UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

MARC ABRAMS, On Behalf of Himself and All Others Similarly Situated, Plaintiff, vs. DELL INC., et al., Defendants.	§	Civil Action No. 1:06-cv-00726-SS CLASS ACTION
STEVE KLEIN, On Behalf of Himself and All Others Similarly Situated, Plaintiff, vs. DELL INC., et al., Defendants.	§	Civil Action No. 1:06-cv-00770-SS CLASS ACTION

[Caption continued on following page.]

THE INSTITUTIONAL INVESTOR GROUP'S SECOND MEMORANDUM OF LAW IN RESPONSE TO THE COURT'S NOVEMBER 16, 2006 ORDER

AMALGAMATED BANK, AS TRUSTEE FOR THE LONGVIEW COLLECTIVE INVESTMENT FUND, et al., On Behalf of Themselves and All Others Similarly Situated Plaintiffs, vs. DELL INC., et al., Defendants.	§ § § § § § § § § § § § §	Civil Action No. 1:07-CA-00077-SS CLASS ACTION

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LEGISLATIVE HISTORY

I. INTRODUCTION

Amalgamated Bank, as Trustee for the Longview Collective Investment Fund ("Amalgamated Bank") and Wolverhampton City Council, Administering Authority for the West Midlands Metropolitan Authorities Pension Fund respectfully submits the following second response to the Court's November 16, 2006 Order ("Order"). The Order permitted any party to "file objections to its competitors on the issue of lead counsel and who is to be the named representative plaintiff by February 15, 2007." Order at 3. Only three of the seven applicant groups that initially sought lead plaintiff/counsel status appear to still be pursing their motions:[1]

- **(i)** Amalgamated Bank; and **(ii)** Wolverhampton City Council ("Institutional Investor Group") represented by Joe Kendall of Provost & Umphrey Law Firm and Messrs. Lerach, Coughlin and Robbins of Lerach Coughlin Stoia Geller Rudman & Robbins LLP;

- **(i)** Pensionskassernes Administration A/S as "Manager and Administrator" for ***nine sub-entities*** called Pensionskassen for Kontorfunktionaerer, Pensionskassen for Bioanalytikere, Pensionskassen for Kost- og Ernaeringsfaglige, Pensionskassen for Laegesekretaerer, Pensionskassen for Sygeplejersker, Pensionskassen for Socialradgivere og Socialpaedagoger, Pensionskassen for Ergoterapeuter og Fysioterapeuter and Pensionskassen for Jordemodre; **(ii)** Stichting Pensioen-Fond ABP; **(iii)** Sjunde AP-Fonden; and **(iv)** Mississippi PERS (collectively, the "Pension Fonden-Stichting Gruppe") (*see* Declaration of Geoffrey J. Jarvis in Support of the Pension Fund Group's Motion to Consolidate Actions, to be Appointed Lead Plaintiff and Selection of Lead Counsel at Exs. A-D) represented by Schiffrin & Barroway, LLP and Grant & Eisenhofer P.A.; and

- **(i)** Union Asset Management Holding AG on behalf of ***seven sub-entities*** called Uni21.Jahrhundert-Net-, Uniglobal, Uniglobal Titans 50, Uniglobal-Net-, Unidynamic Fonds: Global, KCD-Union Nachhaltig Aktien and Invest Global (*see* Certification of Dr. Joachim von Cornberg and Clemens Gaebel

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[1] On February 2, 2007, DeKalb County Pension Fund formally withdrew its motion to be appointed lead plaintiff and for approval of its selection of lead counsel (docket #128). The remaining competitors – I.U.O.E., Local 68 Annuity & Pension Funds and the City of Boca Raton Police and Firefighters Retirement System – did not file responses to the Court Order requiring the filing of an amended complaint by January 31, 2007, and therefore appear to have abandoned their motions. In a letter to the Court dated December 20, 2006, Steve Klein and his counsel asked to be relieved from the service list for this litigation (docket #115).

on Behalf of Union Asset Management AG) (collectively, "Union Asset Management") represented by Motley Rice LLC and Sturman LLC.

For the reasons set forth herein, the Institutional Investor Group hereby respectfully objects to Union Asset Management and the Pension Fonden-Stichting Gruppe's.

Of the three remaining proposed lead plaintiffs, only two investors emerge, at first blush, as being unquestionably qualified to "fairly and adequately" lead this case on behalf of the class – U.S. based ***Amalgamated Bank*** and Pension Fonden-Stichting Gruppe member ***Mississippi PERS***. All of the other investors seeking to be the named representative lead plaintiffs are foreign and, as discussed herein, will be subject to a host of attacks on their adequacy by defendants' very capable counsel. *See In re Discovery Labs. Sec. Litig.*, No. 06-1820, Order at 5 n.2 (E.D. Pa. July 25, 2006) (adopting rule against appointing "foreign investor[s]" as lead plaintiff) (discussing cases), Third Affidavit of Joe Kendall in Support of the Institutional Investor Group's Motion for Consolidation, Appointment as Lead Plaintiff and Approval of Lead Plaintiff's Selection of Co-Lead Counsel ("Kendall Aff."), Ex. A; §II.A.3., *infra*.

Between Amalgamated Bank and Mississippi PERS, however, ***only Amalgamated Bank satisfies all of the requirements necessary to be named representative lead plaintiff***. *See In re Royal Ahold N.V. Sec. & ERISA Litig.*, 219 F.R.D. 343, 350 (D. Md. 2003) ("the lead plaintiff selection will be determined on other factors" than financial interest). Amalgamated Bank – America's oldest labor-owned Bank with Trust assets of approximately $37 billion and offices in New York, California, New Jersey and Washington D.C. – suffered a loss of $4.2 million. *See* Affidavit of Ronald E. Luraschi for Amalgamated Bank in Support of its Motion to Appoint the Institutional Investor Group as Lead Plaintiff and for Approval of Its Selection of Co-Lead Counsel, ¶¶4-10.

Unlike Amalgamated Bank, Mississippi PERS does not and cannot satisfy the Private Securities Litigation Reform Act of 1995's ('PSLRA") lead plaintiff requirements because, as Judge

Harmon reasoned in *Enron*, "[e]ven when a Lead Plaintiff applicant [like it] is otherwise qualified, that party may be statutorily disqualified as a 'Professional Plaintiff' under 15 U.S.C. §78u-4(a)(3)(B)(vi)." *In re Enron Corp., Sec. Litig.*, 206 F.R.D. 427, 443 (S.D. Tex. 2002) (Harmon, J.) (***disqualifying investor with largest loss*** pursuant to 5-in-3 prohibition); *In re Alamosa Holdings, Inc. Sec. Litig.*, No. 5:03-cv-289-C, Order (N.D. Tex. Mar. 4, 2004) (Cummings, J.) (same), Kendall Aff., Ex. C.[2] Here, Mississippi PERS is "statutorily disqualified as a 'Professional Plaintiff' under 15 U.S.C. §78u-4(a)(3)(B)(vi)," because it is currently serving or has already served in that capacity ***in an astonishing 10 cases*** in the past three years – twice the number allotted under the PSLRA's presumptive bar against lead plaintiffs serving in more than five cases during any three-year period. *Enron*, 206 F.R.D. at 443; *see* §II.B.2., *infra*.

Accordingly, due to Mississippi PERS' statutory disqualification, Amalgamated Bank emerges as the only U.S. based applicant that can (and is already) indisputably "fairly and adequately" representing the interests of the class pursuant to the PSLRA. *See* Institutional Investor Group's Memorandum of Law in Response to the Court's November 16, 2006 Order at 6-8. Indeed, just recently, the *Wall Street Journal*, *Austin Business Journal*, *CNN* and other news outlets published articles specifically commenting on the breadth and depth of the Consolidated Complaint Messrs. Kendall, Lerach, Coughlin and Robbins filed on behalf of Amalgamated Bank (and Wolverhampton City Council) pursuant to the Order (*Amalgamated Bank, as Trustee for the Longview Collective Investment Fund v. Dell Inc.*, No. 07-Civ-00077-SS (W.D. Tex. Jan. 31, 2007) ("Amalgamated Bank Complaint")). *See* Kendall Aff., Ex. D ("***Wednesday's 252-page lawsuit,***

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[2] *See also In re Unumprovident Corp. Sec. Litig.*, 2003 U.S. Dist. LEXIS 24633, at *13-*23 (E.D. Tenn. 2003) (rejecting institutional investor with largest loss as lead plaintiff); *Thompson v. Shaw Group, Inc.*, 2004 U.S. Dist. LEXIS 25641, at *19-*23 (E.D. La. 2004) (same).

filed by . . . Lerach Coughlin Stoia Geller Rudman & Robbins LLP, is the first that describes an alleged kickback scheme between Dell and Intel."); *Id*., Ex. E.

Other than Amalgamated Bank and Mississippi PERS, ***all*** the remaining applicants now before the Court are foreign entities which, if appointed, ***may*** face a host of legal issues that ***could*** negatively and needlessly complicate this litigation.[3] *See Royal Ahold*, 219 F.R.D. at 352 (noting that "***[f]oreign courts might not recognize or enforce such a decision from an American court***, which would allow foreign plaintiffs in the class to file suit against the defendant again in those foreign courts"); §§II.A.4 & II.B.2, *infra*.[4] And while some foreign entities can and do in some circumstances ably serve as lead plaintiffs, nearly all of them pose risks to the class if not otherwise appointed alongside qualified and experienced American investors, like Amalgamated Bank. Indeed, Amalgamated Bank and Wolverhampton City Council recognized this reality in jointly moving to be appointed lead plaintiff. *See Bell v. Ascendant Solutions, Inc.*, 2002 U.S. Dist. LEXIS 6850, at *16 (N.D. Tex. 2002) (reasoning that because "it may be inconvenient for [foreign funds] to appear for hearings, to meet in person with counsel, and to meet in person for settlement discussions, the Court believes it is ***sensible and useful*** to include . . . a United States resident[] as one of the plaintiffs") (Solis, J.).

In addition to being foreign and distant, Pension Fonden-Stichting Gruppe member Stichting Pensioen-Fond ABP is inadequate for the added reason that defendants will argue that its ***own***

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[3] Stichting Pensioen-Fonds ABP is ***Dutch***. Sjunde AP-Fonden is ***Swedish***. Wolverhampton City Council is ***British***. Pensionskassernes Administration A/S is ***Danish***. Union Asset Management is ***German***.

[4] *See In re Bally Total Fitness Sec. Litig.*, 2005 U.S. Dist. LEXIS 6243, at *19 (N.D. Ill. 2005) ("The PSLRA . . . provides that we ask simply whether [a movant] ***is likely*** to be 'subject to' . . . unique defenses . . . [not that] the defense is likely to succeed."); *In re Turkcell Iletism Hizmetler, A.S. Sec. Litig.*, 209 F.R.D. 353, 357-58 (S.D.N.Y. 2002) (refusing to certify foreign investor as lead plaintiff).

auditor – PriceWaterhouse Coopers LLC ("PWC") – is a primary participant in the Dell fraud and an important defendant in this accounting fraud case. *See* Amalgamated Bank Complaint, ¶¶274-295. Notably, Stichting Pensioen-Fond ABP and the other members of the Pension Fonden-Stichting Gruppe failed to even name PWC as a defendant in their consolidated complaint. Indeed, of the three remaining competitors, the Pension Fonden-Stichting Gruppe is curiously the ***only*** applicant that failed to do so. If selected as lead plaintiff, therefore, defendants will undoubtedly seize upon and exploit the conflict between the Pension Fonden-Stichting Gruppe and the class will enable PWC – one of the primary participants in the alleged fraud perpetrated here – to escape liability for its alleged wrongdoing. *See Barrie v. Intervoice-Brite, Inc.*, 2006 U.S. Dist. LEXIS 69299, at *13 (N.D. Tex. 2006) ("To satisfy the requirements of Rule 23(a)(4), Lead Plaintiffs must show that [] there are ***no conflicts of interest between them and the class they seek to represent***.") (Kinkeade, J.).[5] The absent class members deserve better.

The Pension Fonden-Stichting Gruppe's motion should be denied. *See id.*; §II.A, *infra*.

Next, in addition to having moved as a ***sole*** foreign proposed named representative, Union Asset Management is not the "most adequate plaintiff" because it is the kind of foreign "asset manager" that some courts have justifiably deemed incapable of satisfying Fed. R. Civ. P. 23. *See, e.g., In re Network Assocs. Sec. Litig.*, 76 F. Supp. 2d 1017, 1028-29 (N.D. Cal. 1999) (rejecting foreign fund manager as lead plaintiff); *In re Peregrine Sys. Sec. Litig.*, 2002 U.S. Dist. LEXIS 27690, at *53-*57 (S.D. Cal. 2002) (same); *In re MicroStrategy Inc. Sec. Litig.*, 110 F. Supp. 2d 427, 439 (E.D. Va. 2000) (same). To appoint as the ***sole*** lead plaintiff an applicant which defendants may later successfully argue lacks an actual financial interest in the relief sought by the class and/or standing to recover any investment losses it may have suffered would dramatically undermine one of

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[5] *But see In re Elec. Data Sys. Corp. Sec. Litig.*, 226 F.R.D. 559 (E.D. Tex. 2005).

the fundamental precepts of the PSLRA, which is to appoint as lead plaintiffs those "class members with large amounts at stake." H.R. Conf. Rep. No. 104-369, at 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679; *see In re Bank One S'holders Class Actions*, 96 F. Supp. 2d 780, 784 (N.D. Ill. 2000) (finding foreign fund manager atypical and inadequate because it "is ***not simply a buyer for its own account***, [but] stand[s] instead in the place of whatever number of investors are participants in its managed fund"); *Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 634-36 (D.N.J. 2002).

In addition to Union Asset Management's tenuous legal standing to lead this litigation, its physical remoteness – being based in Germany – may also as a practical matter preclude it from vigorously pursuing this case and actively overseeing the efforts of its counsel. Indeed, Union Asset Management's seeming disinterest with this case has already been evidenced by its filing of a ***cursory and incomplete 39 page complaint*** for the vast allegations in this case. Given Union Asset Management's less than enthusiastic filing, and failure to identify Intel's secret kickback scheme, one can only imagine how eagerly defendants await the Court's appointment of Union Asset Management to lead this litigation. *See Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005) (holding that the PSLRA raises the standard adequacy threshold in PSLRA cases). Union Asset Management's motion should be denied. *See* §II.B, *infra*.

Finally, on behalf of the Institutional Investor Group, Joe Kendall and Messrs. Lerach, Coughlin and Robbins take no position on the qualifications of the other law firms seeking appointment in this case except to incorporate by reference all of the arguments raised in support of the Institutional Investor Group's Memorandum of Law in Response to the Court's November 16, 2006 Order. *See Krim v. pcOrder.com, Inc.*, 2001 U.S. Dist. LEXIS 6592, at *14 (W.D. Tex. 2001) (lamenting "that ***none*** of the plaintiffs' counsel go unscathed in the mud-slinging pleadings filed among the competing lead plaintiff groups") (Sparks, J.) (emphasis in original).

Amalgamated Bank along with Wolverhampton City Counsel should be named lead representative plaintiffs and its counsel should be appointed Lead Counsel. All other motions should be denied.

II. ARGUMENT

A. Objections to the Pension Fonden-Stichting Gruppe

1. The Pension Fonden-Stichting Gruppe's Attempt to Question the Applicability of Fed. R. Civ. P. 23(g) Is Without Merit

The other competitors may seek to challenge the applicability of Fed. R. Civ. P. 23(g) to these proceedings. Such a suggestion – if advanced – would not only shed light on their possible unwillingness to satisfy that Rule, but perhaps, more importantly, their possible misunderstanding of Rule 23(g). *Compare* Order at 2-3 ("Each group seeking to be lead counsel . . . shall file an amended complaint . . . ***specifically alleging the class or classes to be established and why it should be selected as lead counsel***. . . .") *with* Fed. R. Civ. P. 23(g) ("the Court ***must consider*** the work counsel has done in ***identifying or investigating potential claims in the action***. . . .").

As discussed in the Institutional Investor Group's January 31, 2007, Memorandum of Law, courts throughout the Country hold that Rule 23(g) applies to securities class actions at both the lead plaintiff stage ***and*** at class certification. *See In re Cree, Inc., Sec. Litig.*, 219 F.R.D. 369, 373 (M.D.N.C. 2003) (applying ***Rule 23(g)*** is selecting lead counsel under the PSLRA); *In re Retek, Sec. Litig.*, 236 F.R.D. 431, 437 (D. Minn. 2006) (same); *In re Krispy Kreme Doughnuts, Sec. Litig.*, 2004 U.S. Dist. LEXIS 26282 (M.D.N.C. 2004) (same); *In re Salomon Analyst Metromedia Litig.*, 236 F.R.D. 208, 224 (S.D.N.Y. 2006); *In re BearingPoint, Inc. Sec. Litig.*, 232 F.R.D. 534, 545 (E.D. Va. 2006).

Nevertheless, apparently overlooking Fed. R. Civ. P. 23(g)'s strictures, the Pension Fonden-Stichting Gruppe has already asked the Court to ***limit*** the amount of work its lawyers should have to dedicate to the prosecution of this case. *See* Supplemental Statement by the Pension Fund Group

Pursuant to the Court's Order Dated November 16, 2006 and in Further Support of the Pension Fund Group's Motion to Consolidate Actions, to be Appointed Lead Plaintiff and for Approval of Lead Plaintiff's Selection of Lead Counsel at 6 (Document #111). For instance, the Pension Fonden-Stichting Gruppe explicitly seeks to dilute the requirements of Rule 23 as follows:

> [E]ach movant seeking to be appointed as lead plaintiff should, on or before January 31, 2007, file a ***brief*** amended complaint (for example, of ***no more than 30 or 40 pages*** [because] [t]he research and investigation in drafting the operative complaint in the Related Securities Cases ***will likely involve*** the hiring of private investigators and the interviewing of multiple witnesses. Having competing and simultaneous investigations by different class members . . . creates the potential for the waste of class resources.

See id.

The Pension Fonden-Stichting Gruppe's request to limit the amount of work its counsel should be required to do notwithstanding the fact that, courts in this Circuit routinely hold that examining the work done by counsel to advance the interests of the class is not a "waste of class resources," but rather a critical aspect of the class action device. *See Elec. Data Sys.*, 226 F.R.D. at 571 (applying ***Rule 23(g)*** in securities class action context) (Davis, J.); *Barrie*, 2006 U.S. Dist. LEXIS 69299, at *41-*42 (appointing Lerach Coughlin as lead counsel pursuant to ***Rule 23(g)***) (Kinkeade, J.); *In re Enron Corp. Sec. Derivative & "ERISA" Litig.*, 2006 U.S. Dist. LEXIS 43146, at *77 (S.D. Tex. 2006) (applying Rule 23(g) and concluding that Lerach Coughlin litigation team "is comprised of probably the most prominent securities class action attorneys in the country.") (Harmon, J.).

Further illustrating the importance and applicability of Rule 23(g) to these proceedings, Judge Bruce Lee of the Eastern District of Virginia recently had occasion in *In re Mills Corp. Sec.*

Litig., 2006 U.S. Dist. LEXIS 50485, at *6-*7 (E.D. Va. 2006), to consider the issue of whether Rule 23(g) applies to selecting lead counsel under the PSLRA, and reasoned as follows:[6]

> Under Federal Rule of Civil Procedure 23, "[u]nless a statute provides otherwise, a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23. The ***PSLRA merely states that*** "[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class." 15 U.S.C. § 78u-4(B) (V); Fed. R. Civ. P. 23(g)(1)(A). Under Rule 23, "[a]n attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In determining whether counsel would fairly and adequately represent the class, a court must consider:
>
> - ***the work counsel has done*** in identifying or investigating potential claims in the action,
> - ***counsel's experience*** in handling class actions, other complex litigation, and claims of the type asserted in the action,
> - ***counsel's knowledge*** of the applicable law, and
> - ***the resources counsel will commit to representing the class***;
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> Fed. R. Civ. P. 23(g)(C)(I). Additionally, the Court may consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interest of the class." Fed. R. Civ. P. 23(g)(1)(C)(I).

Id. Here, as demonstrated by the Institutional Investor Group's January 31, 2007, memorandum of law and Amalgamated Bank's Complaint, there is simply no doubt that the Institutional Investor Group's counsel have (i) ***done the most work*** in identifying and pleadings all of the applicable claims in this case against all liable defendants (*see generally* Amalgamated Bank Complaint); (ii) ***the most experience*** in handling class actions (*see* Affidavit of Joe Kendall in Support of Motion to Appoint the Institutional Investor Group as Lead Plaintiff and to Approve Lead Plaintiff's Choice of Co-Lead Counsel, Exs. D-E); (iii) ***the most knowledge*** of the applicable law in this area (*see Enron*, 2006 U.S. Dist. LEXIS 43146, at *77); and (iv) already been recognized by the public at large as

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[6] Mississippi PERS is a lead plaintiff in *Mills*. Any arguments it raises to the contrary here regarding Rule 23(g) should therefore be viewed with a certain degree of skepticism.

having ***dedicated the most resources*** to first identifying this case and then doing the research and investigation necessary to prepare and file Amalgamated Bank's Complaint on behalf of the Class (*see* Kendall Aff., Ex. F (*Suit: Intel Paid Dell Up to $1 Billion a Year Not to Use AMD Chips*, CNNMoney.com ("the charges Lerach leveled in federal court in Austin on January 31 ***are hard to ignore***"))).

2. Mississippi PERS Is a Presumptively Barred Disqualified Professional Plaintiff

Mississippi PERS is ***the*** most prolific filer of securities class actions in the United States in the past two years. Mississippi PERS has sought to serve as the lead plaintiff and/or class representative in no less than 22 complex securities class actions since January 2005. *See* Kendall Aff., Ex. G. Mississippi PERS is so overwhelmed by its current class action obligations that it was unable to even keep track of its current caseload, as evidenced by its failure to even disclose, as it was required to do in its Certification pursuant to the PSLRA, that it had moved to intervene as a lead plaintiff in the *Merck* securities class action on October 26, 2006. *See Piven v. Sykes Enters.*, 137 F. Supp. 2d 1295, 1305 (M.D. Fla. 2000) ("[A] movant not satisfying the certification requirement of §78u-4(a)(2)(A)(v) may not serve as lead plaintiff.").

Mississippi PERS' substantial existing class action obligations aside, the PSLRA mandates that, unless leave of court is granted, "a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, ***in no more than 5 securities class actions . . . during any 3-year period***."[7] 15 U.S.C. §78u-4(a)(3)(B)(vi); *Unumprovident*, 2003 U.S. Dist. LEXIS 24633, at *20-

[7] The PSLRA's professional plaintiff provision explicitly states that an "an officer, director, or fiduciary" of a lead plaintiff is presumptively barred from served in such a capacity during the prescribed limit. 15 U.S.C. §78u-4(a)(3)(B)(vi). It stands to reason, therefore, that had Congress meant to exempt institutions from its restriction on professional plaintiffs, ***as Mississippi PERS will surely argue***, Congress would not have included the words "officer, director, or fiduciary" in its prohibition. "Officers [and] directors" do not serve as

*21. Despite the PSLRA's plain language, there may be some disagreement between the parties concerning the PSLRA's professional plaintiff provision's susceptibility to what the U.S. Supreme Court has designated as the "cardinal canon" of statutory construction. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

The Institutional Investor Group seeks to be appointed lead plaintiff by presuming that Congress both said what it meant and meant what it said in enacting 15 U.S.C. §78u-4(a)(3)(B)(vi). *Id*. By contrast, for Mississippi PERS to be appointed, the Pension Fonden-Stichting Gruppe must urge this Court to ignore the PSLRA's statutory text and appoint Mississippi PERS on the basis of a Conference Report. *See, e.g.*, *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 820-21 (N.D. Ohio 1999) (declining to "accept the suggestion that preference [for institutional investors in the PSLRA's Conference Report] requires, or even encourages, the Court to disregard the ***expressly stated limitations*** [against professional plaintiffs] in the statute itself") (emphasis in original); *Unumprovident*, 2003 U.S. Dist. LEXIS 24633, at *13-*15.

Addressing this very issue in *Aronson*, Judge Whyte reasoned as follows:

> Florida disputes that the professional plaintiff provision is even applicable, because it is an institutional investor, and Congress sought to encourage institutional investors to become lead plaintiffs. Citing the ***House Conference Report***, Florida asserts that the drafters of the Reform Act fully expected institutional investors to exceed the five suits-in-three years provision of the Act. . . .
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> ***Florida's arguments do not persuade the court to lift the presumptive bar***. The text of the statute contains no flat exemption for institutional investors. Indeed,

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representatives of individuals – they serve as representatives of ***institutions***. *See Offshore Logistics v. Tallentire*, 477 U.S. 207, 222 (1986) ("[n]ormal principles of statutory construction require that we give effect to the ***subtleties of language*** that Congress chose to employ" in enacting a statute); *see also Black's Law Dictionary* (6th ed. 1990) defines the word "officer" as "[a] person holding office of trust, command or authority in corporation, government, armed services ***or other institution*** or organization."

> looking at the section as a whole (and the statute commands consideration of "the purposes of this section"), institutional investors are already heavily favored by the requirement that the lead plaintiff have the "largest financial interest" in the litigation. ***Moreover, Congress also desired to increase client control over plaintiff's counsel, and allowing simultaneous prosecution of six securities actions is inconsistent with that goal***.

Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1156-57 (N.D. Cal. 1999).

In a thoughtful and lengthy analysis that bears quoting at length, in *Unumprovident*, Judge Collier barred an investor that had been appointed in nine cases even though it had ***the largest losses***:

> On its face, the statute appears to bar a group such as the Louisiana Funds, who have served as lead plaintiff in thirteen such cases in the past three years, from being appointed lead plaintiff in this case. . . .
>
> * * *
>
> While granting the Louisiana Funds an exception to the bar on professional plaintiffs might be consistent with Congress' preference that institutional investors be lead plaintiffs in securities class actions, ***the Court believes it would be decidedly inconsistent with the other purposes underlying the PSLRA***. Congress hoped to cure perceived abuses of securities class actions by wresting control of such actions from professional plaintiffs and ***overly-aggressive attorneys*** and giving it to institutional investors and other large shareholders who would presumably have greater incentive to monitor counsel and insure the interest of all shareholders were protected. The larger the number of cases being directed by a single institutional investor, the less likely it is these purposes are being served. Simultaneous prosecution of ***nine different securities class actions would stretch the resources of even the largest institutional investors***.

2003 U.S. Dist. LEXIS 24633, at *13-*14, *21-*22 (footnotes omitted). In *Shaw Group*, the Honorable Helen G. Berrigan reached the same conclusion regarding the "5-in-3" prohibition, reasoning that simultaneously prosecuting eight cases was far too much for even the largest institutional investor:

> Any speculation aside, the Court rules simply that there is a risk of overstretch where Detroit P&G would be directing ***a total of eight concurrent lawsuits*** were Detroit P&G selected as Lead Plaintiff here as well. . . . Although the legislative history appears to favor institutional investors, a policy of equal force is the general prevention of over-representation regardless of the plaintiff's status.

Thompson, 2004 U.S. Dist. LEXIS 25641, at *22; *see also In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 45 (S.D.N.Y. 1998) (Brieant, J.) ("The PSLRA calls for greater supervision by the Court in the selection of which plaintiffs will control the litigation.").

And in *Enron*, Judge Harmon rejected the Florida State Board of Administration as lead plaintiff – again – even though its ***loss was by far the largest before the court***, reasoning:

> The number of class actions in which FSBA has served and/or is serving as Lead Plaintiff so far exceeds the statutory cap that at least some of the purposes of the provision would be lost if the Court granted its application, ***especially in view of the demands of this litigation and the fact that there are other competent and qualified institutional applicants***.

206 F.R.D. at 457. There, FSBA was disqualified because it had "moved for appointment as Lead Plaintiff in ***thirteen securities fraud class actions*** in three years [and] FSBA ha[d] served as lead plaintiff in ***nine***." *Id*. Here, Mississippi PERS has moved for lead plaintiff in ***22 securities class actions*** in the past three years and has current obligations in ***ten*** of those. *See* Kendall Aff., Ex. G (charts detailing the breadth of Mississippi PERS' current class action litigations). Like Judges Harmon, Collier and Berrigan, this Court too should decline to exercise its discretion to lift the bar against Mississippi PERS.

"[T]he burden is upon the presumptively barred candidate to demonstrate why the bar should not be applied in a given case. . . . [A] lead plaintiff seeking to overcome the presumption against professional plaintiffs must persuade the court failure to grant an exception in the case at bar would be ***inconsistent*** with the purposes of the PSLRA." *Unumprovident*, 2003 U.S. Dist. LEXIS 24633, at *20 (emphasis in original). Here, Mississippi PERS has not articulated any exceptional circumstances that would warrant lifting the presumptive bar under the facts of this case.

When examined in conjunction with its repeated efforts to wrest control of numerous other class actions all across the United States, Mississippi PERS' certification filing oversight evidences its inability to vigorously prosecute yet another litigation – and hence its inadequacy to represent the

class. *See Enron*, 206 F.R.D. at 457 (reasoning that professional plaintiffs should not be appointed lead plaintiffs due to their "***fractured attention and resources with respect to [the present] suit***"); *Telxon*, 67 F. Supp. 2d at 822 ("[A]n institutional investor that is ***simultaneously*** involved in one or more other securities class actions would have fewer resources available and be less able to police its attorney's conduct.") (emphasis in original).

To illustrate just how stretched Mississippi PERS' resources are, the attached exhibit (*see* Kendall Aff., Ex. G) highlights some of Mississippi PERS' ***active*** cases and begs the question how Mississippi PERS could adequately litigate this case – particularly given the elevated adequacy standards set forth by the Fifth Circuit in *Elec. Data*, 429 F.3d at 130 and *Berger v. Compaq Computer Corp.*, 257 F.3d 475 (5th Cir. 2001). Given its existing duties as lead plaintiff, how can Mississippi PERS credibly claim that it (as opposed to counsel) will actively oversee the prosecution of this case? It cannot. *See Enron*, 206 F.R.D. at 457; *Thompson*, 2004 U.S. Dist. LEXIS 25641, at *22; *Unumprovident*, 2003 U.S. Dist. LEXIS 24633, at *13-*22.

The courts that ***have*** lifted the PSLRA's bar for institutional plaintiffs have only done so in limited circumstances, none of which apply here. Courts have lifted the presumptive bar if the otherwise barred institution is the "only movant," or if "the other movants [] 'accrued an even longer record of participation in securities litigation'" than the otherwise barred institution. *Unumprovident*, 2003 U.S. Dist. LEXIS 24633, at *18; *Aronson*, 79 F. Supp. 2d at 1156. Other courts have lifted the presumptive bar when the other proposed lead plaintiffs were grossly inadequate, ***foreign*** or because the presumptively barred applicant was the only institutional competitor. *See, e.g., Network Assocs.*, 76 F. Supp. 2d at 1030 (***lifting bar for American investor rather than appointing foreign investor***); *Piven*, 137 F. Supp. 2d at 1305 (***same***); *Naiditch v. Applied Micro Circuits Corp.*, 2001 U.S. Dist. LEXIS 21374, at *8 (S.D. Cal. 2001); *In re Critical Path, Inc.*, 156 F. Supp. 2d 1102 (N.D. Cal. 2001).

Here, given Amalgamated Bank's demonstrated dedication to this litigation, there is simply no need to lift the bar for Mississippi PERS. *See Unumprovident*, 2003 U.S. Dist. LEXIS 24633, at *23 ("the Court finds no justification for granting an exception to a party which has so significantly exceeded the limitations of the professional plaintiff rule, ***at least where a viable alternative is available which would be just as, if not more, consistent with the purposes underlying the PSLRA***.").

Ultimately, under Article I, §1 of the U.S. Constitution, it is the text of the PSLRA as enacted by Congress that binds the parties and this Court – not what the Conference Committee says that the PSLRA means.[8] *See* U.S. Const. art. I, §1; *Hirschey v. Fed. Energy Regulatory Comm'n*, 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring). Thus, under both the language of the PSLRA, and well-reasoned case law interpreting it, the Pension Fonden-Stichting Gruppe's motion for appointment as lead plaintiff must be denied because Mississippi PERS is presumptively barred from being appointed. *See Ascendant Solutions*, 2002 U.S. Dist. LEXIS 6850, at *16 (refusing to appoint foreign investors as sole lead plaintiffs without also appointing U.S. resident lead plaintiff).

3. The Pension Fonden-Stichting Gruppe's Remaining Members Are Foreign and, if Appointed, Will Subject the Class to Unnecessary Risk

Besides Mississippi PERS, the Pension Fonden-Stichting Gruppe's remaining three members are all foreign entities with "***complex corporate structure[s]***" that, if appointed, defendants will later

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[8] In light of the role well-paid special interests play in drafting conference reports, their unreliability has been the subject of considerable scholarly and judicial discussion. *See, e.g.*, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, 65-94 (Princeton Univ. Press 1997) (Comment by Laurence H. Tribe) (Kendall Aff., Ex. H); Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History In Interpreting Statutes*, 65 S. Cal. L. Rev. 845 (1992) (Kendall Aff., Ex. I); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 Harv. J. on Legis. 369 (1999) (Kendall Aff., Ex. J).

seize upon to the detriment of the class. *In re Cardinal Health, Inc. Sec. Litig.*, 226 F.R.D. 298, 311 (S.D. Ohio 2005). Stichting Pensioen-Fond ABP is a type of "***entity*** established under the laws of the ***Kingdom of the Netherlands***." *See* Certification of René Maatman on behalf of Stichting Pensioen-Fond ABP, ¶3. Sjunde AP-Fonden is an organizational firm created under the laws of Sweden and Pensionskassernes Administration A/S is structure formed under the laws of Denmark.[9] *See* Certifications of Richard Gröttheim, Annegrette Birck Jakobsen; Certification of Michael Nellerman Pederson.

In *Network Associates*, 76 F. Supp. 2d at 1029, Judge Ronald Whyte refused to appoint two European financial entities, like those that comprise the Pension Fonden-Stichting Gruppe , because of the ***practical problems*** associated with their involvement:

> Finally, both ING and KBC are foreign organizations. They are distant. . . . The distances involved and some differences in business culture would impede their ability to manage and to control American lawyers conducting litigation in California. ***At trial, the representative plaintiff would normally testify and attend. In a long trial, it would be obviously difficult for ING and KBC to attend in its entirety***. The Court certainly does not say that a foreign investor could never qualify. But these factors, when added to the others set forth above, ***reinforce the Court's conclusion that neither KBC nor ING can fairly and adequately represent the class***.

Id. at 1030. Similarly, here, it is difficult to conceive of how the Pension Fonden-Stichting Gruppe's separate Dutch, Danish and Swedish members could efficiently meet with their American counsel during business hours, let alone effectively and adequately represent the class and exercise the

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[9] Pensionskassernes Administration A/S is Manager and Administrator for some entities called: **(i)** Pensionskassen for Kontorfunktionaerer; **(ii)** Pensionskassen for Bioanalytikere; **(iii)** Pensionskassen for Kost- og Ernaeringsfaglige; **(iv)** Pensionskassen for Laegesekretaerer; **(v)** Pensionskassen for Sygeplejersker; **(vi)** Pensionskassen for Socialradgivere og Socialpaedagoger; **(vii)** Pensionskassen for Ergoterapeuter og Fysioterapeuter; and **(viii)** Pensionskassen for Jordemodre. ***No explanation is provided concerning the legal relationship under the laws of Denmark, Sweden, the Netherlands and Germany between these entities and the individuals that signed the Certification on their behalf***.

control over counsel mandated by the PSLRA. *Id*. The distances involved alone will serve to convert even the most elementary exercise such as a conference call or a deposition into a task of Herculean proportions requiring significant advance planning, translation and increased cost to the class. These entities should not be the face of the class.

In *Ascendant Solutions*, Judge Solis, concerned with appointing a foreign entity ***with the largest loss*** as sole lead plaintiff, reasoned as follows:

> Although this is not a case involving complicated facts, massive sums of money, or allegations of wrongdoing spread out over several years, the two plaintiffs with the largest financial interest in the outcome of the litigation (Plutarch [Ltd.] and Jeffries) appear to be ***foreign citizens***. Therefore, because it may be inconvenient for Plutarch and Jeffries to appear for hearings, to meet in person with counsel, and to meet in person for settlement discussions, ***the Court believes it is sensible and useful to include Sonzone, a United States resident, as one of the plaintiffs included as Lead Plaintiff***.

Ascendant Solutions, 2002 U.S. Dist. LEXIS 6850, at *16-*17. Under our facts, Judge Solis' decision to appoint a United States resident as lead plaintiff applies with even more force because this ***is*** a case involving complicated facts, massive sums of money and allegations of wrongdoing spread out over several years. *See id*.

Not only would the appointment of the Pension Fonden-Stichting Gruppe under these circumstances create practical difficulties, it would also create serious issues as to whether the outcome of the case will have *res judicata* effect. Defendants will persuasively argue that any judgment achieved by the Pension Fonden-Stichting Gruppe's foreign members or "sub-entities" would not have *res judicata* effect. In *Bersch*, for example, the court refused to certify a securities class action containing foreign plaintiffs in part because countries of plaintiffs' origins, "would not recognize a United States judgment in favor of the defendant as a bar to an action by their own citizens, even assuming that the citizens had in fact received notice that they would be bound unless they affirmatively opted out of the plaintiff class." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974,

996-97 (2d Cir. 1975). In refusing to appoint ***Union Asset Management*** as lead plaintiff in *Royal Ahold*, Judge Blake reasoned as follows:

> Adding to the concerns about subject matter jurisdiction over Union's claims ***is the question of the res judicata effect of a judgment in favor of Royal Ahold in this class action***. Foreign courts might not recognize or enforce such a decision from an American court, which would allow foreign plaintiffs in the class to file suit against the defendant again in those foreign courts. ***This factor must be considered in determining whether a class action is the superior method of litigating a particular case, although it is not determinative***. *Cromer Finance Ltd. v. Berger*, 205 F.R.D. 113, 134-35 (S.D. N.Y. 2001). A strong possibility or near certainty that a foreign court will not recognize a judgment in favor of the defendant as a bar to the action of its own citizens may be the basis for eliminating foreign purchasers from the class. *Bersch*, 519 F.2d at 996. ***No specific evidence has been produced thus far regarding which foreign courts may or may not recognize a decision of this court***. It is possible, however, that Union and other foreign purchasers might be eliminated from the class at the certification stage because a judgment would not be enforceable. *See id*. at 996-97.

219 F.R.D. at 352. Similarly, in *Ansari v. New York Univ.*, 179 F.R.D. 112 (S.D.N.Y. 1998), the court considered the *res judicata* effect of a class action judgment in a foreign plaintiff's home country in denying class certification. The court reasoned that "[i]f the foreign court would refuse to recognize the preclusive effect of such an action, this fact, although not dispositive, counsels against a finding that the class action is superior to other forms of litigation." *Id*. at 116.

More recently, in *Discovery Labs.*, the Court seemingly adopted a rule against appointing ***foreign investors – even ones with the largest loss*** – as lead plaintiff, in favor of domestic lead plaintiffs, reasoning:

> Even if we concluded that OPAM [the foreign investor] made out a *prima facie* case, ***we would still deny its motion***. Because it is a foreign investor, OPAM "is subject to unique defenses that render [it] ***incapable*** of adequately representing [the interests of] the class," 15 U.S.C. §78u-4(a)(3)(B)(iii)(II). Specifically, defendants could move to dismiss OPAM's claims for lack of subject matter jurisdiction. To defeat such a motion, OPAM would have to provide evidence that it satisfies the conduct or effects test. While OPAM might ultimately prevail, the point is that it would ***be subject to*** at least one unique defense that only it would have to meet. This could divert its attention away from major substantive defenses.

Discovery Labs., No. 06-1820, Order at 5 n.2; Kendall Aff., Ex. A. Ultimately, there is no reason to subject the class to the risks of appointing Stichting Pensioen-Fond ABP, Sjunde AP-Fonden or Pensionskassernes Administration A/S as lead plaintiffs given that ***Amalgamated Bank*** faces none of these issues and possesses a sufficiently large financial interest in the outcome of this litigation. The Pension Fonden-Stichting Gruppe's motion should be denied.

4. The Pension Fonden-Stichting Gruppe Suffers from What Defendants Will Argue Is a Disabling Conflict of Interest

"A class representative, once designated by the Court, is a fiduciary for the absent class members." *Oxford*, 182 F.R.D. at 46 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949)). Here, Stichting Pensioen-Fond ABP's ***own auditor*** – PWC – is a primary participant in the Dell fraud and an important defendant in this case. *See* Amalgamated Bank Complaint, ¶¶274-295. Even though the Dell fraud arises out of accounting manipulations which falsified its financial condition as reviewed, certified and/or approved by PWC, Stichting Pensioen-Fond ABP and the rest of the Pension Fonden-Stichting Gruppe refused to name PWC as a defendant. Despite the existence of red flags which should have caused PWC to withhold its "clean" opinions or withdraw as Dell's auditor, PWC participated in this fraud and violated the securities laws. *See id*. Despite PWC's primary involvement in the alleged fraud here, only Amalgamated Bank and Union Asset Management name PWC as a defendant. *Id*. Thus, it cannot be ignored that defendants will vigorously argue that Stichting Pensioen-Fond ABP has a conflict in serving as a lead plaintiff where it must vigorously prosecute huge damage claims for fraud against its own auditor. *See Elec. Data*, 429 F.3d at 134-35 (finding, under the facts before it, that defendants failed to "rebut the presumption of inadequacy against a class representative who fails to sue a potential defendant . . .").

Stichting Pensioen-Fond ABP comes into this litigation with reporting obligations under Dutch law, which obligations require reporting of its financial records to its pensioners and/or Dutch regulators. PWC's audits are undertaken to determine whether Stichting Pensioen-Fond ABP is

properly executing fiduciary responsibility in its portfolio management, specifically whether it properly structures, monitors and analyzes the investment portfolios and activities, controls investment risk and expense and properly measures and evaluates investment performance. These audits are incorporated into Stichting Pensioen-Fond ABP's records and reports. Yet, Stichting Pensioen-Fond ABP seeks to represent class members who are asserting billions of dollars of claims against the very accounting firm responsible for providing Stichting Pensioen-Fond ABP's pensioners with an independent audit of their benefit and retirement funds.

Hence, Stichting Pensioen-Fond ABP's ongoing relationship with Dell's auditor, creates a conflict that may impair its ability to serve as a fiduciary charged with vigorously pursuing claims against PWC. Can Stichting Pensioen-Fond ABP really be motivated to inflict a potentially ruinous judgment on its own auditor? As Judge Walls noted, in *In re Cendant Corp. Litig.*, 182 F.R.D. 144 (D.N.J. 1998), a lead plaintiff cannot cure such a conflict by seeking to abandon troublesome claims. As a practical matter, a fiduciary cannot solve the dilemma of dual loyalties by abandoning an inconvenient obligation. It is unfair to the Class ***and*** Stichting Pensioen-Fond ABP to entrust Stichting Pensioen-Fond ABP with the ***responsibility*** to prosecute a case where its own auditor is a key defendant. Despite its large loss, Stichting Pensioen-Fond ABP is not the "most adequate" plaintiff to prosecute this action.

B. Objections to Union Asset Management Holding AG

1. The Viability of Union Asset Management's Loss Is Subject to Attack By Defendants

If appointed, defendants will argue that Union Asset Management does not have a financial stake in the outcome of this litigation because Union Asset Management, a self-described German "asset ***manager***," did not ***itself*** suffer investment losses from the purchase of Dell stock. *See Network Assocs.*, 76 F. Supp. 2d at 1030; *Peregrine*, 2002 U.S. Dist. LEXIS 27690, at *53-*57. To appoint as the ***sole*** lead plaintiff a foreign and distant movant that defendants will suggest itself has

no losses would dramatically undermine one of the fundamental precepts of the PSLRA, which is to appoint as lead plaintiffs those "class members with large amounts at stake." H.R. Conf. Rep. No. 104-369, at 34. Even if this case were to yield a 100% recovery for the class, for instance, defendants will later claim that Union Asset Management is entitled to recover nothing because the funds it ***manages*** actually own the stock at issue – not Union Asset ***Management***. *See Suprema Specialties*, 206 F. Supp. 2d at 634-36; *Turkcell*, 209 F.R.D. at 357-58 (limiting investment fund's loss to the .35% fee it earned on the total assets it invested).

In *Network Assocs.*, the court found that although

> [t]he Weiss firm argue[d] that "ING Investment Management" has the largest stake. ***There is, really, no such entity***. The actual name of the company is ING Insurance Verseiking NV. It is located in the Netherlands. ING Investment Management is merely an unincorporated business unit. ***It manages a number of separate funds, each fund being the actual owner of the shares***. These funds are separate legal entities with their own directors. The funds were the entities that actually bought and sold the Network securities. ING Fund Management is the business unit that by contract provides administrative support to the funds.

76 F. Supp. 2d at 1027-28. The same reasoning that Judge Whyte found precluded ING Investment Management's appointment in *Network Associates*, precludes Union Asset Management's appointment here. *See Suprema Specialties*, 206 F. Supp. 2d at 635 (rejecting the lead plaintiff motion of an asset manager); *Cardinal Health*, 226 F.R.D. at 311 ("Wood Asset Management will be subject to a unique defense regarding its standing to assert securities fraud claims on behalf of its clients because it has no proof that it is the clients' attorney-in-fact.").

More recently, in *Discovery Labs.*, No. 06-1820, Order at 5 n.2, the court rejected another foreign asset manager represented by the same counsel for Union Asset management here – Motley Rice – reasoning that as "***a foreign investor***, OPAM 'is subject to unique defenses that render [it] incapable of adequately representing the class." Kendall Aff., Ex. A. Similarly, here, because Union Asset Management failed to present any verifiable proof that it possesses authority under the ***laws of Germany*** to claim investment losses on behalf of the investment funds it manages,

defendants would no doubt persuasively argue, as discussed below, that Union Asset Management lacks standing to recover those losses. The class should not be burdened with such distractions. *See Bank One*, 96 F. Supp. 2d at 784; *Network Assocs.*, 76 F. Supp. 2d at 1030.

2. Defendants Will Argue That Union Asset Management Lacks Standing in These Proceedings

Union Asset Management is not the "most adequate plaintiff" for the additional reasons that it has failed to establish that it possesses the required authority under unknown provisions of German law to bring suit on behalf of its funds, or to demonstrate that it has the requisite standing to claim its unknown number of individual clients' investment losses.[10] *See Suprema Specialties*, 206 F. Supp. 2d at 634-35 ("The clients' mere grant of authority to an investment manager to invest on its behalf does not confer authority to initiate suit on its behalf."); *Turkcell*, 209 F.R.D. at 357-58; *Bank One*, 96 F. Supp. 2d at 784.

In *Turkcell*, 209 F.R.D. 353, the court held that a foreign asset manager, like Union Asset Management, seeking lead plaintiff appointment must demonstrate standing to pursue claims under the Exchange Act by evidencing that it is the "***legal purchaser***" of the stock at issue. *Id.* at 358; *see generally Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 755 (1975). Here, Union Asset Management has not satisfied this standard because Union Asset Management's own Certification demonstrates that it was some entities called Uni21.Jahrhundert-Net-, Uniglobal, Uniglobal Titans 50, Uniglobal-Net-, Unidynamic Fonds: Global, KCD-Union Nachhaltig Aktien and Invest Global that were the legal purchasers of Dell stock – not Union Asset ***Management Holdings***. Defendant will have a field day with Union Asset Management if it were appointed lead plaintiff.

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[10] These same issues may also apply to Pension Fonden-Stichting Gruppe member Pensionskassernes Administration A/S. *See* n.10, *supra*.

Finally, in *Bank One*, the court also had occasion to address whether a foreign investment advisor could be appointed lead plaintiff on behalf of entities for whom it claimed to make investment decisions. 96 F. Supp. 2d at 784. In denying the foreign fund's motion, the court held that investment advisors are not "simply [] buyer[s] for [their] own account [but] stand[] instead in the place of whatever number of investors are participants in its managed fund . . . this Court does not view that posture as qualifying Thales for the 'most adequate plaintiffs' designation in preference to a handful of foreign and domestic institutional investors who make up the Institutional Group with greater aggregate claimed losses." *Id*. Here, too, not only will defendants argue that Union Asset Management not a buyer for its own account, it has also failed to provide evidence (*i.e.*, investment agreements from its individual clients under the laws of Germany) that it received express authorization from each of its individual funds to file a lawsuit and/or move for lead plaintiff on their behalf, as opposed to the authority to make investment management decisions. *See id*.; *Suprema Specialties*, 206 F. Supp. 2d at 634-35.

For these reasons, the Institutional Investor Group strongly objects to Union Asset Management's appointment.

III. CONCLUSION

For the foregoing reasons, the Institutional Investor Group asks the Court to appoint it as lead plaintiff and to approve its selection of Messrs. Kendall, Lerach, Coughlin and Robbins as lead counsel.

DATED: February 15, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2007, I electronically filed 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 have 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.

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