UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| DROR GRONICH, Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>vs.<br><br>OMEGA HEALTHCARE INVESTORS, INC., C. TAYLOR PICKETT, ROBERT O. STEPHENSON and DANIEL J. BOOTH,<br><br>Defendants. | Civil Action No. 1:17-cv-08983-NRB<br><br>CLASS ACTION |
| STEVE KLEIN, Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>vs.<br><br>OMEGA HEALTHCARE INVESTORS, INC., C. TAYLOR PICKETT, ROBERT O. STEPHENSON and DANIEL J. BOOTH,<br><br>Defendants. | Civil Action No. 1:17-cv-09024-NRB<br><br>CLASS ACTION |

OPPOSITION TO COMPETING MOTIONS FOR APPOINTMENT AS LEAD PLAINTIFF

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## I. INTRODUCTION

Four remaining movants seek appointment as lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").[1] Only one qualifies as the presumptive lead plaintiff: the Pension Fund. Indeed, as the only institutional investor that filed a motion, the Pension Fund is ideally situated to serve as lead plaintiff in this case.

The movant that initially claimed to have suffered the largest collective loss and unequivocally asserted that it satisfied the Rule 23 requirements – the Omega Investor Group – has perplexingly thrown its support behind The Hannah Rosa Trust, which arrived at its alleged loss by way of a flawed calculation that ignores the PSLRA. *See* ECF No. 25. This sudden turn of events raises the specter of undisclosed arrangements between counsel considering that, as asserted in their motions, the Omega Investor Group's collective loss was more than double The Hannah Rosa Trust's claimed loss. An undisclosed agreement between counsel is consistent with an arrangement the Omega Investor Group's counsel entered into earlier this month in connection with lead plaintiff motions pending in this Court that was revealed only ***after*** Judge Kaplan ordered "disclos[ure of] whether there are any agreements or understandings between or among the plaintiffs who withdrew or announced non-opposition" to the movant with the largest claimed loss.[2] That the withdrawal of the Omega Investor Group was a decision by and amongst counsel is also consistent with the fact

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[1] The remaining movants are: Carpenters Pension Fund of Illinois (the "Pension Fund"); The Hannah Rosa Trust; Royce Setzer; and Glenn Fausz. *See* ECF Nos. 9, 12, 16, 22. Mr. Fausz also filed a motion as part of the Omega Investor Group (comprised of Mr. Fausz, Patricia Zaborowski, Hong Jun, Cynthia Peterson, and Simona Vacchieri), which withdrew its motion in support of The Hannah Rosa Trust's motion. *See* ECF No. 25.

[2] *See generally DeSmet v. Intercept Pharm. Grp., Inc.*, No. 1:17-cv-07371-LAK (S.D.N.Y.), ECF Nos. 25 (Order), 31 (disclosing three law firm fee arrangement between competing lead counsel firms), 32 (requesting leave to respond to disclosure), 35 (Order granting leave to respond), and 38 (opposition to three law firm arrangement).

that the Omega Investor Group is hobbled by other serious defects, including its failure to submit evidence of cohesion amongst the five strangers comprising the group. Highlighting that the balance between the Omega Investor Group and counsel tipped decidedly in favor of counsel calling the shots is that one member (Glenn Fausz) filed a competing motion with a different law firm, strongly suggesting that neither firm actually spoke with the individual(s) they purport to represent. *Compare* ECF No. 19 *with* ECF No. 22. Furthermore, all of the individual investors appear to have been solicited to join the case via an onslaught of ***twenty-four*** press releases issued by the law firms that represent them.

The various issues plaguing the competing movants militate strongly in favor of denying the competing motions and appointing the lone institutional investor with previous experience serving as lead plaintiff that selected a single, qualified law firm as the lead plaintiff in this case. *See generally In re Intercept Pharm., Inc. Sec. Litig.*, 1:14-cv-01123-NRB (S.D.N.Y.) ($55 million settlement achieved by Robbins Geller for investors during two-day class period). The Pension Fund's motion should be granted.

## II. ARGUMENT

"The purpose of appointing a Lead Plaintiff is to insure that the most capable plaintiff controls the litigation and protects the interests of the absent class members." *Xianglin Shi v. Sina Corp.*, 2005 WL 1561438, at *5 (S.D.N.Y. July 1, 2005) (Buchwald, J.). And, in "'enacting the PSLRA, Congress expressed an intention to encourage institutional investors to step forward and assume the role of lead plaintiff in an effort to prevent lawyer-driven litigation.'" *Id.*[3] Indeed, "[b]ecause the size and experience of institutional investors can be of significant assistance to the prosecution of the action, a number of courts 'have understood [the PSLRA] to favor large

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

institutional investors' as lead plaintiff." *Id.* (appointing institutional investors as lead plaintiff over individuals even though institutions' loss ($190,248) was only 30% of the individuals' loss ($570,438)).

As in *Sina*, the movants that claim to have suffered larger losses than the Pension Fund are not suitable lead plaintiff candidates.

### A. None of the Individual Movants Can Trigger the Most Adequate Plaintiff Presumption

There are several reasons why all of the individual investors are not qualified lead plaintiff candidates. Perhaps most concerning, the Omega Investor Group – a menagerie of previously unaffiliated individuals that did not evidence the group's cohesion – initially claimed to have suffered the largest collective loss and advocated its compliance with the Rule 23 requirements. *See* ECF No. 20 at 1, 5-9. The Omega Investor Group abruptly did an about face and now claims (without reason or explanation) that "The Hannah Rosa Trust appears to be the most adequate plaintiff." *See* ECF No. 25 at 2. The Omega Investor Group's curious opinion about a competing movant should be disregarded.[4]

That the views of the Omega Investor Group are entitled to no weight is supported by the fact that "group" member Glenn Fausz simultaneously filed dueling lead plaintiff motions with two different law firms and is competing with himself to serve as lead plaintiff. *See* ECF Nos. 19 (motion as part of Omega Investor Group requesting Pomerantz's appointment as lead counsel), ECF No. 22 (individual motion requesting Faruqi & Faruqi's appointment as lead counsel). Indeed, this confounding sequence of events indicates that Mr. Fausz either knowingly allowed two sets of

[4] *See In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 100 (S.D.N.Y. 2005) (holding that "a group of unrelated investors should not be considered as lead plaintiff when that group would displace the institutional investor preferred by the PSLRA").

lawyers to file competing motions or that he is completely unaware of who his counsel is, who his co-movants are, and he essentially lent his name to a lawsuit.[5] That counsel did not actually speak to Mr. Fausz – or possibly any of the individuals seeking appointment as lead plaintiff – before filing both of his motions is not remote speculation.

Recently, another district court *sua sponte* ordered all individual lead plaintiff applicants to file a declaration setting forth, among other facts: "(i) each individual's city and state of residence; (ii) each individual's occupation; (iii) whether and to what extent the moving individuals are familiar with one another; (iv) how each individual came to retain his/her respective lawyer(s); and (v) the general nature of each individual's investment in the [company]." *Desilvio v. Lion Biotechnologies, Inc.*, No. 3:17-cv-02086-SI, Order re: Proposed Lead Plaintiffs, ECF No. 35 (N.D. Cal. July 7, 2017), attached as Exhibit 1 to the Declaration of David A. Rosenfeld in Support of Opposition to Competing Motions for Appointment as Lead Plaintiff ("Rosenfeld Opp. Decl."). Instead of providing the information the court ordered, movants represented by some of the very same counsel here withdrew the motions. *See Desilvio*, ECF No. 37.

Even more recently, Judge Kaplan ordered "disclos[ure of] whether there are any agreements or understandings between or among the plaintiffs who withdrew or announced non-opposition" to the movant with the largest claimed loss. *See DeSmet*, ECF No. 25 (Order). Thereafter, two of the law firms representing movants in this case disclosed a previously unknown fee arrangement between two competing movants. *See id.*, ECF No. 31. That motion is still being briefed. *Id.*, ECF

[5] *See Tsirekidze v. Syntax-Brillian Corp.*, 2008 WL 942273, at *4 (D. Ariz. Apr. 7, 2008) (court determined that "blatant gaffe" by individual who moved against himself and claimed he "sent his lead-plaintiff certification to the wrong firm 'in error'" did "not bode well" for movant's ability to "lead this litigation"); *Singer v. Nicor, Inc.*, 2002 WL 31356419, at *2 (N.D. Ill. Oct. 16, 2002) (viewing movant's "mis-communication" as a "more serious problem" because the movant's "unknowing retention of two different law firms and filing of two motions for appointment as lead plaintiff reveal conflicts . . . that make it unsuitable to make decisions on behalf of the class").

Nos. 32, 35, 38. In light of *DeSmet*, this Court should inquire as to whether any such agreements exist in this case, whether the clients are aware of and consented to the agreements before counsel agreed to them, and what the terms of any such agreements are.[6] Indeed, the PSLRA expressly requires that the lead plaintiff – ***not counsel*** – "select and retain counsel to represent the class." 15 U.S.C. §78u-4(a)(3)(B)(v).

The *Desilvio* and *DeSmet* courts' attention to these issues involving barebones motions by individual investors is particularly warranted considering that counsel representing all of the individual movants here bombarded investors with ***twenty-four*** press releases repeatedly urging investors to contact them about the case:

**Brower Piven Press Releases (The Hannah Rosa Trust's counsel):**

- SHAREHOLDER ALERT: Brower Piven Notifies Investors of Class Action Lawsuit And Encourages Those Who Have Losses In Excess Of $100,000 From Investment In Omega Healthcare Investors, Inc. (NYSE:OHI) To Contact Brower Piven Before The Lead Plaintiff Deadline (dated 11/17/17);
- SHAREHOLDER ALERT: Brower Piven Encourages Investors Who Have Losses in Excess of $100,000 from Investment in Omega Healthcare Investors, Inc. to Contact Brower Piven before the Lead Plaintiff Deadline in Class Action Lawsuit (dated 11/30/17);
- SHAREHOLDER ALERT: Brower Piven Encourages Investors Who Have Losses in Excess of $100,000 from Investment in Omega Healthcare Investors, Inc. to Contact Brower Piven before the Lead Plaintiff Deadline in Class Action Lawsuit (dated 12/2/17);
- INVESTOR ALERT: Brower Piven Encourages Shareholders Who Have Losses In Excess Of $100,000 From Investment In Omega Healthcare Investors, Inc.

[6] The PSLRA permits "discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff." 15 U.S.C. §78u-4(a)(3)(B)(iv). Based on the lack of any information surrounding the curious alliance between The Hannah Rosa Trust and the Omega Investor Group, discovery is warranted in this case. *See In re The Reserve Fund Sec. and Derivative Litig.*, No. 1:09-md-02011-PGG, Order at 1, ECF No. 73 (S.D.N.Y. Aug. 5, 2009) (ordering discovery in connection with lead plaintiff motions).

(NYSE:OHI) To Contact Brower Piven Before The Lead Plaintiff Deadline In Class Action Lawsuit (dated 12/4/17);

- DEADLINE ALERT: Brower Piven Reminds Investors of Upcoming Deadline in Class Action Lawsuit and Encourages Shareholders Who Have Losses in Excess of $100,000 from Investment in Omega Healthcare Investors, Inc. to Contact the Firm (dated 12/19/17); and

- FINAL DEADLINE ALERT: Brower Piven Reminds Shareholders Of Approaching Deadline In Class Action Lawsuit And Encourages Investors Who Have Losses In Excess Of $100,000 From Investment In Omega Healthcare Investors, Inc. (NYSE:OHI) To Contact The Firm (dated 1/3/18).

**Rosen Law Firm Press Releases (Royce Setzer's counsel):**

- EQUITY ALERT: Rosen Law Firm Announces Filing of Securities Class Action Lawsuit Against Omega Healthcare Investors, Inc. (dated 11/21/17);

- OHI LOSS NOTICE: Rosen Law Firm Reminds Omega Healthcare Investors, Inc. of Important Deadline in Class Action (dated 11/29/17);

- EQUITY ALERT: Rosen Law Firm Announces Filing of Securities Class Action Lawsuit Against Omega Healthcare Investors, Inc. OHI (dated 12/12/17);

- EQUITY ALERT: Rosen Law Firm Announces Filing of Securities Class Action Lawsuit Against Omega Healthcare Investors, Inc. – OHI (dated 12/13/17);

- OHI ALERT: Rosen Law Firm Reminds Omega Healthcare, Inc. Investors of Important Deadline in Class Action OHI (dated 12/26/17);

- OHI ALERT: Rosen Law Firm Reminds Omega Healthcare, Inc. Investors of Important Deadline in Class Action – OHI (dated 12/27/17);

- Rosen Law Firm Reminds Omega Healthcare, Investors Inc. Investors of Important January 16 Deadline in Class Action – OHI (dated 1/12/18); and

- Rosen Law Firm Reminds Omega Healthcare, Investors Inc. Investors of Important January 16 Deadline in Class Action – OHI (dated 1/13/18)

**Pomerantz LLP Press Releases (Omega Investor Group's counsel):**

- SHAREHOLDER ALERT: Pomerantz Law Firm Announces the Filing of a Class Action against Omega Healthcare Investors, Inc. and Certain Officers OHI (dated 11/19/17);

- SHAREHOLDER ALERT: Pomerantz Law Firm Announces the Filing of a Class Action against Omega Healthcare Investors, Inc. and Certain Officers OHI (dated 11/20/17);

- SHAREHOLDER ALERT: Pomerantz Law Firm Reminds Shareholders with Losses on their Investment in Omega Healthcare Investors, Inc. of Class Action Lawsuit and Upcoming Deadline OHI (dated 12/9/17);

- SHAREHOLDER ALERT: Pomerantz Law Firm Reminds Shareholders with Losses on their Investment in Omega Healthcare Investors, Inc. of Class Action Lawsuit and Upcoming Deadline – OHI (dated 12/16/17);

- SHAREHOLDER ALERT: Pomerantz Law Firm Reminds Shareholders with Losses on their Investment in Omega Healthcare Investors, Inc. of Class Action Lawsuit and Upcoming Deadline – (dated 12/19/17); and

- SHAREHOLDER ALERT: Pomerantz Law Firm Reminds Shareholders with Losses on their Investment in Omega Healthcare Investors, Inc. of Class Action Lawsuit and Upcoming Deadline – OHI (dated 1/13/18).

**Faruqi & Faruqi Press Releases (one of Mr. Fausz's two sets of counsel):**

- LEAD PLAINTIFF DEADLINE ALERT: Faruqi & Faruqi, LLP Encourages Investors Who Suffered Losses Exceeding $100,000 in Omega Healthcare Investors, Inc. to Contact the Firm (dated 11/21/17);

- LEAD PLAINTIFF DEADLINE ALERT: Faruqi & Faruqi, LLP Encourages Investors Who Suffered Losses Exceeding $100,000 In Omega Healthcare Investors, Inc. To Contact The Firm (dated 11/29/17);

- LEAD PLAINTIFF DEADLINE ALERT: Faruqi & Faruqi, LLP Encourages Investors Who Suffered Losses Exceeding $100,000 In Omega Healthcare Investors, Inc. To Contact The Firm (dated 12/14/17); and

- LEAD PLAINTIFF DEADLINE ALERT: Faruqi & Faruqi, LLP Encourages Investors Who Suffered Losses Exceeding $100,000 In Omega Healthcare Investors, Inc. To Contact The Firm (dated 12/27/17).

Rosenfeld Opp. Decl., Ex. 2.

The PSLRA was enacted to curb this type of lawyer-driven activity.[7] *See Tsirekidze*, 2008 WL 942273, at *4 (denying group's motion because "[w]ithout determining the ethical implications

[7] One court has gone so far as to adopt a local rule to curtail the issuance of repeated press releases to drum up clients in securities cases. *See, e.g.*, N.D. Ga. LR 23.1C(4) & (a)(iii) (because "numerous

of counsel's patent effort to solicit clients, we conclude that the Farrukh Group's formation runs directly contrary to the goals of the PSLRA – to reduce lawyer-driven litigation"); *Bowman v. Legato Sys., Inc.*, 195 F.R.D. 655, 658 (N.D. Cal. 2000) (noting that "many district courts have rejected lead plaintiff applications from large, lawyer-solicited aggregations of shareholders") (citing cases). This Court should decline to reward counsels' efforts to "solicit clients and to create misleading forms of notice under the PSLRA that prompt plaintiffs to 'volunteer' as lead plaintiffs when they [may] think they are merely providing notice to preserve their claims." *Sakhrani v. Brightpoint, Inc.*, 78 F. Supp. 2d 845, 847 (S.D. Ind. 1999).[8]

In short, based on the record before the Court, none of the individual investors qualify as the presumptive lead plaintiff. Their motions should all be denied.

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notices of the same litigation have been released, thereby creating the potential for confusion for potential class members and potential damage to the interests of shareholders and businesses," court adopted a rule that "there shall be only one notice per law firm regardless of the number of complaints filed").

[8] *See also In re Muni. Mortg. & Equity, LLC, Sec. and Derivative Litig.*, No. 1:08-cv-00269-MJG, Memorandum and Order re: Lead Plaintiff Reconsideration at 6, ECF No. 123 (D. Md. Nov. 17, 2008) ("the MMA Group does not deny that counsel commenced the collection of the Group by means of an attorney generated solicitation" which "action is hardly consistent with the PSLRA policy disfavoring lawyer driven litigation") (Rosenfeld Opp. Decl., Ex. 3); *In re Vonage Initial Pub. Offering (IPO) Sec. Litig.*, 2007 WL 2683636, at *7-*9 (D.N.J. Sept. 7, 2007) (finding no prima facie showing of adequacy where plaintiff's "understanding, based on the materials his counsel sent to him, was that he had to timely return his PSLRA certification to counsel or risk becoming ineligible to share in any recoveries the class may later obtain" and, after movant's deposition, court was "unconvinced that Mr. Guzhagin was fully aware of the situation prior to selecting counsel or that he is sophisticated enough to lead the litigation"); *In re Bally Total Fitness Sec. Litig.*, 2005 WL 627960, at *2 (N.D. Ill. Mar. 15, 2005) (lamenting "powerful incentives for lawyers competing to represent the class to solicit clients and to create misleading forms of notice under the PSLRA that prompt plaintiffs to 'volunteer' as lead plaintiffs when they think they are merely providing notice to preserve their claims"); *In re Conseco, Inc. Sec. Litig.*, 120 F. Supp. 2d 729, 733 (S.D. Ind. 2000) (noting that "firms . . . sent numerous notices over the press wire, in what other courts have described as an attempt to recruit potential plaintiffs").

### B. The Hannah Rosa Trust's Counsel Advocates a Flawed – and Overwhelmingly Rejected – Method to Estimate Losses and Misleadingly Claims that Courts Have Adopted Its Method

Another reason compelling denial of The Hannah Rosa Trust's motion is its counsel's advocacy of a legal contention that conflicts with the PSLRA, which is compounded by its inaccurate citation to decisions it claims have "approved and recognized this method." *See* ECF No. 13 at 7 n.3; *see also* ECF No. 14-2 (explaining *Dura* method).

Judge Gardephe recently addressed this very issue and soundly rejected The Hannah Rosa Trust's counsel's so-called "*Dura* method." *Sallustro v. CannaVest Corp.*, 93 F. Supp. 3d 265, 275-76 (S.D.N.Y. 2015). Under Brower Piven's new method, as in *Sallustro*, "'*Dura* loss is calculated by crediting only the stock price declines caused by the alleged corrective disclosures,' and purchase price is irrelevant." *Id.* at 275; *see also* ECF No. 14-2 (failing to take into account purchase price). Yet, as Judge Gardephe recognized, Brower Piven's "new loss model – which renders purchase price irrelevant – is inconsistent with the statutory scheme and with *Dura* itself." *Id.* at 276.

Indeed, "the PSLRA provides for a statutory cap on damages that is calculated based on the 'difference between the purchase or sale price paid . . . by the plaintiff for the subject security and the mean trading price of that security during the 90–day period beginning on the date on which [disclosure is made].'" *Id.* (quoting 15 U.S.C. §78u-4(e)(1)). As Judge Gardephe duly noted, "[g]iven the statutory scheme, it would be odd to apply a loss model that precludes any reference to purchase price." *Id.*; *see also id.* at 276 & n.11 (recognizing that the "application of [Brower Piven's] proposed new loss model leads to absurd results").

"Moreover, *Dura* mandates no such approach." *Id.* "*Dura* merely holds that, in fraud-on-the-market cases, 'an inflated purchase price will not itself constitute or proximately cause the relevant economic loss.'" *Id.* (quoting *Dura Pharm. v. Broudo*, 544 U.S. 336, 342 (2005)). "But in

holding that a plaintiff must plead loss causation – *i.e.*, a sale or retention of stock after a corrective disclosure – the Supreme Court did not rule that purchase price is irrelevant." *Id.* "To the contrary, the Supreme Court repeatedly states that purchase price might prove relevant to loss analysis." *Id.* (citing *Dura*, 544 U.S. at 343). "In sum, *Dura* does not state that purchase price plays no role in loss analysis, nor does its logic require such an approach." *Id.* at 277.

Finally, as Judge Gardephe stated, "countless decisions in this District have— in the context of selecting lead plaintiff—premised discussions of loss in part on purchase price." *Id.* (citing a dozen cases). As such, the "adoption of a standard in which purchase price never plays a part in determining loss would work a radical change in the law." *Id.* In short, "*Dura* requires no such result," and the cases Brower Piven cites in support of this method do not so hold. *Id.*; *see also Fialkov v. Celladon Corp.*, 2015 WL 11658717, at *5 (S.D. Cal. Dec. 9, 2015) (rejecting Brower Piven's novel method as inconsistent with *Dura* and the PSLRA as it "declines to account for the purchase price").

Not only does Brower Piven's method conflict with the PSLRA and *Dura*, the cases Brower Piven cites in support of its new method do ***not*** approve of its new-fangled (and oft-rejected) method or even consider the method. *See* ECF No. 13 at 7 n.3 (citing cases). In fact, the very first case cited, *Prefontaine v. Research In Motion Ltd.*, 2012 U.S. Dist. LEXIS 4238, at *9-*10 (S.D.N.Y. Jan. 5, 2012), ***does not cite Dura anywhere in the decision and the movants' loss calculation methods were not addressed at all***. *Id.*[9] Most of the other cases ***exclusively*** rely on *Dura* expressly

[9] One other case Brower Piven relied upon, *Shah v. GenVec, Inc.*, No. 8:12-00341-DKC, Memorandum Opinion at 2, ECF No. 14 (D. Md. Apr. 26, 2012), was an ***unopposed motion*** filed by Brower Piven. *Id.* (noting "[n]o opposition has been filed and no other shareholder has sought to be named lead plaintiff"). To state the obvious, as an unopposed motion, no movant was able to inform that court that the loss analysis conflicted with the PSLRA and *Dura* and should have been rejected. Equally as important, the *Shah* court merely accepted Brower Piven's calculation at face value; the

in the context of assessing a movant's ability to assert loss causation and whether a movant sold its shares before any alleged disclosures (*i.e.*, whether a movant has a "recoverable loss"), and actually take the purchase price into account. *See Marjanian v. Allied Nevada Gold Corp.*, 2015 U.S. Dist. LEXIS 2782, at *23-*26 (D. Nev. Jan. 8, 2015) (citing *Dura* to "calculate ***recoverable losses***" in the context of a "partial corrective disclosure," crediting movant's argument that method was flawed because it failed to take purchase price into account and crediting calculation of losses that did take purchase price into account).[10]

Finally, Judge Gardephe rejected the lone case that does discuss Brower Piven's new method – *Espinoza v. Whiting*, 2013 WL 171850 (E.D. Mo. Jan. 16, 2013) – because it "contains little analysis" and "cites no supporting cases." *Sallustro*, 93 F. Supp. 3d at 276. In fact, "*Espinoza* itself has never been cited or relied on by another court." *Id.*

Brower Piven's attempt to induce this Court to endorse a method that runs directly counter to the PSLRA and *Dura* weighs against its appointment as lead counsel for the putative class here.

**C. The Pension Fund Is the Presumptive Lead Plaintiff**

The Pension Fund is the only movant before the Court that possesses experience serving as

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court did not discuss the method or cite *Dura* in the decision. *Id.* Consequently, this unopposed decision that does not even discuss the loss calculation method is hardly an endorsement.

[10] *See In re K-V Pharm. Co. Sec. Litig.*, 2012 WL 1570118, at *4 (E.D. Mo. May 3, 2012) (explaining that "Courts following *Dura* look only at those ***recoverable losses*** caused by the alleged fraud-on-the-market when determining lead plaintiff" without any further discussion of loss calculations); *Perlmutter v. Intuitive Surgical, Inc.*, 2011 WL 566814, at *4 (N.D. Cal. Feb. 15, 2011) (explaining that "some district courts decided, in light of *Dura*, not to consider losses resulting from stock trades that occurred prior to any disclosure of the defendant's fraud," using "***recoverable damages***" and "actual losses" to assess movants' interests and disqualifying movant that sold all of its shares before a partial disclosure and had no recoverable loss); *In re Comverse Tech., Inc. Sec. Litig.*, 2007 WL 680779, at *4 (E.D.N.Y. Mar. 2, 2007) (recognizing that "it is clear that under *Dura* and its progeny, any losses that P & P may have incurred before Comverse's misconduct was ever disclosed to the public are not recoverable" and that "any such losses must not be considered in the ***recoverable losses*** calculation that courts engage in when selecting a lead plaintiff").

lead plaintiff and is an institutional investor. This is certainly a key part of the Court's assessment of which movant is the most adequate as "Congress enacted the PSLRA in 1995 with the consideration that the best way to prevent lawyer-driven litigation was to encourage institutional investors to serve as lead plaintiffs." *Juliar v. SunOpta Inc*., 2009 WL 1955237, at *2 (S.D.N.Y. Jan. 30, 2009); *In re Oxford Health Plans, Inc. Sec. Litig*., 182 F.R.D. 42, 43-44 (S.D.N.Y. 1998).[11] "This goal could best be achieved, according to Congress, by encouraging institutional investors to serve as lead plaintiffs." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. LaBranche & Co*., 229 F.R.D. 395, 402 (S.D.N.Y. 2004); H.R. Conf. Rep. No. 104-369 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 731-33.[12]

As a result, "'many courts have demonstrated a clear preference for institutional investors to be appointed as lead plaintiffs.'" *Reitan v. China Mobile Games & Entm't Grp., Ltd.*, 68 F. Supp. 3d 390, 396 (S.D.N.Y. 2014). In fact, "[t]his preference has been determinative in other cases, even when an institutional investor has a slightly lower loss than another potential lead plaintiff." *In re Gentiva Sec. Litig*., 281 F.R.D. 108, 113 (E.D.N.Y. 2012); *SunOpta*, 2009 U.S. WL 1955237, at *2 (appointing institutional investor over an individual investor with larger losses); *Malasky v.*

[11] *See* H.R. Conf. Rep. No. 104-369, at *34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733 (1995) (explaining that "increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions"); S. Rep. No. 104–98, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 690 ("The Committee intends to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring the court to presume that the member of the purported class with the largest financial stake in the relief sought is the 'most adequate plaintiff.'").

[12] *See also Glauser v. EVCI Ctr. Colls. Holding Corp*., 236 F.R.D. 184, 188 (S.D.N.Y. 2006) ("'[T]he PSLRA was passed . . . to increase the likelihood that institutional investors would serve as lead plaintiffs in actions such as this one.'"); *In re eSpeed, Inc. Sec. Litig*., 232 F.R.D. 95, 99 (S.D.N.Y. 2005) ("[T]he PSLRA was designed to favor institutional investors[.]").

*IAC/InteractiveCorp*, 2004 WL 2980085, at *4 (S.D.N.Y. Dec. 21, 2004) (finding institutional investor status determinative in appointing lead plaintiff).

The Pension Fund is a multi-employer, defined benefit fund based in Illinois. With approximately $1.8 billion in assets under management, the Pension Fund provides pension services and benefits to more than 17,900 participants. Importantly, the Pension Fund is well-versed in the obligations and responsibilities of a lead plaintiff based on its prior service as lead plaintiff in securities cases.

As an institutional investor with prior service as lead plaintiff that suffered a substantial loss and selected qualified counsel, the Pension Fund is the paradigmatic lead plaintiff candidate. Its motion should be granted.

### D. Both of Mr. Fausz's Motions Should Be Denied

Beyond his dueling motions and retention of two different law firms, Mr. Fausz claims to have suffered a smaller loss than the Pension Fund. *See* ECF No. 23 at 8; *see also Tsirekidze*, 2008 WL 942273, at *4 (movant disqualified from consideration by "blatant gaffe" of moving against himself with two different law firms). As such, the Court cannot consider his motions unless the presumption in favor of appointing the Pension Fund as lead plaintiff is sufficiently rebutted. 15 U.S.C. §78u-4(a)(3)(B)(iii)(II). Here, because the Pension Fund is willing to serve and satisfies the Rule 23 requirements, Mr. Fausz's two motions should be denied.

## III. CONCLUSION

The competing individual movants cannot trigger the PSLRA's most adequate plaintiff presumption. Their motions should be denied.

DATED: January 30, 2018

Respectfully submitted,

s/ David A. Rosenfeld
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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, 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 January 30, 2018.

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