inc.*, No. 10-cv-03864 (S.D.N.Y.)

Dear Counsel:

It was good to see each of you last week.

I am a bit perplexed by your Motion for Reconsideration. Although the Court "den[ied] Oklahoma Firefighters and Union's motion for approval of their chosen counsel as co-lead counsel for the class, [Judge Hellerstein] suggest[ed] that Robbins Geller Rudman & Dowd LLP consider incorporating into their litigation group the attorneys who represent Oklahoma Firefighters and Union, to the extent that such cooperation would enhance the efficiency of this litigation without duplicating efforts or causing undue expense." *See* Summary Order, Docket #37 (filed November 4, 2010). As I indicated to Bill that I would do immediately following last Wednesday's hearing, we reached out to Stichting Philips Pensioenfonds ("Philips") and conveyed the Court's request that Abraham Fruchter & Twersky and Motley Rice work on this action under Philips' and lead counsel's oversight and direction.

Without waving the attorney-client or work-product privileges, I can advise you that we conferred with Philips about the Court's suggestion. Like the Court, Philips was concerned about preventing excess expenditures and avoiding duplication of effort, particularly in light of the fact that my firm has two offices in New York. However, after being advised of the Court's express qualification that any assistance provided by your firms would be conducted without any duplication of effort or undue expense, Philips agreed to have your firms assist in the prosecution of this action under the direction of the lead plaintiff and lead counsel. Of course Philips retains the right to: (i) allocate work to Abraham Fruchter and Motley Rice in a manner that will not result in duplication of effort or undue expense; and (ii) inspect and review attorney time and expenses on an *ad hoc* basis to ensure there is no such duplication.

Robbins Geller Rudman & Dowd LLP



Philips' consent to the Court's suggestion moots your Motion for Reconsideration. Please confirm no later than noon Eastern Time on Wednesday, November 10, 2010 whether you will be withdrawing your Motion for Reconsideration.

We look forward to working with you on this matter.

Very truly yours,

DARREN J. ROBBINS

DJR:dsm

cc: Sam Rudman
Henry Rosen

# EXHIBIT 2

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November 10, 2010

via U.S. Mail & e-mail (darrenr@rgrdlaw.com)
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San Diego, CA 92101

**Re: Jones v. Pfizer, Inc. et al. – 10 Civ. 3864 (AKH)**

Dear Darren:

It was indeed a pleasure seeing you on your visit to New York. Moreover, we appreciate that your client, Stichting Philips Pensioenfond, has decided to follow the suggestion of Judge Hellerstein and has agreed to have Abraham, Fruchter & Twersky, LLP and Motley Rice LLC assist your firm in the efficient prosecution of this action against Pfizer. We disagree, however, that your client's agreement to have your firm enlist our assistance renders Oklahoma Firefighters and Union's Motion for Reconsideration moot.

Oklahoma Firefighters and Union respectfully submitted their Motion for Reconsideration on the basis of the sound legal principle that they were improperly denied a leadership role in this action under the straightforward framework of the PSLRA and its progeny of interpreting case law. Moreover, both Oklahoma Firefighters and Union actively desire to play a lead role in prosecuting this action. However, to the extent your client will agree to provide Oklahoma Firefighters and Union an appropriate, and clearly defined, role in the prosecution of this action, Oklahoma Firefighters and Union will consider withdrawing their motion.

In any event, Abraham, Fruchter & Twersky, LLP and Motley Rice LLC also look forward to working together with you on this matter.

Sincerely,

William H. Narwold

cc: via email only
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