

JUN 07 2004

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SPOKANE, WASHINGTON

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WASHINGTON

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4  
5 KEITH CAUVEL, et al.,  
6 Plaintiffs,

7 v.

8  
9 METROPOLITAN INVESTMENT  
10 SECURITIES COMPANY INC., et al.,

11 Defendants.

No. CV-04-025-FVS

ORDER RE: APPOINTMENT OF  
LEAD PLAINTIFF

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13  
14 ESTHER HALL, et al.,  
15 Plaintiffs,

16 v.

17  
18 METROPOLITAN MORTGAGE &  
19 SECURITIES CO. INC., et al.,

20 Defendants.

No. CV-04-028-FVS

ORDER RE: APPOINTMENT OF  
LEAD PLAINTIFF

21  
22 **THIS MATTER** came before the Court on May 10, 2004, pursuant to  
23 the Motion for Appointment of Lead Plaintiffs and for Appointment of  
24 Lead Plaintiffs' Lead Counsel (Ct. Rec. 30 in No. CV-04-025-FVS), and  
25 the Motion for Appointment of Lead Plaintiff and Approval of Lead  
26 Counsel (Ct. Rec. 27 in No. CV-04-028-FVS; Ct. Rec. 37 in No. CV-04-

ORDER RE: APPOINTMENT OF LEAD PLAINTIFF- 1

1 025-FVS). Bradley Jones and Steve Berman appeared on behalf of the  
2 group of plaintiffs including Keith Cauvel (hereinafter the Saylor  
3 group). Darrell Scott represented the group of plaintiffs including  
4 Esther Hall (hereinafter the Meyers group). Lori Phillips appeared  
5 on behalf of Ernst & Young.

#### 6 BACKGROUND

7 This matter arises from two securities fraud class actions  
8 against Metropolitan Investment Securities Company, Inc.,  
9 Metropolitan Mortgage & Securities Co., Inc., and various other  
10 defendants. The Meyers group consist of investors from an extended  
11 family. The Saylor group consists of six unrelated investors who  
12 have formed a committee to serve as the lead plaintiff.

#### 13 DISCUSSION

##### 14 A. *The Motions to Appoint Lead Plaintiff*

15 The Private Securities Litigation Reform Act (PSLRA) provides  
16 that the Court shall appoint as lead plaintiff the member(s) of the  
17 class "most capable of adequately representing the interests of class  
18 members ...." 15 U.S.C.A. § 78u-4(a)(3)(B)(i). The PSLRA provides a  
19 three-step process to determine the lead plaintiff. First, the Act  
20 mandates compliance with certain procedural requirements intended to  
21 give notice to the purported class of the action's existence and of  
22 the motion to serve as lead plaintiff.<sup>1</sup> See 15 U.S.C. § 78u-4(a)(3).

23 Second, the Court must examine the losses allegedly suffered by  
24 the proposed lead plaintiff, and determine which "person or group of  
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26 <sup>1</sup>It appears to be undisputed that the parties have complied with the procedural prerequisites in this case.

1 persons ... has the largest financial interest in the relief sought  
2 by the class ...." 15 U.S.C.A. § 78u-4(a)(3)(B)(iii)(I)(bb). Once  
3 the Court determines which person or group of persons has the largest  
4 financial interest, it must determine whether that person or group of  
5 persons "otherwise satisfies the requirements of Rule 23 of the  
6 Federal Rules of Civil Procedure." 15 U.S.C.A. § 78u-  
7 4(a)(3)(B)(iii)(I)(bb). If the person or group of persons with the  
8 largest financial interest satisfies the Rule 23 inquiries, it  
9 becomes the "presumptively most adequate plaintiff." In re  
10 Cavanaugh, 306 F.3d 726, 730 (9th Cir. 2002). If it does not satisfy  
11 the Rule 23 inquiries, the Court must repeat the process with the  
12 person or group of persons possessing the next-largest financial  
13 interest. Id. This process continues until the Court finds a  
14 presumptively most adequate plaintiff. Id.

15 Third, the other plaintiffs get an opportunity to rebut the  
16 presumptive lead plaintiff's showing that it satisfies the  
17 requirements of Rule 23. 15 U.S.C.A. § 78u-4(a)(3)(B)(iii)(II). See  
18 also Cavanaugh, 306 F.3d at 730.

19 1. *A collection of unrelated individuals may constitute a*  
20 *"group" under the PSLRA*

21 The statute makes it clear that a "group of persons" can serve  
22 collectively as a lead plaintiff under the PSLRA. See 15 U.S.C. §  
23 78u-4(a)(3)(B)(iii)(I). The parties disagree whether unrelated  
24 investors may be aggregated as a "group" for purposes of selecting a  
25 lead plaintiff. The Saylor group contends that the PSLRA's explicit  
26 language does not require a pre-existing relationship, and that the  
statute's legislative history indicates an intent not to require such

1 a relationship. The Meyers group asserts that the legislative  
2 history, structure and purpose of the statute provide that a pre-  
3 existing relationship is required. The Meyers group also maintains  
4 that if the Court applies the "rule of reason," and therefore would  
5 permit aggregation under some circumstances, there is not enough  
6 information to determine whether the Saylor group has the ability to  
7 communicate and coordinate their decision-making adequately.

8 The Ninth Circuit has not yet addressed whether a group of  
9 unrelated investors may be aggregated to serve as a lead plaintiff  
10 under the PSLRA. See In re Cavanaugh, 306 F.3d at 731 n. 8. The  
11 district courts have generally provided three responses to this  
12 question, which have "ranged from tepid acceptance to open hostility"  
13 and may be characterized as "(1) permitting any number of plaintiffs  
14 to aggregate, (2) aggregating only a limited number of individuals or  
15 institutions, or (3) refusing to permit aggregation." Burke, et al.  
16 v. Ruttenberg, et al., 102 F.Supp.2d 1280, 1322 (N.D. Ala. 2000)  
17 (quoting R. Chris Heck, Conflict and Aggregation: Appointing  
18 Institutional Investors as Sole Lead Plaintiffs Under the PSLRA, 66  
19 U.Chi.L.Rev. 1199, 1214 (1999)) (internal quotation marks omitted).

20 a. *Permissive Aggregation*

21 Most cases permitting absolute aggregation spend scant time  
22 explicitly addressing the issue. See, e.g., Knisley v. Network  
23 Associates, Inc., 77 F.Supp.2d 1111 (N.D. Cal. 1999); Squyres v.  
24 Union Texas Petroleum Holdings, Inc., 1998 WL 1144586 (C.D. Cal.  
25 1998). See also Burke, 102 F.Supp.2d at 1322 n. 50. The most  
26 frequent rationale offered in favor of permissive aggregation is that

1 the statute permits, without explicit limitation, a "group of  
2 persons" to serve as lead plaintiff. See, e.g., Reiger v. Altris  
3 Software, Inc., 1998 U.S. Dist. LEXIS 14705 at \*13 (S.D. Cal. 1998).  
4 This approach has "few active proponents." Burke, 102 F.Supp.2d at  
5 1322.

6 *b. No aggregation*

7 A second group of courts has held that the PSLRA does not permit  
8 the aggregation of plaintiffs who had no relation to one another  
9 prior to the lawsuit. See, e.g., Aronson v. McKesson HBOC, Inc., 79  
10 F.Supp.2d 1146, 1154 (N.D. Cal. 1999); In re Network Associates  
11 Inc., Securities Litigation, 76 F.Supp.2d 1017. These courts reason  
12 that the common meaning of the term "group," as well as the structure  
13 of the PSLRA, lead to the conclusion that a "group" under the statute  
14 must consist of members with a preexisting relationship, rather than  
15 a collection of unrelated individuals. See, e.g., In re Telxon Corp.  
16 Securities Litigation, 67 F.Supp.2d 803, 811-16 (N.D. OH 1999).  
17 These courts reason further that unrelated individuals may find it  
18 more difficult to exercise supervision or control over plaintiff's  
19 counsel and the action. See, e.g., id. at 815-16.

20 *c. Limited Aggregation*

21 A third group of courts permit limited aggregation of unrelated  
22 plaintiffs under a "rule of reason," which was first propounded in  
23 Chill v. Green Tree Financial Corp., 181 F.R.D. 398 (D. Minn. 1998).  
24 After examining the PSLRA's legislative history, the Chill court  
25 concluded that the Act was intended to shift "primary control of  
26 private securities litigation from lawyers to investors ...." Id. at

1 408 (quoting Senate Rep. No. 104-98, at 685). Accordingly, the lead  
2 plaintiff must be able to "actively represent the class," id.  
3 (quoting Senate Rep. No. 104-98, at 689), a duty which could be  
4 threatened by a large number of lead plaintiffs, id. at 408. While  
5 the court did

6 not suggest ... an arbitrary limit on the number of  
7 proposed Lead Plaintiffs, [it] h[e]ld that, in a case-  
8 by-case inquiry, a rule of reason prevails. If the  
9 proposed group of Lead Plaintiffs will not 'actively  
10 represent the class,' and the profusion of Lead  
11 Plaintiffs would threaten to unnecessarily complicate  
12 the proceedings, then the Court may exercise its  
13 supervisory authority to restrict the number of Lead  
14 Plaintiffs.

15 Id. at 409. See also In re Baan Co. Securities Litigation, 186  
16 F.R.D. 214 (D.D.C. 1999).

17 Other courts have cited the multiplicity or diversity of  
18 interests as relevant to whether a proposed group of lead plaintiffs  
19 will be able to actively represent the class. See, e.g., In re Party  
20 City Securities Litigation, 189 F.R.D. 91; In re Milestone Scientific  
21 Securities Litigation, 183 F.R.D. at 417-18. These courts emphasize  
22 that the purpose of the PSLRA is "the empowerment of a unified force  
23 to control the litigation." In re Party City Securities Litigation,  
24 189 F.R.D. at 113 (citing Conference Report at 683, 685).

25 Accordingly, the Act also precludes the appointment of multiple  
26 parties with divergent interests who are not part of a cohesive  
group. Id. at 113-14.

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1 d. *Unrelated individuals may constitute a "group" for*  
2 *purposes of the PSLRA under the "rule of reason"*

3 The Court determines that a collection of unrelated individuals  
4 may constitute a group for purposes of the PSLRA under the "rule of  
5 reason." See Chill, 181 F.R.D. at 409. The PSLRA is primarily  
6 intended to ensure that private securities litigation is controlled  
7 by clients rather than counsel. Accordingly, the primary inquiry  
8 when considering whether to appoint a group as lead plaintiff is  
9 whether the group will be able to "actively represent the class."  
10 Id. at 408 (quoting Senate Rep. No. 104-98, at 689). This requires  
11 the Court to evaluate whether the number of group members, and the  
12 multiplicity of interests among group members, will be too great to  
13 permit active representation of the class. For these reasons, a  
14 group of unrelated individuals may serve as lead plaintiff if the  
15 Court determines, after applying the "rule of reason," that it will  
16 be able to actively represent the class.

17 While the existence of a pre-litigation relationship among group  
18 members may be a factor to consider under the Court's analysis, a  
19 pre-existing relationship is not a prerequisite to the formation of a  
20 group. A group of individuals with pre-litigation relationships may  
21 not necessarily provide more active representation than a group of  
22 unrelated individuals. Furthermore, automatically precluding a group  
23 of individuals from serving as lead plaintiff due solely to their  
24 lack of a pre-litigation relationship has the potential to  
25 arbitrarily eliminate groups that would in fact provide active  
26 representation. Such a conclusion would run counter to the purpose  
underlying the PSLRA: to ensure that control over private securities

1 litigation rests with investors, rather than lawyers. See Chill, 181  
2 F.R.D. at 408.

3 e. *The Saylor group may constitute a "group" under the*  
4 *PSLRA*

5 The Court determines that, under the "rule of reason," the  
6 Saylor group has shown that it will be able to actively represent the  
7 class, and therefore, that it constitutes a "group" for purposes of  
8 the PSLRA's lead plaintiff provisions. The Saylor group is  
9 relatively small, comprising of only six members. They all have  
10 sufficiently similar interests, i.e., they all allegedly lost  
11 substantial investments due to the alleged wrongful acts of the  
12 defendants, to permit them to form a unified, cohesive group. The  
13 group has formed a committee, and agreed in writing on a formal  
14 methodology for communicating and making decisions about the case.  
15 Finally, the group members appear to be experienced investors with  
16 the necessary knowledge to make informed decisions about the  
17 litigation.

18 2. *Financial interest*

19 The Court must next determine which group "has the largest  
20 financial interest in the relief sought by the class ...." 15  
21 U.S.C.A. § 78u-4(a)(3)(B)(iii)(I)(bb). It is clear that the Saylor  
22 group has a larger financial interest than the Meyers group. The  
23 Saylor group allegedly lost a total of \$2,471,842.00 during the class  
24 period, and a total of \$3,541,634.00. By comparison, the Meyers  
25 group allegedly lost \$1,092,689.00 during the class period, and a  
26 total of \$1,593,133.00.

1           3.     *The Requirements of Rule 23*

2           The Court must next determine whether the Saylor group  
3 "otherwise satisfies the requirements of Rule 23 of the Federal Rules  
4 of Civil Procedure." 15 U.S.C.A. § 78u-4(a)(3)(B)(iii)(I)(bb). If  
5 so, it becomes the "presumptively most adequate plaintiff." In re  
6 Cavanaugh, 306 F.3d 726, 730 (9th Cir. 2002).

7           Rule 23(a) provides that a party may serve as class  
8 representative if

9           (1) the class is so numerous that joinder of all  
10 members is impracticable, (2) there are questions of  
11 law or fact common to the class, (3) the claims or  
12 defenses of the representative parties are typical of  
the claims or defenses of the class, and (4) the  
representative parties will fairly and adequately  
protect the interests of the class.

13 A court need only address the (3) typicality and (4) adequacy  
14 tests when considering a motion to appoint lead plaintiff.

15 Aronson v. McKesson HBOC, Inc., 79 F.Supp.2d 1146, 1158 (N.D.Cal.  
16 1999) (citing Wenderhold v. Cylink Corp., 188 F.R.D. 577, 587.  
17 (N.D.Cal. 1999); Gluck v. CellStar Corp., 976 F.Supp. 542, 546  
18 (N.D.Tex. 1997)).

19           a.     *Typicality*

20           Under the typicality requirement, "representative claims are  
21 'typical' if they are reasonably coextensive with those of absent  
22 class members; they need not be substantially identical." Staton  
23 v. Boeing Co., 313 F.3d 447, 466 (9th Cir. 2002) (quoting Hanlon  
24 v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998)) (internal  
25 quotation marks omitted).

26           The Saylor group has satisfied the typicality requirement

1 for the limited purpose of establishing its eligibility to serve  
2 as lead plaintiff. Its members purchased securities both during  
3 and outside of the class period. Its members allegedly lost  
4 substantial holdings due to the alleged wrongful acts of the  
5 defendants. This is sufficient to establish typicality under  
6 Rule 23(a) for purposes of the present motions.

7           b. Adequacy

8           Under the adequacy requirement, a court addresses (1)  
9 whether the representative plaintiffs and their counsel have any  
10 conflicts of interest with the other class members, and (2)  
11 whether the representative plaintiffs and their counsel will  
12 vigorously prosecute the action on behalf of the class. Id.  
13 (citing Hanlon, 150 F.3d at 1020) (some citations omitted).

14           The Saylor group has satisfied the adequacy requirement for  
15 the limited purpose of establishing its eligibility to serve as  
16 lead plaintiff. It does not appear to have any conflicts of  
17 interest with other class members. Furthermore, they have  
18 indicated that they will vigorously prosecute the action on  
19 behalf of the class, which is evidenced by their creation of a  
20 committee and the written agreement outlining a formal  
21 methodology for communicating and decision making regarding the  
22 litigation. This is sufficient to establish adequacy under Rule  
23 23(a) for purposes of the present motions.

24           Accordingly, the Court determines that the Saylor group is  
25 the "presumptively most adequate plaintiff." Cavanaugh, 306 F.3d  
26 at 730.

1           4.    *Rebuttal*

2           Once the Court decides which person or group of persons is  
3   the presumptively most adequate lead plaintiff, the other  
4   plaintiffs get an opportunity to rebut the presumptive lead  
5   plaintiff's showing under Rule 23.  15 U.S.C.A. § 78u-  
6   4(a)(3)(B)(iii)(II).  *See also Cavanaugh*, 306 F.3d at 730.  It  
7   appears to the Court that the issue of appointment of lead  
8   plaintiff has already been extensively briefed and argued.  
9   However, in an abundance of caution, the Court will permit  
10  objections rebutting the Saylor group's showing as the  
11  presumptively most adequate lead plaintiff to be filed within  
12  fourteen (14) days of the entry of this Order.  Any objections  
13  filed shall state, among other things, whether discovery is  
14  requested, and if so, the grounds therefore.  The Saylor group  
15  shall have until twenty-one (21) days after the entry of this  
16  order to file a response to any objections.  If no objections are  
17  filed within fourteen (14) days, the Court will presume that no  
18  further issues exist regarding the appointment of lead plaintiff,  
19  and will appoint the Saylor group as the lead plaintiff in both  
20  the Cauvel action, No. CV-04-025-FVS, and the Hall action, No.  
21  CV-04-028-FVS, should there be a successful motion to  
22  consolidate.

23    *B.    The Motion to Appoint Counsel Is Granted.*

24           The PSLRA requires "[t]he most adequate plaintiff ... to ....  
25   select and retain counsel to represent the class."  15 U.S.C. §  
26   78u-4(a)(3)(B)(v).  The Court refrains from ruling on the motions

1 to appoint counsel until the motions to appoint lead plaintiff  
2 are finally resolved.

3 **IT IS HEREBY ORDERED:**

- 4 1. The Motion to File Over-Length Reply Brief (Ct. Rec. 72  
5 in No. CV-04-025-FVS; Ct. Rec. 50 in No. CV-04-028-FVS)  
6 is **GRANTED**.
- 7 2. The Motion to File Surrebuttal Memorandum (Ct. Rec. 77  
8 in No. CV-04-025-FVS; Ct. Rec. 55 in CV-04-028-FVS) is  
9 **GRANTED**.
- 10 3. The Motion to Strike (Ct. Rec. 77 in No. CV-04-025-FVS;  
11 Ct. Rec. 55 in No. CV-04-028-FVS) is **DENIED**.
- 12 4. The Motion to File Over-length Brief (Ct. Rec. 24 in  
13 CV-04-028-FVS) is **GRANTED**;
- 14 5. Any objections rebutting the Saylor group's showing as  
15 the presumptively most adequate lead plaintiff shall be  
16 filed within fourteen (14) days after the entry of this  
17 Order. Any objections filed shall state, among other  
18 things, whether discovery is requested, and if so, the  
19 grounds therefore. The Saylor group shall have until  
20 twenty-one (21) days after the entry of this order to  
21 file a response to any objections.
- 22 6. The Court clarifies that nothing in this Order limits  
23 the defendants' ability to challenge a subsequent.

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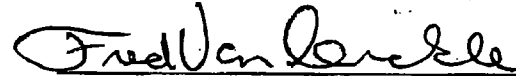
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1 motion for class certification under Federal Rule of  
2 Civil Procedure 23.

3 IT IS SO ORDERED. The District Court Executive is hereby  
4 directed to enter this order and furnish copies to counsel.

5 DATED this 4<sup>th</sup> day of June, 2004.

6 

7 Fred Van Sickle  
8 Chief United States District Judge