UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDITH DESMET, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

INTERCEPT PHARMACEUTICALS, INC., MARK PRUZANSKI and SANDIP S. KAPADIA,

Defendants.

No. 1:17-cv-07371-LAK

THE LIU FAMILY'S MEMORANDUM IN OPPOSITION TO THE INTERCEPT INVESTMENT GROUP'S LEAD PLAINTIFF MOTION

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Husband and wife Hou Liu and Amy Fu (collectively, the "Liu Family") respectfully submit this memorandum in further support of their motion for lead plaintiff and in opposition to the motion filed by the self-styled "Intercept Investment Group" ("IIG"), which seeks IIG's appointment as lead plaintiff and approval of IIG's selections of Levi & Korsinsky LLP ("L&K") and Pomerantz LLP ("Pomerantz") as co-lead counsel.[1]

PRELIMINARY STATEMENT

Under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the role of the lead plaintiff is to empower investors so that they—***not their lawyers***—exercise primary control over private securities litigation. *Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 82 n.13 (2d Cir. 2004). Based on the recently filed joint declaration from IIG's counsel, ECF No. 31, and additional research by the Liu Family, it is now clear that IIG's lawyers are driving IIG's application in ways that render both IIG and IIG's lawyers inadequate.

First, IIG's "co-lead counsel structure," pursuant to which L&K and Pomerantz brought the Rosen Law Firm P.A. ("Rosen") into the fold, was not disclosed to the Court by IIG's lawyers and is improperly lawyer-driven in any event because the PSLRA ***requires*** IIG to have selected and retained its counsel. 15 U.S.C. §78u-4(a)(3)(B)(v).

Second, L&K and Pomerantz surrendered IIG's right as the lead plaintiff to name additional class representatives to Rosen. The idea that an undisclosed law firm would usurp the role of the lead plaintiff in this manner is proof positive that IIG and its lawyers have already failed as fiduciaries.

[1] Unless stated otherwise, all citations and quotations are omitted, and all emphases are added.

Third, the fee sharing agreement between L&K, Pomerantz, and Rosen is consistent with the presence of a fourth undisclosed law firm, as the fees generated in the case are being divided into quarters, not thirds.

Fourth, the firms' fee sharing agreement violates New York's attorney ethics rules because Rosen could receive a quarter of the fees without having performed any of the work. Further, the agreement does not appear to have been disclosed to and consented to by IIG.

Fifth, in violation of New York's attorney ethics rules, L&K engaged in a misleading advertising campaign by using a shill firm to bombard the electronic wire services with advertising that did not disclose L&K's involvement.

Sixth, multiple law firms are entirely unnecessary in this case and serve only to enrich the firms promoting this lawyer-driven arrangement.

When these reasons are viewed collectively and in light of the fact that IIG is a group of unrelated investors from Armenia to Arizona, *see* ECF No. 22-1, who were cobbled together solely for the purposes of the PSLRA's financial interest presumption, *see* 15 U.S.C. §78u-4(a)(3)(B)(iii), the Liu Family respectfully submits that IIG and its counsel are inadequate. Accordingly, the Liu Family's motion should be granted instead.

PROCEDURAL HISTORY

On November 27, 2017, the Liu Family, alleging losses of $109,656.73, filed a motion seeking appointment as lead plaintiff and approval of their selection of Faruqi and Faruqi, LLP as lead counsel. ECF Nos. 14-15. That same day, three competing lead plaintiff motions were filed: (1) IIG alleged losses of roughly $2.2 million and sought approval of L&K and Pomerantz as co-lead counsel, ECF Nos. 8, 9; (2) Abraham Kassin ("Kassin") alleged losses of $926,571 and sought approval of Rosen as lead counsel, ECF. Nos. 6, 7; and (3) Richard Schubert

("Schubert") alleged losses of $58,229.85 and sought approval of Glancy Prongay & Murray LLP as lead counsel. ECF Nos. 11, 12.

After reviewing the competing motions, the Liu Family recognized that each member of IIG possessed a larger financial interest in the litigation than the Liu Family, and as the Liu Family was then unaware of any evidence establishing that IIG did not satisfy Rule 23's adequacy requirements, the Liu Family filed a notice of non-opposition. ECF No. 20. In the Liu Family's notice of non-opposition, they noted however that they were "willing and able to assume the role of Lead Plaintiffs on behalf of the purported class" if any of the movants with larger financial interests were unable to serve as lead plaintiff. *Id.*

Schubert likewise filed a notice of non-opposition. ECF No. 19.

Appearing to have reached the same conclusion as Schubert and the Liu Family, Kassin formally withdrew his motion, conceding that he did not have the largest financial interest in the case. ECF No. 18 at 1. Nowhere in Kassin's withdrawal, however, did Kassin ever state that he and his counsel were still involved in the case behind the scenes. *Id.* Nor, for that matter, did IIG's brief in further support of IIG' motion, which was filed the same day as Kassin's withdrawal, give any indication that Kassin or Rosen were still involved. ECF No. 21.[2]

With the competing lead plaintiff movants ostensibly having conceded, IIG faced but one last hurdle. Namely, the Court has an independent duty under the PSLRA and Rule 23 to vet IIG's application. Presumably this duty is what led to the Court's order dated December 22, 2017 ("Order"), which required IIG to disclose, by January 9, 2018, "whether there are any agreements or understandings between or among the plaintiffs who withdrew or announced non-

[2] IIG's reply brief in support of its lead plaintiff motion also omitted this information. *See* ECF No. 24.

opposition to the IIG motion and/or the respective counsel for those plaintiffs with respect to the sharing of work on behalf of the putative class or of attorneys' fees that might be awarded in this case and, if so, the substance of any such agreements or understandings." ECF No. 25.

Pursuant to the Order, on January 9, 2018, IIG filed a Joint Declaration of Jeremy A. Lieberman and Adam M. Apton in response to the Court's order ("Joint Declaration of Counsel" or "JDOC"). ECF No. 31. The JDOC admitted that a previously undisclosed agreement between "Pomerantz, Levi & Korsinksy and Rosen" existed (the "Fee Sharing Agreement" or "FSA"), a "true and correct copy" of which was annexed as Exhibit A to the JDOC. *See* JDOC at ¶¶ 3-7 & Ex. A. The FSA provided that Rosen could receive 25% of the fees earned in the action if Rosen did 25% of the work ***or*** if Rosen did not do 25% of the work but L&K and Pomerantz failed to provide Rosen the opportunity to perform 25% of the work or cure any shortfall in Rosen's work after being provided notice of the deficit. *See* JDOC, Ex. A at 1. The FSA also provided that Rosen, "shall have the option to include Abraham Kassin as a named plaintiff[.]" *Id.*

The next day, the Liu Family sought leave from the Court for permission to withdraw their notice of non-opposition and file a brief in opposition to IIG's motion. ECF No. 32.

The Court granted the Liu Family's request on January 11, 2018. ECF No. 35.

ARGUMENT

I. IIG AND ITS PROPOSED CO-LEAD COUNSEL ARE INADEQUATE DUE TO THE LAWYER-DRIVEN NATURE OF THEIR RELATIONSHIP

The PSLRA requires that, in addition to possessing the largest financial interest in the litigation, proposed lead plaintiffs must satisfy Rule 23's adequacy and typicality requirements for class representatives. *See* 15 U.S.C. §78u-4(a)(3)(B); *Strougo v. Brantley Capital Corp.*, 243 F.R.D. 100, 105 (S.D.N.Y. 2007). Proposed lead plaintiffs have an obligation to make a

"preliminary showing" of their adequacy, *see Blackmoss Invs., Inc. v. ACA Capital Holdings, Inc.*, 252 F.R.D. 188, 191 (S.D.N.Y. 2008); but competing movants can rebut another movant's showing with evidence to the contrary, *see* 15 U.S.C. §78u-4(a)(3)(B)(iii)(II).

To be successful, proposed lead plaintiffs must also demonstrate the adequacy of their proposed selection of lead counsel. *See Pipefitters Local No. 636 Defined Benefit Plan v. Bank of Am. Corp.*, 275 F.R.D. 187, 190 (S.D.N.Y. 2011) ("In considering the adequacy of a proposed lead plaintiff, a court must consider . . . whether class counsel is qualified, experienced, and generally able to conduct the litigation."). Indeed, if lead counsel is inadequate so too is the lead plaintiff. *See In re Vonage Initial Pub. Offering Sec. Litig.*, No. Civ. 07-177 (FLW), 2007 WL 2683636, at *9 (D.N.J. Sept. 7, 2007) (lead plaintiff was rejected where lead plaintiff did not show a "willingness and ability to select competent class counsel" and where "it was counsel who selected him" instead of vice versa).

Based on IIG's recent submissions, and as explained herein, IIG and its counsel are inadequate.

A. IIG'S Undisclosed "Co-Lead Counsel Structure" Is Improper

Subject to the Court's approval, proposed lead plaintiffs are required to select and retain proposed counsel to represent the class. 15 U.S.C. §78u-4(a)(3)(B)(v) ("The most adequate plaintiff ***shall***, subject to the approval of the court, ***select and retain*** counsel to represent the class."). In deciding whether to approve a plaintiff's choice of counsel, the court's "ultimate inquiry is always whether the lead plaintiff's choices were the result of a good faith selection and negotiation process and were arrived at via meaningful arms-length bargaining. Whenever it is shown that they were not, it is the court's obligation to disapprove the lead plaintiff's choices." *In re Cendant Corp. Litig.*, 264 F.3d 201, 276 (3d Cir. 2001).

Here, IIG's "co-lead counsel structure," JDOC at ¶ 6, consisting of L&K, Pomerantz, and Rosen, was not disclosed to the Court until the court issued its *sua sponte* Order. Given that the Fee Sharing Agreement was entered into by L&K, Pomerantz, and Rosen—***IIG was not a party***—and the agreement was memorialized in writing within a day of the firms' initial discussions, it is highly unlikely that the FSA was disclosed to and agreed to by all five (or any) of IIG's members prior thereto. *See* JDOC, Ex. A at 1. Indeed, the joint declaration that IIG submitted on December 11, 2017, which was filed after the FSA was entered into, includes no indication that Rosen is involved in the case, and simply states: "In this case, we selected Pomerantz LLP . . . and Levi & Korsinsky, LLP . . . to serve as Co-Lead Counsel."[3] ECF No. 22-1 at ¶ 11.

An agreement of this nature runs directly counter to the PSLRA, which specifically requires the lead plaintiff to "select ***and*** retain" proposed counsel to represent the class. 15 U.S.C. §78u-4(a)(3)(B)(v). If a lead plaintiff wants the court to approve a co-lead counsel structure, he must, at minimum, know which firms he is proposing as co-lead counsel. *See, e.g., In re Baan Co. Sec. Litig.*, 271 F. Supp. 2d 3, 13-14 (D.D.C. 2002) (finding the lead plaintiff inadequate and denying class certification when, among other things, he was not aware of the co-lead counsel structure set up by his attorneys); *see also Gordon v. Sonar Capital Mgmt. LLC*, 92 F. Supp. 3d 193, 199 (S.D.N.Y. 2015) (finding plaintiff inadequate to represent the class in part

[3] Even if all of IIG's members had known of the agreement and provided their informed consent, IIG's failure to disclose the arrangement would render IIG inadequate because it failed to apprise the Court of IIG's selection of counsel in contravention of the PSLRA. *See* 15 U.S.C. §78u-4(a)(3)(B)(v); *Savino v. Computer Credit*, 164 F.3d 81, 87 (2d Cir. 1998) (explaining that "[t]o judge the adequacy of representation, courts may consider the honesty and trustworthiness of the named plaintiff" and finding plaintiff inadequate when he made contradictory statements about when he received a letter); *Xianglin Shi v. SINA Corp.*, No. 05 Civ. 2154 (NRB), 2005 WL 1561438, at *4 (S.D.N.Y. July 1, 2015) ("Honesty and trustworthiness are [] relevant factors in determining an individual's ability to serve as a class representative. . . . As such, convictions of fraud or other forms of dishonesty undermine the qualifications of a potential class representative.").

because he failed to disclose an attorney fee-sharing agreement during the lead plaintiff appointment stage); *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 155 (S.D.N.Y. 2010) (finding the lead plaintiff inadequate and denying class certification when he was represented by a undisclosed attorney who had not been approved by the Court).

If the PSLRA's goal of ending lawyer-driven litigation is to have any chance of succeeding, IIG and its counsel must be deemed inadequate under these circumstances.

B. L&K and Pomerantz Surrendered the Lead Plaintiff's Right To Designate Additional Class Representatives to the Rosen Law Firm

The decision whether to name someone as a class representative "is within the lead plaintiffs' prerogative to exercise control over the litigation as a whole." *In re Bank of Am. Corp. Sec., Derivative, and Emp. Ret. Income Sec. Act (ERISA) Litig.*, No. 09 MD 2058 (PKC), 2011 WL 4538428, at *1 (S.D.N.Y. Sept. 29, 2011) (citing *Hevesi*, 366 F.3d at 82, n.13). Notwithstanding, L&K and Pomerantz surrendered IIG's right to decide whether Kassin should be named as a class representative to Kassin's counsel, namely Rosen. *See* JDOC, Ex. A. at 1 (". . . [Rosen] shall have the option to include Abraham Kassin as a named plaintiff . . . "). This agreement runs directly counter to the PSLRA's purpose of ending lawyer-driven litigation by allowing Rosen to "interpose themselves as representatives of a class." *In re NTL, Inc. Sec. Litig.*, No. 02 Civ. 3013(LAK)(AJP), 2007 WL 438320, at *3 (S.D.N.Y. Feb. 8, 2007); *see also In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 311 (S.D.N.Y. 2001) (finding that when "the named plaintiffs exercise no meaningful oversight over their counsel, the class action becomes little more than a lawyer's playground."). Accordingly, IIG and its counsel are inadequate.

C. The Firms' Fee Sharing Agreement Is Consistent with the Presence of a Fourth Undisclosed Firm

People do not ordinarily split a pie four ways if only three people are going to eat it. The fact that Rosen agreed to receive a fourth of the fees in the case—instead of a third—suggests that a fourth, unnamed firm also has a quarter stake. *See* JDOC, Ex. A at 1. Notably, although the Court's December 22, 2017 Order called for the disclosure of certain fee sharing agreements, *i.e.* those with parties who filed withdrawals or non-oppositions, a strict construction of the Order would not have required the disclosure of all existing fee sharing agreements, such as those with firms who represent or referred IIG members to L&K or Pomerantz. Given that IIG has not offered detailed evidence of how, when, and by whom the "Intercept Investor Group" was formed, and given IIG's failure to disclose the role Rosen assumed in IIG's co-lead counsel structure, the inference of a fourth law firm is plausible if not compelling. The presence of a fourth undisclosed law firm would only further underscore that IIG and its counsel are inadequate for the reasons discussed *supra* in §I.A.

D. The Firms' Fee Sharing Agreement Violates Attorney Ethics Rules

The Fee Sharing Agreement provides that, in exchange for Kassin withdrawing his lead plaintiff motion, L&K and Pomerantz will assign Rosen 25% of the work for 25% of any fees generated in the case. JDOC, Ex. A at 1. However, the FSA also includes an exception to this arrangement: "It is incumbent that Pomerantz LLP and L&K ("Co-Lead Counsel") inform us if [Rosen] is not doing 25% of the work and provide an opportunity to cure. If such notice and opportunity to cure is not provided, [Rosen] shall still receive 25% of the fee awarded. . ." *Id.* Thus, Rosen could receive 25% of any fee generated in the case in situations where it did not perform 25% of the work. An agreement of this nature violates N.Y. Rules of Prof'l Conduct Rule 1.5(g) (2009) which provides, "A lawyer shall not divide a fee for legal services with

another lawyer who is not associated in the same law firm unless . . . the division is in proportion to the services performed by each lawyer . . . [and] the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing." Given that there is no written evidence of IIG's informed consent, an agreement of this nature additionally corroborates the lawyer-driven nature of IIG's relationship with its counsel.

E. L&K Used Deceptive Advertising To Solicit Sufficient Clients To Secure a Co-Lead Counsel Slot

As explained by the Seventh Circuit Court of Appeals in *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002):

> For purposes of determining whether the class representative is an adequate representative of the members of the class, the performance of the class lawyer is inseparable from that of the class representative. This is so because even when the class representative has some stake (unlike Culver), it is usually very small in relation to the stakes of the class as a whole, magnifying the role of the class lawyer and making him (or in this case her) realistically a principal. Indeed the principal.

Thus, in situations where proposed lead counsel has acted improperly both counsel and the proposed lead plaintiff are inadequate. *See, e.g.*, Ex. A, *Gutman v. Sillerman*, 2015 U.S. Dist. LEXIS 179553, at *10-11 (S.D.N.Y. Dec. 8, 2015) (rejecting lead plaintiff movant as inadequate where counsel engaged in "chicanery").[4]

In connection with securities class actions, many firms (including those here) advertise through electronic wire services in order to reach class members who desire to serve as the lead plaintiff. Although advertising by this method is perfectly legitimate, this method has practical limitations because the wire services limit the number of press releases that any one firm may

[4] Unless stated otherwise, all exhibits are to the Declaration of Richard W. Gonnello filed contemporaneously herewith.

issue. In an effort to circumvent the numerical limitations imposed by the wire services, some firms have elected to use shill firms, which advertise in the shill's name but are in reality simply advertising for the larger firm.

In this case (and others) L&K has used the Law Offices of Vincent Wong ("Wong") in this capacity. To wit, Wong issued eight press releases announcing a case or potential claims against Intercept Pharmaceuticals, and advertising to potential lead plaintiffs. *See* Ex. B. But Wong merely operates as a front for L&K. Indeed, L&K got sloppy in this case, as L&K issued a press release on November 15, 2017 on Wong's behalf—but forgot to take out the Levi & Korskinsky logo. *See* Ex. C (noting that the "Source" of the release was "Levi & Korsinsky, LLP" and included L&K's logo but otherwise lists contact information for Wong).

Moreover, this was not an isolated incident. A similar blunder occurred on November 15, 2017, when L&K was listed as the source of a press release that Wong issued in a case against Navient Corporation, which likewise mistakenly included L&K's logo. *See* Ex. D (noting that the "Source" of the release was "Levi & Korsinsky, LLP" and included L&K's logo but otherwise listed Wong's contact information). And on December 23, 2014, Wong issued a press release on behalf of L&K in a case against Volcano Corporation that mistakenly included Wong's logo (which includes Chinese characters). *See* Ex. E (noting that the "Source" of the release was "The Law Offices of Vincent Wong" and included Wong's logo but otherwise listed L&K's contact information).

The only reasonable inference is that L&K controls both its own wire service accounts as well as Wong's. Wire service accounts allow users to upload press releases remotely through the internet and likewise allow users to upload their corporate logo if they want them featured on

their releases. Mistakes like the ones identified above can only occur if L&K and Wong share access to each other's logos, usernames, and passwords.

In fact, there was a curious but telling incident before this very Court in *Randall v. Fifth St. Fin. Corp.*, No. 15-cv-7759(LAK), 2016 WL 462479, at *1 n.2 (S.D.N.Y. Feb. 1, 2016). There, L&K and Wong filed a lead plaintiff motion on behalf of two plaintiffs, but when the Court ordered that the plaintiffs provide copies of their fee agreements with their "proposed lead counsel, and any other counsel that purport to represent them in this action," the plaintiffs "provided a copy of their agreement with L&K, but not with Vincent Wong." *Id.*

New York's Rules of Professional Conduct prohibit "deceptive or misleading" attorney advertising. N.Y. Rules of Prof'l Conduct R. 7.1(a). "All advertisements shall include the name, principal law office address and telephone number *of the lawyer or law firm whose services are being offered*." *Id.* R. 7.1(h); *see Anonymous v. Grievance Comm. for Second & Eleventh Judicial Dist.*, 136 A.D.2d 344, 349 (N.Y. App. Div. 2d Dep't 1988) (relying on *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and upholding this requirement as both constitutional and necessary to protect the public). But Wong's advertisements regarding this case never disclosed that Wong was operating on L&K's behalf, nor did Wong's advertisements list L&K's contact information, rendering Wong's advertising in violation of New York's attorney advertising rules. *See* Ex. B.

Courts must consider the honesty and integrity of putative class counsel because they will stand in a fiduciary relationship with the class. *See* Fed. R. Civ. P. 23(g)(4) ("Class counsel must fairly and adequately represent the interest of the class."); *Chana Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 160 (S.D.N.Y. 2010) ("[I]n considering whether the proposed class counsels are adequate, the Court may consider the honesty and integrity of the

putative class counsel[.]"); *Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489, 498 (7th Cir 2013) ("[W]hen class counsel have demonstrated a lack of integrity, a court can have no confidence that they will act as conscientious fiduciaries of the class"); *In re Network Assocs., Inc. Secs Litig.*, 76 F. Supp. 2d 1017, 1021 (N.D. Cal. 1999) (rejecting lead plaintiff group assembled through misleading solicitations and lamenting that the PSLRA was not intended to replace the "race to the courthouse" with the race to the "publisher").

This kind of unethical relationship creates an "appearance of impropriety" that could easily lead a court to deny class certification. *See In re IMAX Sec. Litig.*, 272 F.R.D. 138, 157 (S.D.N.Y. 2010). Thus, IIG and its counsel are inadequate.

F. Multiple Law Firms Are Unnecessary In This Case

Whatever the precise contours of IIG's proposed co-lead counsel structure, the Court has final say over whether that structure should be approved. *See* 15 U.S.C. §78u-4(a)(3)(B)(v) ("The most adequate plaintiff shall, ***subject to the approval of the court***, select and retain counsel to represent the class."); *Khunt v. Alibaba Grp. Holding Ltd.*, 102 F. Supp. 3d 523, 540 (S.D.N.Y. 2015) (rejecting a request to appoint co-lead counsel).

The greater the number of lead counsel, the more difficult it will be for IIG to manage this litigation and supervise its lawyers. Yet IIG has offered no justification for the presence of multiple law firms other than the combined resources the firms possess. *See* JDOC at ¶¶ 5-6.

IIG cannot have it both ways. Either IIC's proposed law firms are adequate in their own right—or they are not.

If the former, there is no need for co-lead counsel, and IIG's proposal confirms IIG's lawyer-driven inadequacy. *See In re Jones Soda Co. Sec. Litig.*, No. C07-1366RSL, 2008 WL 418002, at *3 (W.D. Wash. Feb. 12, 2008) ("The potential for duplicative services, leadership discord, and increased attorney's fees militate against the appointment of multiple law firms. . . .

In addition, where more than one lead counsel is appointed, there is the potential that their coordinated handling of the litigation (assuming the best) or their fractious infighting (assuming the worst) could strip the lead plaintiff of control over the litigation, an occurrence the PSLRA intended to foreclose."); *In re Milestone Sci. Sec. Litig.*, 187 F.R.D. 165, 177 (D.N.J. 1999) (rejecting proposed multiple counsel structure, explaining, "where several lead counsel are appointed, there is the potential they may ultimately seize control of the litigation, an occurrence the PSLRA intended to foreclose. . . . Accordingly, those seeking the appointment of several lead counsel must demonstrate the lead plaintiff will be able to withstand any limitation on, or usurpation of, control, and effectively supervise the several law firms acting as lead counsel.").

If the latter, IIG's respective counsel—and therefore IIG—are inadequate to represent the putative class. *See Pipefitters Local No. 636 Defined Benefit Plan v. Bank of Am. Corp.*, 275 F.R.D. 187, 190 (S.D.N.Y. 2011) ("In considering the adequacy of a proposed lead plaintiff, a court must consider . . . whether class counsel is qualified, experienced, and generally able to conduct the litigation."); *cf. In re Hi-Crush Partners LP Sec. Litig.*, No. 12 Civ. 8557(CM), 2013 WL 8913033, at *1 (S.D.N.Y. Feb. 11, 2013) (while rejecting a proposed co-lead structure, the court noted, "As far as the Court is concerned, McInerney is the *only* lead counsel, and thus will be the only law firm to be compensated. If McInerney feels that it cannot represent the class adequately alone, the Court may need to reconsider the appointment of lead counsel.").

Either way, IIG and its counsel are inadequate.

II. ALTERNATIVELY, DISCOVERY OF IIG AND ITS COUNSEL IS JUSTIFIED

Under the PSLRA, "discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class." 15 U.S.C. §78u-4(a)(3)(A)(iv). To

demonstrate whether there is a reasonable basis for this request, the Liu Family must demonstrate that it "remains debatable" whether IIG is the most adequate plaintiff. *See* Ex. F, *Brown v. Biogen IDEC, Inc.*, 2005 U.S. Dist. LEXIS 19350, at *7 (D. Mass. July 26, 2005); *see also Fischler v. Amsouth Bancorporation*, No. 96-1567-Civ-T-17A, 1997 WL 118429, at *3 (M.D. Fla. Feb. 6, 1997) (holding that "the uncertainty of Movant's claims and the unanswered questions of Movant's intent, both raised by Plaintiff, are sufficient to meet that standard.").

Based on the issues identified above, IIG and its proposed co-lead counsel are inadequate to protect the class. That said, if the Court finds the Liu Family's points regarding IIG and its counsel debatable, the Liu Family requests permission to seek documents and testimony from each of IIG 's members concerning the following:

- When, how, and why IIG was formed;
- When, how, and why IIG selected its various lawyers, including whether (and if so when) IIG became aware of the Fee Sharing Agreement and its implications; and
- Any fee sharing or other agreements with law firms not mentioned in IIG's submissions that relate to IIG and/or this case.

Additionally, the Liu Family requests permission to seek documents and take testimony from L&K and the Law Offices of Vincent Wong concerning the relationship between these firms and their press release practices as well as any other law firm that L&K controls or "coordinates" with to issue press releases advertising for clients in securities class actions.

Discovery of this nature is appropriate at this stage of the proceedings in order to protect the class. *See, e.g.*, *Deering v. Galena Biopharma, Inc.*, No. 3:14-cv-00367-SI, 2014 WL 4954398, at *11 (D. Or. Oct. 3, 2014) (noting that the court allowed limited discovery to determine largest financial interest); *Vonage*, 2007 WL 2683636, at *3 (ordering discovery in the form of all documents relating to the transactions at issue and a one-hour deposition of the

presumptive lead plaintiff, and using the evidence derived from this to find him inadequate). For that matter, the Liu Family is concerned that, if these issues are not vetted by the Court now, these issues may result in the class action not being certified (either in the district court or on appeal) or in the defendants using the threat of these arguments to reduce the value of any settlement.

While the Liu Family is prepared to conduct this discovery, there is no reason to given the facts already established, particularly when the risks to the class can be "circumvented at this early stage by selecting another lead plaintiff." *See Baydale v. Am. Express Co.*, No. 09 Civ. 3016(WHP), 2009 WL 2603140, at *3 (S.D.N.Y. Aug. 14, 2009). The Liu Family are those plaintiffs.

CONCLUSION

For the foregoing reasons, the Liu Family respectfully request that the Court appoint the Liu Family as lead plaintiff for the Action, approve the Liu Family's selection of the Faruqi Firm as lead counsel, and grant such other relief as the Court may deem just and proper.

Dated: January 22, 2018

Respectfully submitted,

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