UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DROR GRONICH, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. OMEGA HEALHCARE INVESTORS, INC., C. TAYLOR PICKETT, ROBERT O. STEPHENSON, and DANIEL J. BOOTH, Defendants.	No. 1:17-cv-08983-NRB
STEVE KLEIN, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. OMEGA HEALHCARE INVESTORS, INC., C. TAYLOR PICKETT, ROBERT O. STEPHENSON, and DANIEL J. BOOTH, Defendants.	No. 1:17-cv-09024-NRB

MEMORANDUM OF LAW IN SUPPORT OF GLENN FAUSZ'S MOTION FOR (1) CONSOLIDATION; (2) APPOINTMENT AS LEAD PLAINTIFF; AND (3) APPROVAL OF LEAD COUNSEL

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Glenn Fausz ("Fausz") respectfully submits this memorandum of law pursuant to § 21D(a)(3)(B) of the Securities Exchange Act of 1934 ("Exchange Act") as amended by Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B), in support of his motion for the entry of an order (1) consolidating the above-captioned actions (the "Actions"); (2) appointing Fausz as Lead Plaintiff for the consolidated Action; and (3) approving Fausz's selection of the law firm of Faruqi & Faruqi, LLP (the "Faruqi Firm") as Lead Counsel.

PRELIMINARY STATEMENT

The Actions presently pending before this Court are securities class actions brought on behalf of a putative class (the "Class") of investors who purchased or otherwise acquired securities of Omega Healthcare Investors, Inc. ("Omega" or the "Company") between February 8, 2017 and October 31, 2017, both dates inclusive (the "Class Period"), seeking to recover damages caused by defendants' violations of the federal securities laws and to pursue remedies under Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder, against the Company and certain of its executives.

As an initial matter, the Court must decide whether to consolidate the Actions. *See* 15 U.S.C. § 78u-4(a)(3)(B)(ii). Pursuant to Rule 42(a)(2) of the Federal Rules of Civil Procedure, the Court may consolidate the actions before it that involve a common question of law or fact. Fed. R. Civ. P. 42(a)(2). The Actions may be consolidated as they allege violations of §§ 10(b) and 20(a) of the Securities and Exchange Act of 1934 (the "Exchange Act") and Securities and Exchange Commission ("SEC") Rule 10b-5, promulgated thereunder. The Actions also allege substantially similar misconduct by the Company and its officers. As the Actions raise common issues of fact and law, and consolidation will be more efficient for the Court and the parties, the Actions should be consolidated.

With respect to the appointment of a lead plaintiff to oversee the Actions, Congress established a presumption in the PSLRA that requires the Court to appoint the most adequate plaintiff as the lead plaintiff for the Actions. 15 U.S.C. § 78u-4(a)(3)(B)(ii). The most adequate plaintiff is the person who has the "largest financial interest in the litigation" and who also satisfies the typicality and adequacy requirements of Rule 23 of the Federal Rules of Civil Procedure for class representatives. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii).[1]

With losses of $46,172.58, Fausz, to the best of counsel's knowledge, has the largest financial interest in the litigation of any movant. Fausz also satisfies Rule 23's typicality and adequacy requirements. Fausz's claims are typical of the Class's claims because he suffered losses on his Omega investment as a result of the defendants' allegedly false and misleading statements. Further, Fausz has no conflict with the Class and will adequately protect the Class's interests given his significant stake in the litigation and his conduct to date in prosecuting the litigation, including his submission of the requisite certification and selection of experienced class counsel. Accordingly, Fausz is the presumptive Lead Plaintiff.

If appointed Lead Plaintiff, Fausz is entitled to select, subject to the Court's approval, Lead Counsel to represent the Class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v). Fausz has engaged the Faruqi Firm for this purpose. The Faruqi Firm is an appropriate selection to serve as Lead Counsel because it has substantial securities class action experience.

For the reasons summarized above and those explained more fully below, Fausz's motion should be granted in its entirety.

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[1] All internal citations and quotations are omitted, and all emphases are added unless otherwise noted.

FACTUAL BACKGROUND

Omega is incorporated in Maryland, and its common stock trades on the New York Stock Exchange under the ticker symbol "OHI." Complaint ¶14, *Gronich v. Omega Healthcare Investors, Inc., et al.*, No. 1:17-cv-08983-NRB, ECF No. 1 (S.D.N.Y. Nov. 16, 2017) ("*Gronich* Compl."); Complaint ¶14, *Klein v. Omega Healthcare Investors, Inc., et al.*, No. 1:17-cv-09024-NRB, ECF No. 1 (S.D.N.Y. Nov. 17, 2017) ("*Klein* Compl."). Omega is a self-administered real estate investment trust ("REIT") that invests in income producing healthcare facilities, including long-term care facilities located in the United States and the United Kingdom. *Gronich* Compl. ¶19; *Klein* Compl. ¶19.

The complaints in the Actions allege that defendants knowingly or recklessly made false and/or misleading statements and/or failed to disclose that: (1) financial and operating results of certain of the Company's operators were deteriorating; (2) as a result, certain of the Company's operators were experiencing worsening liquidity issues that were significantly impacting the operators' ability to make timely rent payments; (3) as a result, certain of the Company's direct financing leases were impaired and certain receivables were uncollectible; and (4) as a result of the foregoing, Defendants' statements about Omega's business, operations, and prospects, were materially false and/or misleading and/or lacked a reasonable basis. *Gronich* Compl. ¶24; *Klein* Compl. ¶24.

On July 26, 2017, after the market closed, Omega issued a press release titled "Omega Announces Second Quarter 2017 Financial Results; Increased Dividend Rate for 20th Consecutive Quarter." *Gronich* Compl. ¶25; *Klein* Compl. ¶25. The next day, on July 27, 2017, Omega held a conference call with investors where defendant Daniel J. Booth stated, in relevant part, "Two our top ten private operators in particular have seen margins and coverages decline and as a result created liquidity concerns" and that "Omega has considerable security deposits

and significant personal guarantees to support what we believe are short term liquidity issues." *Gronich* Compl. ¶26; *Klein* Compl. ¶26.

On this news, the Company's stock price fell $1.35 per share, or 4%, to close at $32.10 per share on July 27, 2017, on unusually heavy trading volume. *Gronich* Compl. ¶27; *Klein* Compl. ¶27.

Then, on October 30, 2017, after the market closed, the Company issued a press release where it disclosed in relevant part that Omega was incurring a "$197.4 million in impairment on direct financing leases related to the Orianna portfolio, [and] $11.9 million in provision for uncollectible accounts ($9.5 million related to Orianna)[.]" *Gronich* Compl. ¶29; *Klein* Compl. ¶29. The next day, on October 31, 2017, the Company held a conference call where defendants disclosed that "liquidity issues [were] impacting the ability of the[] operators to pay rent on a timely basis." *Gronich* Compl. ¶30; *Klein* Compl. ¶30.

On this news, the Company's stock price fell $2.11 per share, or 6.8%, to close at $28.86 per share on October 31, 2017, on unusually heavy trading volume. *Gronich* Compl. ¶31; *Klein* Compl. ¶31.

Through the Actions, Fausz seeks to recover for himself and absent class members the substantial losses that were suffered as a result of the defendants' fraud.

ARGUMENT

I. THE ACTIONS SHOULD BE CONSOLIDATED FOR ALL PURPOSES

The PSLRA provides that, "[i]f more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter has been filed," the court shall not determine the most adequate plaintiff "until after the decision on the motion to consolidate is rendered." 15 U.S.C. § 78u-4(a)(3)(B)(ii) (the PSLRA advises courts to make the decision

regarding the appointment of the lead plaintiff for the consolidated action "as soon as practicable after [the consolidation] decision is rendered").

Consolidation is appropriate when the actions before the court involve common questions of law ***or*** fact. *See* Fed. R. Civ. P. 42(a); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (citing *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir. 1990)); *In re Tronox, Inc. Sec. Litig.*, 262 F.R.D. 338, 344 (S.D.N.Y. 2009) (consolidating securities class actions); *Blackmoss Invs., Inc. v. ACA Capital Holdings, Inc.*, 252 F.R.D. 188, 190 (S.D.N.Y. 2008) (same). Differences in causes of action, defendants, or the class period do not render consolidation inappropriate if the cases present sufficiently common questions of fact and law, and the differences do not outweigh the interest of judicial economy served by consolidation. *Kaplan v. Gelfond*, 240 F.R.D. 88, 91 (S.D.N.Y. 2007); *see In re GE Sec. Litig.*, No. 09 Civ. 1951 (DC), 2009 U.S. Dist. LEXIS 69133, at *4-5 (S.D.N.Y. July 29, 2009) (consolidating actions asserting different claims against different defendants over different class periods).

The Actions at issue here clearly involve common questions of fact ***and*** law. The Actions assert claims under the Exchange Act on behalf of investors who were defrauded by defendants. The Actions allege substantially the same wrongdoing, namely that defendants issued materially false and misleading statements that artificially inflated the price of Omega securities and subsequently damaged the Class when the price crashed as the truth emerged. Consolidation of the Actions is therefore appropriate. *See Bassin v. Decode Genetics, Inc.*, 230 F.R.D. 313, 315 (S.D.N.Y. 2005) (consolidation is particularly appropriate in the context of securities class actions where the complaints are based on the same statements and the defendants will not be prejudiced).

II. FAUSZ SHOULD BE APPOINTED LEAD PLAINTIFF FOR THE CLASS

A. The PSLRA's Provisions Concerning The Appointment Of A Lead Plaintiff

The PSLRA governs the appointment of a Lead Plaintiff for "each private action arising under the [Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. §§ 78u-4(a)(1) & (a)(3)(B). It provides that within 20 days of the filing of the action, the plaintiff in that action is required to publish notice in a widely circulated business-oriented publication or wire service, informing class members of their right to move the Court, within 60 days of the publication, for appointment as lead plaintiff. *See Foley v. Transocean Ltd.*, 272 F.R.D. 126, 127 (S.D.N.Y. 2011) (citing 15 U.S.C. § 78u-4(a)(3)(A)(i)(II)).

Under 15 U.S.C. § 78u-4(a)(3)(B)(i), the Court is then to consider any motion made by class members and is to appoint as lead plaintiff the movant that the Court determines to be "most capable of adequately representing the interests of class members." Further, the PSLRA establishes a rebuttable presumption that the "most adequate plaintiff" is the person that:

> (aa) has either filed the complaint or made a motion in response to a notice (published by a complainant); (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Foley, 272 F.R.D. at 127 (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)); *see also Tronox*, 262 F.R.D. at 343-44 (same).

Once it is determined who among the movants seeking appointment as lead plaintiff is the presumptive lead plaintiff, the presumption can be rebutted only upon proof by a class member that the presumptive lead plaintiff: "(aa) will not fairly and adequately protect the interests of the class; or (bb) is subject to unique defenses that render such plaintiff incapable of

adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II); *see also Foley*, 272 F.R.D. at 127.

B. Under The PSLRA, Fausz Should Be Appointed Lead Plaintiff

As discussed below, Fausz should be appointed Lead Plaintiff because all of the PSLRA's procedural hurdles have been satisfied, Fausz holds the largest financial interest of any movant, and he otherwise satisfies Rule 23's typicality and adequacy requirements.

1. Fausz Filed a Timely Motion

Pursuant to 15 U.S.C. § 78u-4(a)(3)(A)(i), the first plaintiff to file a complaint was required to publish notice within twenty (20) days of its filing. Counsel for the first-filed plaintiff Dror Gronich published notice of the lead plaintiff deadline via *Business Wire* on November 16, 2017. *See* Ex. A;[2] *see also Stoopler v. Direxion Shares ETF Trust*, No. 09 Civ. 8011 (RJH), 2010 U.S. Dist. LEXIS 82296, at *9 (S.D.N.Y. Aug. 12, 2010) (considering publication in *Business Wire* to be sufficient to satisfy the PSLRA's notice requirement). Consequently, any member of the proposed Class was required to seek to be appointed Lead Plaintiff within 60 days after publication of the notice, *i.e.*, on or before January 16, 2018.[3] Thus, Fausz's motion is timely filed. Additionally, pursuant to 15 U.S.C. § 78u-4(a)(2), Fausz timely signed and submitted the requisite certification, identifying all of his relevant Omega transactions during the Class Period, and detailing Fausz's suitability to serve as Lead Plaintiff in this case. *See* Ex. B. The PSLRA's procedural requirements have therefore been met.

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[2] All Exhibits referenced herein are annexed to the Declaration of Richard W. Gonnello, dated January 16, 2018, filed herewith.

[3] Because the 60th day fell on Martin Luther King Jr. Day, which is a federal holiday, Fed. R. Civ. P. 6(a)(1) extended the deadline to Tuesday, January 16, 2018.

2. Fausz Has the Largest Financial Interest in the Relief Sought by the Class

The PSLRA instructs the Court to adopt a rebuttable presumption that the "most adequate plaintiff" for lead plaintiff purposes is the person or persons with the largest financial interest in the relief sought by the Class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

Although the PSLRA is silent as to any definitive methodology courts are to use in determining which movant has the largest financial interest in the relief sought, courts in this Circuit have often looked to the following four factors in the inquiry: (1) the number of shares purchased by the movant during the class period; (2) the number of net shares purchased by the movant during the class period; (3) the total net funds expended by the movant during the class period; and (4) the approximate losses suffered by the movant. *See Foley*, 272 F.R.D. at 127-28; *Topping v. Deloitte Touche Tohmatsu CPA, Ltd.*, 95 F. Supp. 3d 607, 616 (S.D.N.Y. 2015). Courts have placed the most emphasis on the last of the four factors: the approximate loss suffered by the movant. *See, e.g.*, *Foley*, 272 F.R.D. at 128; *Topping*, 95 F. Supp. 3d at 616.

Overall, during the Class Period, Fausz purchased 8,955 net and total shares of Omega common stock, expended $291,060.23 in net funds, and suffered losses of $46,172.58 when calculated using a last in, first out ("LIFO") methodology. *See* Ex. C. Fausz is presently unaware of any other movant with a larger financial interest in the outcome of this litigation.

3. Fausz Meets Rule 23's Typicality and Adequacy Requirements

The PSLRA also requires that in addition to possessing the largest financial interest in the outcome of the litigation, the lead plaintiff satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See* 15 U.S.C. § 78u-4(a)(3)(B). When assessing a potential lead plaintiff, only Rule 23(a)'s typicality and adequacy requirements are relevant. *See, e.g.*, *Strougo v. Brantley Capital Corp.*, 243 F.R.D. 100, 105 (S.D.N.Y. 2007); *see also Blackmoss*, 252 F.R.D.

at 191 ("At this stage of the litigation, the moving plaintiff must only make a preliminary showing that the adequacy and typicality requirements have been met.").

Typicality is established where each class member's claim "arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Blackmoss*, 252 F.R.D. at 191 (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992)).

Fausz's claims are clearly typical of the Class's claims. Fausz purchased Omega shares during the Class Period, suffered damages as a result of the Company's false and misleading statements, and possesses claims against Omega and certain of its officers under the federal securities laws. Because the factual and legal bases of Fausz's claims are similar, if not identical, to those of the Class's claims, Fausz necessarily satisfies the typicality requirement. *See Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 397 (S.D.N.Y. 2008) (finding movant typical where "(1) he purchased CSP stock during the Class Period; (2) he purchased shares in reliance on CSP's misrepresentations; and (3) he suffered damages as a result").

With respect to adequacy, Rule 23(a)(4) requires that the representative party will "fairly and adequately protect the interests of the class." Adequate representation will be found if able and experienced counsel represent the proposed representative, and the proposed representative has no fundamental conflicts with the interests of the class as a whole. *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: (1) whether the lead plaintiff's claims conflict with those of the class; and (2) whether class counsel is qualified, experienced, and generally able to conduct the litigation.").

As evidenced by the representations in his certification, Fausz's interests are perfectly aligned with—and by no means antagonistic to—the Class. *See Blackmoss*, 252 F.R.D. at 191 ("Bergamini has indicated in his certification his willingness to serve as Lead Plaintiff.").

Fausz has also selected and retained highly competent counsel to litigate the claims on behalf of himself and the Class. As explained below in Section III, the Faruqi Firm is highly regarded for its experience, knowledge, and ability to conduct complex securities class action litigation. *See* Ex. D. Consequently, Fausz is more than adequate to represent the Class and has every incentive to maximize the Class's recovery.

In light of the foregoing, Fausz respectfully submits that he is the presumptive Lead Plaintiff and should be appointed Lead Plaintiff for the consolidated Action.

III. FAUSZ'S SELECTION OF THE FARUQI FIRM AS LEAD COUNSEL SHOULD BE APPROVED

Pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v), the Lead Plaintiff is entitled to select and retain Lead Counsel for the Class, subject to the Court's approval. Fausz has selected the Faruqi Firm to be Lead Counsel for the Class. The Faruqi Firm is a minority-owned and woman-owned law firm, and, as reflected in the firm's resume, possesses extensive experience litigating complex class actions on behalf of plaintiffs, including securities class actions. *See* Ex. D; *see also In re China Mobile Games & Entertainment Group, Ltd. Sec. Litig.*, 68 F. Supp. 3d 390, 401 (S.D.N.Y. 2014) (Wood, J.) (appointing the Faruqi Firm as sole lead counsel and noting: "Faruqi & Faruqi has extensive experience in the area of securities litigation and class actions. The firm's resume indicates that it has litigated more than ten prominent securities class actions since its founding in 1995. Faruqi & Faruqi achieved successful outcomes in many of these cases."). For example, the Faruqi Firm has previously obtained significant recoveries for injured investors. *See, e.g.*, *In re Avalanche Biotechnologies Sec. Litig.*, No. 3:15-cv-03185-JD (N.D. Cal. 2017)

(appointed as sole lead counsel in the federal action and awaiting final approval of a $13 million global settlement of the state and federal actions); *Rihn v. Acadia Pharms., Inc.*, No. 3:15-cv-00575-BTM-DHB (S.D. Cal. 2017) (where, as sole lead counsel, the Faruqi Firm obtained preliminary approval of a $2.925 million settlement); *In re Geron Corp*., *Sec. Litig.*, No. 3:14-CV-01424 (CRB) (N.D. Cal. 2017) (where, as sole lead counsel, the Faruqi Firm obtained final approval of a $6.25 million settlement); *In re Dynavax Techs. Corp. Sec. Litig*., No. 12-CV-02796 (CRB) (N.D. Cal. 2016) (where, as sole lead counsel, the Faruqi Firm obtained final approval of a $4.5 million settlement); *McIntyre v. Chelsea Therapeutics Int'l, LTD*, No. 12-CV-213-MOC-DCK (W.D.N.C. 2016) (where, as sole lead counsel, the Faruqi Firm secured the reversal of the district court's dismissal of the action at the Fourth Circuit, *see Zak v. Chelsea Therapeutics Int'l, Ltd*., 780 F.3d 597 (4th Cir. 2015), and obtained final approval of a $5.5 million settlement); *In re L&L Energy, Inc. Sec. Litig.,* No. 13-CV-06704 (RA) (S.D.N.Y. 2015) (where the Faruqi Firm as co-lead counsel, secured a $3.5 million settlement); *In re Ebix*, *Inc. Sec. Litig*., No. 1:11-CV-02400-RWS (N.D. Ga. 2014) (where the Faruqi Firm, as sole lead counsel for the class, secured a $6.5 million settlement); *Shapiro v. Matrixx Initiatives, Inc*., No. CV-09-1479-PHX-ROS (D. Ariz. 2013) (where the Faruqi Firm, as co-lead counsel for the class, secured a $4.5 million settlement); *In re United Health Grp. Inc. Deriv. Litig*., Case No. 27 CV 06-8065 (Minn. 4th Jud. Dt. 2009) (where the Faruqi Firm, as co-lead counsel, obtained a recovery of more than $930 million for the benefit of the Company and negotiated important corporate governance reforms designed to make the nominal defendant corporation a model of responsibility and transparency); *In re Tellium Inc. Sec. Litig.*, No. 02-CV-5878 (FLW) (D.N.J. 2006) (where the Faruqi Firm, as co-lead counsel, recovered a $5.5 million settlement); *In re Olsten Corp. Sec. Litig.*, No. 97-CV-5056 (E.D.N.Y. 2005) (where the Faruqi Firm, as co-lead

counsel, recovered $24.1 million for class members); *Ruskin v. TIG Holdings, Inc.*, No. 98-CV-1068 (S.D.N.Y. 2002) (where the Faruqi Firm, as co-lead counsel, recovered $3 million for the class); and *In re Purchase Pro Inc. Sec. Litig*., No. CV-C-01-0483-JLQ (D. Nev. 2001) (where the Faruqi Firm, as co-lead counsel for the class, secured a $24.2 million settlement).

The Faruqi Firm is also currently litigating several prominent securities class actions. *See, e.g.*, *Bielousov v. GoPro, Inc.*, No. 4:16-cv-06654-CW (N.D. Cal.) (where, as sole lead counsel for the class, the firm defeated defendants' motion to dismiss); *Loftus v. Primero Mining Corp.*, No. 16-01034-BRO (RAOx) (C.D. Cal) (appointed as sole lead counsel for the class); *Cabrera Jr. v. Tahoe Resources Inc.*, No. 1:17-cv-05155-AT (S.D.N.Y.) (appointed as sole lead counsel for the class).

CONCLUSION

For the foregoing reasons, Fausz respectfully requests that the Court: (1) consolidate the Actions; (2) appoint Fausz as Lead Plaintiff for the consolidated Action; (3) approve Fausz's selection of the Faruqi Firm as Lead Counsel for the Class; and (4) grant such other relief as the Court may deem just and proper.

Dated: January 16, 2018

Respectfully submitted,

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