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CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

COUCHMAN PARTNERS LP, On Behalf
of Itself and All Others
Similarly Situated,

CV 02-02329-ABC(PJWx)

CLASS ACTION

Plaintiff,

ORDER GRANTING JOHN A. LEVIN &
CO.'S MOTION TO BE APPOINTED
LEAD PLAINTIFF AND FOR
APPROVAL OF CHOICE OF LEAD
COUNSEL AND DENYING COUCHMAN
PARTNERS, LP'S MOTION TO BE
APPOINTED LEAD PLAINTIFF AND
FOR APPROVAL OF CHOICE OF LEAD
COUNSEL

v.

L90, INC, et al.,

Defendant.

Both Couchman Partners LP ("Couchman") and John A. Levin & Co. ("Levin") move this Court pursuant to § 21D(a)(3)(B) of the Securities and Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78u-4(a)(3)(B), as amended by the Private Securities Litigation Reform Act ("PSLRA"), for consolidation of related actions, for appointment as lead plaintiff and to approve lead plaintiff's selection of counsel. For the reasons stated below, the Court appoints Levin as lead plaintiff and approves Levin's choice of counsel.

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2 **I. Background**

3 L90, Inc. ("L90" or the "Company") is an online media and
4 direct marketing company that works with marketers and publishers
5 to build relationships with customers on the Internet. See
6 Complaint filed in Vanmiddlesworth v. L90, Inc., No. CV 02-3798,
7 filed May 9, 2002 ("Cpt.") ¶¶ 2, 4. In the various complaints
8 filed in this matter, plaintiffs assert that during the class
9 period, defendants overstated the company's revenues in an attempt
10 to boost the stock price and make L90 more attractive to a third-
11 party acquirer. See Cpt. ¶¶ 3, 26. Plaintiffs further assert that
12 these acts violated the Generally Accepted Accounting Principles
13 and Securities and Exchange Commission ("SEC") rules and prompted
14 an investigation by the SEC and a restatement by L90 of its
15 financial results for 2000 and 2001. See Cpt. ¶¶ 8-9, 29-30.

16 On February 4, 2002, L90 issued a press release announcing
17 that the SEC was investigating L90 and had issued subpoenas
18 requesting documents from L90 and one of its directors. See Cpt. ¶
19 4. On March 11, 2002, a press release reported that L90 and the
20 contemplated acquirer had terminated their merger plans, and L90
21 paid the contemplated acquirer a cash reimbursement for expenses
22 relating to the merger. See Cpt. ¶¶ 6, 27.

23 On May 6, 2002, L90 announced the L90 was restating operating
24 results for 2000 and 2001. See Cpt. ¶¶ 8, 29. As a result of the
25 SEC investigation, L90 reduced its cumulative revenue by a total of
26 approximately \$8.3 million. See Cpt. ¶¶ 8, 29-30. L90 shares fell
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1 by more than 50% the day after L90 announced the SEC investigation
2 and have continued to decrease. See Cpt. ¶ 5.

3 Couchman filed the first action on March 21, 2002. Six
4 related actions have been filed. On July 17, 2002, the Court, upon
5 motions by Couchman and Levin, consolidated the six actions under
6 Master File No. C-02-2329. On May 20, 2002 Couchman filed the
7 instant Motion to Appoint Couchman Partners LP as Lead Plaintiff
8 and to Approve Lead Plaintiff's Choice of Co-Lead Counsel
9 ("Couchman Motion") and Levin filed the instant Motion for the
10 Consolidation of All Related Actions to be Appointed Lead Plaintiff
11 and for Approval of its Choice of Lead Counsel ("Levin Motion").
12 Levin opposed Couchman's motion and Couchman opposed Levin's
13 motion. Both parties filed replies. The matter was originally set
14 for hearing on June 17, 2002. Due to Court congestion, the Court
15 continued the hearing date to July 22, 2002.¹

16 **II. Appointment of Lead Plaintiff**

17 **A. Standard**

18 Congress enacted the PSLRA in 1995 to redress certain
19 perceived abuses in securities class actions. See In re Tyco

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21 ¹ On July 17, 2002, the law firm of Abbey Gardy, LLP filed
22 a Declaration of Arthur N. Abbey in Further Support of Levin's
23 motion. Attached to this declaration is (1) a copy of the
24 minutes of a meeting of the Board of Directors of LevCo
25 Alternative authorizing its investment manager Levin & Co. to
26 pursue this litigation and seek to be appointed lead
27 plaintiff, dated June 13, 2002 and (2) a copy of the Third
28 Amended and Restated Agreement of Limited Partnership of
Purchase Associates, L.P., dated January 1, 2001, authorizing
Levin & Co. to pursue this litigation. Abbey Gardy, LLP is
admonished for filing additional briefing without leave of
court. Abbey Gardy is on notice that this Court will not
tolerate violations of the local rules and any future
violations will not be entertained.

1 Int'l. Ltd., No. 00-MD-1335-B, 2000 U.S. Dist. LEXIS 13390 (Aug.
2 17, 2000); In re Party City Secs. Lit., 189 F.R.D. 91, 103 (D.N.J.
3 1999). Among other objectives, Congress sought to ensure that such
4 actions would be controlled by investors with a significant stake
5 in the litigation, rather than by lawyers with an independent
6 financial interest in bringing "strike" suits. See Greebel v. FTP
7 Software, Inc., 194 F.3d 185, 191 (1st Cir. 1999) ("The enactment of
8 the PSLRA in 1995 marked a bipartisan effort to curb abuse in
9 private securities lawsuits, particularly the filing of strike
10 suits.") (citing H.R. Conf. Rep. No. 104-369, at 32 (1995),
11 reprinted in 1995 U.S.C.C.A.N. 730, 731.)

12 Section 21D of the Exchange Act, as amended by the PSLRA,
13 establishes the procedure for the selection of lead plaintiff to
14 oversee class actions brought under the federal securities law.
15 Specifically, § 21D(a)(3)(A)(i) provides that within 20 days after
16 the date on which a class action is filed under the PSLRA,

17 the plaintiff or plaintiffs shall cause to be published, in a
18 widely circulated national business-oriented publication or
19 wire service, a notice advising members of the purported
20 plaintiff class -

- 19 (I) of the pendency of the action, the claims asserted
20 therein, and the purported class period; and
21 (II) that, not later than 60 days after the date on which
22 the notice is published, any member of the purported
23 class may move the court to serve as lead plaintiff of
24 the purported class.

23 15 U.S.C. §4(a)(3)(A)(i).

24 In addition, § 21D(a)(3)(B)(i) of the Exchange Act directs the
25 court to consider any motions brought by plaintiffs or purported
26 class members to appoint lead plaintiffs filed in response to any
27 such notice no later than 90 days after the date of publication, or
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1 as soon as practicable after this Court decides any pending motion
2 to consolidate any actions asserting substantially the same claim
3 or claims. Pursuant to this provision, the court is to appoint the
4 most adequate plaintiff to serve as lead plaintiff and shall
5 presume that that plaintiff is the person, or group of person that

- 6 (aa) has either filed the complaint or made a motion in
response to a notice under subparagraph (A) (i);
- 7 (bb) in the determination of the court, has the largest
financial interest in the relief sought by the class; and
- 8 (cc) otherwise satisfies the requirements of Rule 23 of the
Federal Rules of Civil Procedure.

9 15 U.S.C. § 78u-4(a) (3) (B) (iii) (I).

10 If several persons or entities seek to represent the class,
11 the PSLRA establishes a presumption that the person or entity with
12 "the largest financial interest in the relief sought by the class"
13 is the "most adequate plaintiff" and may be designated Lead
14 Plaintiff. See 15 U.S.C. § 77z-1(a) (3) (B) (iii) (I). That plaintiff
15 then may select counsel to represent the class, subject to the
16 court's approval. See 15 U.S.C. § 77z-1(a) (3) (B) (v). The
17 expectation is that the person or group with the largest financial
18 stake can best prosecute the claims, and will be able to select,
19 negotiate with, and monitor class counsel. The lead plaintiff
20 presumption may be rebutted by proof that the presumptively most
21 adequate plaintiff "(aa) will not fairly and adequately protect the
22 interests of he class; or (bb) is subject to unique defenses that
23 render such plaintiff incapable of adequately representing the
24 class." Id.

25 **B. Discussion**

26 On March 21, 2002, Couchman published a notice of pendency of
27 the action on Business Wire. See Declaration of Michael Dowd. The
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1 notice advised class members of the existence of the lawsuit and
2 described the claims asserted. On May 20, 2002, both Couchman and
3 Levin filed Motions to Consolidate, be appointed lead plaintiffs
4 and for approval of choice of counsel. Therefore, both motions
5 were timely filed within 60 days from publication of the notice of
6 pendency of the action.

7 **1. Filing of Complaint or Notice**

8 The Court now turns to the question of who should serve as
9 lead plaintiff. Both candidates satisfy the first requirement for
10 appointment as lead plaintiff, namely, that it either filed the
11 complaint or made a motion in response to a notice. Couchman filed
12 the initial complaint and Levin made a timely motion in response to
13 published notice.

14 **2. Federal Rule of Civil Procedure 23**

15 The Court also finds that both candidates satisfy the
16 requirements of Fed. R. Civ. P. 23. The typicality requirement of
17 Rule 23 is satisfied when named plaintiffs have (1) suffered the
18 same injuries as the absent class members; (2) as a result of the
19 same course of conduct by defendants; and (3) their claims are
20 based on the same legal issues. See e.g. Hanon v. Dataproducts
21 Corp., 976 F.2d 497, 508 (9th Cir. 1992); Haley v. Medtronic, Inc.,
22 169 F.R.D. 643, 649 (C.D.Cal. 1996).

23 The questions of law and fact common to the class members that
24 predominate over questions that may affect individual class members
25 include: (a) whether the federal securities laws were violated by
26 defendants' acts; (b) whether L90 issued false and misleading
27 statements during the Class Period; (c) whether defendants caused
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1 L90 to issue false and misleading statements during the Class
2 Period; (d) whether defendants acted knowingly or recklessly in
3 issuing false and misleading financial statements; (e) whether the
4 market price of L90 stock was artificially inflated during the
5 Class Period because of the defendants' conduct; and (f) whether
6 the members of the class sustained damages, and, if so, what is the
7 proper measure of damages. See Couchman Motion at 9; Levin Motion
8 at 12.

9 At this stage, the Court finds that there is a well-defined
10 community of interest in the questions of law and fact involved in
11 this case and the claims asserted by both Couchman and Levin are
12 typical of the claims of the members of the proposed class.
13 Couchman and Levin and members of the class allege that defendants
14 violated the Exchange Act by publicly disseminating materially
15 false and misleading statements about L90 during the Class Period.
16 Couchman and Levin, as well as the members of the proposed class,
17 argue that they acquired L90 common stock at prices artificially
18 inflated by defendants' fraudulent misrepresentations and omissions
19 and allege that they were damaged thereby. Because the claims
20 asserted by Couchman and Levin are based on the same legal theories
21 and arise "from the same event or course of conduct giving rise to
22 the claims of other class members," typicality is satisfied.
23 See e.g. In re United Energy Corp. Solar Power Modules Tax Shelter
24 Inv. Sec. Litig., 122 F.R.D. 251, 256 (C.D. Cal. 1988).

25 The Court also finds that the interests of both Levin and
26 Couchman are clearly aligned with the members of the proposed
27 class. There is no evidence of any antagonism between the
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1 interests of these entities and the proposed class members. As
2 indicated above, both Couchman and Levin share substantially
3 similar questions of law and fact with the members of the proposed
4 class. Their claims are thus typical of the members of the class,
5 and they have taken steps to advance this litigation.² In
6 addition, both Couchman and Levin have demonstrated their adequacy
7 to serve as class representative by signing a certification
8 affirming their willingness to serve as, and assume the
9 responsibilities of class representative. Finally, both potential
10 lead plaintiffs have selected and retained counsel highly
11 experienced in prosecuting securities class actions to represent
12 them.³

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15 ² The Court is cognizant of the fact that Couchman's
16 counsel, Milberg Weiss Bershad Hynes & Lerach LLP, has taken
17 significant steps in advancing the instant litigation.
18 Milberg Weiss has filed six of the seven complaints which
19 comprise the instant consolidated action. The complaint filed
20 on behalf of Dennis Cooley was filed by Weis & Yourman and
21 Bernstein Liebhard & Lifshitz. While Levin's counsel, Abbey
22 Gardy, LLP, has not filed any of the complaints in this
23 consolidated action, it timely made a motion in response to
24 the notice published regarding the pendency of the action, as
25 required by 15 U.S.C. § 4(a)(3)(A)(i). Accordingly, while
26 Couchman has indeed taken significant steps in advancing this
27 litigation, both Couchman and Levin have taken the action
28 necessary for appointment as lead plaintiff.

23

24 ³ Couchman contends that Levin has failed to provide the
25 Court with any specific information about its qualifications,
26 legal sophistication or litigation experience and it has given
27 no indication that it is willing or able to discharge the
28 fiduciary duties of a lead plaintiff. However, Levin has
submitted a certification indicating that it is willing to
serve as lead plaintiff and the Court finds that both Levin
and its lead counsel possess the legal sophistication
necessary to discharge the duties of lead plaintiff.

1 **3. Largest Financial Stake**

2 The criteria that the plaintiff who has the largest financial
3 stake in the relief sought be appointed as lead plaintiff clearly
4 favors Levin. Levin asserts that it has lost approximately
5 \$767,200 from its purchase of shares L90 common stock from March
6 21, 2001, through January 2, 2002. See Levin Motion at 9. Couchman
7 asserts that it purchased 415,500 shares of L90 common stock and
8 lost approximately \$151,835 during the Class Period. See Couchman
9 Opp'n. at 3.

10 Couchman contends that its loss is more significant than it
11 seems because it is an investment fund that manages assets valued
12 at \$27 million. Accordingly, losses arising from its purchases of
13 415,500 shares of L90 stock during the Class Period are material to
14 its fund. However, Couchman has failed to complete its argument
15 and explain how this factor is significant. In addition, Couchman
16 has not directed the Court to any authority which supports
17 considering the size of the overall assets managed by the potential
18 lead plaintiff in determining the largest financial stake.
19 Finally, Couchman argues that the \$767,200 loss claimed by Levin is
20 misleading because Levin has not shown that it purchased the stock
21 at issue for its own account or that it held a beneficial interest
22 in the stock. Couchman cites to the 2001 Annual Report filed by
23 BKF Capital Group, Inc., which owns Levin, and describes Levin as
24 an "investment advisor specializing in managing equity portfolios
25 for other investors." See Opp'n. at 5-6. As such, argues
26 Couchman, Levin managed the accounts of institutional and
27 individual investors who, in turn, were the actual purchasers of
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1 L90 stock. Therefore, Couchman contends that Levin does not have
2 standing to act as lead Plaintiff. Couchman also asserts that
3 Levin cannot be lead plaintiff because Levin has failed to provide
4 proper certification. The Court finds that Couchman has standing
5 to serve as lead plaintiff and that Couchman's certification does
6 not bar its appointment.

7 **a. Levin has Standing to be Appointed Lead Plaintiff**

8 Couchman argues that the rebuttal presumption favoring the
9 plaintiff with the largest financial interest was not intended to
10 obviate the principle of providing the class with the most adequate
11 representation. Couchman contends that because Levin has not
12 demonstrated that it has standing to serve as lead plaintiff, Levin
13 is not the most adequate lead plaintiff.

14 Couchman contends that as an "investment advisor" specializing
15 in managing equity portfolios for other investors, Levin lacks
16 standing. See Couchman Opp'n., citing BFK's 2001 Annual Report,
17 Declaration of Jonathan E. Behar, Exh. A. Couchman first asserts
18 that Levin managed the accounts of institutional and individual
19 investors who were the actual purchasers of the L90 stock. Couchman
20 further argues that Levin has made no showing that it actually
21 purchased L90 stock for its own account, as opposed to its clients'
22 accounts. In addition, Couchman points to the absence of evidence
23 demonstrating that Levin has any beneficial interest in L90 stock,
24 or in the alternative, that it received authorization from its
25 clients to participate in this lawsuit on their behalf prior to the
26 time Levin filed its motion on May 20, 2002. See Couchman Opp'n.
27 at 5-6. Accordingly, argues Couchman, if Levin is unable to
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1 establish that it purchased acquired L90 stock in its own right, it
2 lacks standing to serve as lead plaintiff.

3 Levin counters that Couchman's argument is unconvincing
4 because Couchman is itself an "investment fund" that manages assets
5 valued at \$27 million and Couchman itself fails to affirmatively
6 state whether it took either record/legal and/or
7 beneficial/equitable title to the L90 stock. See Reply at 5.
8 Levin explains that the L90 stock at issue was purchased through
9 two entities controlled by Levin, namely, Levco Alternative Fund,
10 Ltd. ("Levco Alternative") and Purchase Associates, L.P.
11 ("Purchase"). Levin is the investment manager for both Levco
12 Alternative and for Purchase, as well as the parent of Levco GP,
13 Inc, which is the managing general partner of Purchase. See
14 Declaration of Henry Levin ("Levin Decl.") ¶ 3. According to the
15 declaration of Henry Levin, Levin has full discretion and authority
16 to make and manage the investments of both of these entities and
17 has full authority to take all actions as may be necessary or
18 advisable, including the right to vote the shares, and the
19 authorization to bring this litigation and to seek appointment as
20 lead plaintiff. See Levin Decl. ¶ 3.

21 In support of its position, Couchman cites Takeda v. Turbodyne
22 Technologies, Inc., et al., 67 F.Supp.2d 1129 (C.D. Cal. 1999), for
23 the principle that "appointment of an investment advisor as lead
24 plaintiff was permitted where the investment advisor demonstrated
25 that his company also 'invests on its own account,' thereby
26 incurring some portion of the loss in its personal rather than
27 representative capacity." Opp'n. at 6. First, Takeda is of
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1 limited applicability to the instant case because it involved
2 several private investors, not institutional investors, who were
3 seeking to be appointed lead counsel. Second, Takeda does not
4 stand for the proposition advanced by Coachman. In a footnote, the
5 Takeda court rejected the argument that one of the private
6 investors, Williamson, should not be appointed lead plaintiff
7 because it resembled an institutional investor. The plaintiff
8 opposing Williamson's appointment as lead plaintiff argued that
9 Williamson should not be lead plaintiff because some of the losses
10 incurred by Williamson were incurred on behalf of his investment
11 clients and not by him personally or by his company. The Takeda
12 court rejected this argument, failing to see how such an argument
13 detracted from Williamson's suitability as lead plaintiff given the
14 Congressional preference for large, institutional investors. See
15 id. at n.18. The court also noted, in the phrase apparently relied
16 upon by Couchman, that Williamson's company invested on its own
17 account and therefore some portion of his loss must be incurred in
18 a personal rather than a representative capacity. Id. Thus, while
19 the court noted the fact that some portion of the loss must have
20 been incurred by Williamson in a personal capacity, and Williamson
21 was appointed lead plaintiff, the Court does not state that
22 personal loss is a prerequisite to appointment as lead plaintiff.

23 Couchman similarly misstates the applicability of In re
24 Network Assocs. Sec. Litig., 76 F.Supp.2d 1017, 1027-28 (N.D. Cal.
25 1999). Couchman asserts that the In re Network court, "rather than
26 appointing plaintiffs with the largest loss, ... appointed as lead
27 plaintiff one entity with the third-largest loss, who was an
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1 "actual owner" of Network Associates' stock." See Opp'n. at 9-10.
2 While the In re Network court did appoint the entity with the
3 third-largest loss as lead plaintiff, it did not base this
4 determination on the fact that that plaintiff was an "actual
5 owner." Rather, the court determined that the two candidates with
6 larger losses were inadequate as lead plaintiffs because, among
7 other things, they were foreign organizations and had affiliates
8 who were under investigation. Indeed, the court noted that the
9 funds affiliated with those candidates, and not the actual
10 candidates, were the actual owners of the shares at issue.
11 However, that did not appear to factor into the court's decision to
12 reject those candidates as lead plaintiff.⁴ Similarly, in In re
13 Waste Management, 128 F.Supp.2d 401 (S.D. Tex. 2000), the court did
14 not appoint a group seeking appointment as lead plaintiff because
15 the group was too large and unconnected. While the court did note
16 that the plaintiff who was ultimately appointed lead plaintiff
17 purchased the stock, suffered the loss and came forward as the real

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20 ⁴ In addition, the principal question addressed by the In
21 re Network case was whether "groups" of unrelated investors
22 could serve as lead plaintiff. The court held that the groups
23 seeking to serve as lead plaintiff could not be appointed lead
24 plaintiff because they had nothing in common other than their
25 lawyer. The court noted that the group had "no organized
26 decision making apparatus, no coherency, no common ground
27 other than the lawyer." In re Network, 76 F.Supp.2d at 1022.
28 In reaching its ruling, the Court relied on the purposes
advanced by Congress in enacting the PSLRA reform and noted
that "[t]he whole point of the reform was to install a lead
plaintiff with substantive decision making ability and
authority. For example, a group of mutual funds managed by a
single organization might qualify. It would have an internal
coherency and would be capable of acting as a unified decision
maker." Id. at 1024.

1 | property in interest, the point emphasized by Couchman, the court
2 | did not rely on this fact in its ultimate decision to appoint lead
3 | plaintiff. Instead, the court relied on the fact that the lead
4 | plaintiff functioned as a single investor and had the largest
5 | interest in recovery. See id. 432. The court was not dissuaded
6 | from its decision to appoint Connecticut Retirement Plans and Trust
7 | Fund ("Connecticut") as lead plaintiff by the fact that Connecticut
8 | was an institutional investor investing monies pooled into it from
9 | numerous, interrelated funds. Id.

10 | Couchman cites to a number of other cases which do not
11 | persuade this Court that Levin should not be appointed lead
12 | plaintiff. Davidson v. Belcor, Inc., 933 F.2d 603, 606 (7th Cir.
13 | 1991) and Prudential Ins. Co. v. BMC Indus., Inc., 655 F.Supp. 710
14 | (S.D.N.Y. 1987) are both pre-PSLRA and consequently of limited
15 | value. In the post-PSLRA case cited by Couchman, In re Bank One
16 | Shareholders Class Actions, 96 F.Supp.2d 780 (N.D. Ill. 2000), the
17 | court chose as lead plaintiff a group that had the largest volume
18 | of purchases of any individual purchaser listed in any of the
19 | underlying actions or in any of the lead plaintiff submissions.
20 | Id. at 783-84. The fact that one of the plaintiffs who had smaller
21 | losses was also an investment manager (with an extensive day
22 | trading pattern) does not stand for the proposition that it was
23 | inadequate as a plaintiff.

24 | Finally, Couchman relies on a July 19, 2000 unpublished
25 | district court case from the District of New Hampshire. Indeed, in
26 | In re Tyco Int'l, Ltd. Securities Litigation, the district court
27 | judge ordered the plaintiffs seeking to be appointed lead
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1 | plaintiffs to file affidavits indicating, among other things,
2 | whether they purchased the securities at issue on their own account
3 | or the account of others and whether they took equitable/beneficial
4 | title. See July 19, 2000 Order, Exh. B. After these affidavits
5 | were filed, the judge emphasized that the lead plaintiff he
6 | appointed purchased securities in its own account and that it had
7 | equitable/beneficial title to those securities. See In re Tyco
8 | Int'l, Ltd. Securities Litigation, No. 00-MD-1335-G, 2000 U.S. Dist
9 | LEXIS 13390 (August 17, 2000). While the Tyco cases do support
10 | Couchman's argument that a lead plaintiff should have purchased
11 | securities on its own account and should have taken
12 | equitable/beneficial title in the securities, the Court is not
13 | persuaded by these cases. First, these are unpublished cases from
14 | outside of this circuit. Second, more recent cases, which are
15 | published, have reached the contrary conclusion - that an
16 | institutional advisor may be appointed a lead plaintiff without
17 | showing that it purchased securities on its own account or took
18 | equitable/beneficial title. See e.g. Ezra. Finally, the Court
19 | finds Couchman's reliance on Tyco somewhat puzzling as Couchman,
20 | which is a investment fund managing assets, has failed to show that
21 | it purchased securities on its own account or that it took
22 | equitable/beneficial interest in the securities.

23 | Lastly, the precise arguments raised by Couchman were
24 | considered and rejected recently in The Ezra Charitable Trust v.
25 | Rent-Way, Inc., 136 F.Supp.2d 435 (W.D. Penn. 2001). In Ezra, one
26 | of the plaintiffs seeking to be appointed lead counsel, FSBA,
27 | argued that even though another plaintiff, Cramer, sustained the
28 |

1 largest loss, Cramer could not be appointed lead plaintiff because
2 it purchased securities on behalf of its clients rather than on its
3 own behalf. As a result, FSBA argued Cramer had suffered no loss.
4 The court disagreed and noted that two recent cases had held that
5 "investment advisors with the delegated authority to make
6 investment decisions for clients are purchasers under the
7 securities laws." Id. at 4411, citing Monetary Mgmt. Group of St.
8 Louis, Inc. v. Kidder, Peabody, & Co., Inc., 604 F.Supp. 764 (E.D.
9 Mo. 1985) and Ulemanik, S.A. v. McKinley Allsopp, Inc., 125 F.R.D.
10 602 (S.D.N.Y. 1989). The court also noted that the delegation of
11 substantial investment discretion may disqualify the delegating
12 party from purchaser status. See Ezra, 136 F.Supp.2d at 441,
13 citing Congregation of the Passion, Holy Cross Province v. Kidder
14 Peabody & Co., 800 F.2d 177 (7th Cir. 1986). Because it was a
15 "purchaser" under the federal securities laws with standing to sue
16 in its own name, Cramer could be appointed lead plaintiff. The
17 court noted that the federal securities laws do not use the terms
18 "purchaser" and "owner" interchangeably as evidenced by the fact
19 that unlike § 16(b) of the 1934 Act, § 12(2) of the 1933 Act does
20 not expressly require that a plaintiff be an owner, but simply
21 requires that a plaintiff be a purchaser. The court relied on
22 Cramer's assertion that it "had complete investment discretion as
23 to which securities to buy for its clients" and, based on that
24 unrestricted decision-making authority, concluded that Cramer was a
25 "purchaser" under the federal securities laws with standing to sue
26 in its own name. Accordingly, Cramer was appointed lead plaintiff.

27 In the instant case, it has not been disputed that Levin
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1 independently determined which securities to purchase for its
2 clients' accounts. See Levin Decl. ¶ 3. Based on the guidance
3 provided by Ezra, as well as the fact that federal securities laws
4 do not embrace a rule that a "purchaser" of securities must also be
5 an owner, the Court finds that Levin has standing to sue.⁵

6 Thus, Couchman has failed to rebut the presumption that the
7 most adequate plaintiff is the person or group of persons that has
8 the largest financial interest in the relief sought by the Class.
9 Couchman has not shown that Levin, the presumptively most adequate
10 plaintiff, will not fairly and adequately protect the interests of
11 the class or is subject to unique defenses that render such
12 plaintiff incapable of adequately representing the class. See 17
13 U.S.C. § 71-z1(a)(3)(B)(iii)(II) and 15 U.S.C. § 78u-
14 4(a)(3)(B)(iii)(II). As stated previously, the PSLRA was enacted
15 with the explicit hope that institutional investors, who tend to
16 have the largest financial stakes in securities litigation, would
17 step forward to represent the class and exercise effective
18 management and supervision of the class lawyers. Based on the
19 mandate of the PSLRA, and its interpretation by the federal courts,
20 the Court finds that Levin is the most adequate plaintiff.

21 b. Certification

22 Couchman also contends that Levin has failed to demonstrate
23 that it is the "most adequate" lead plaintiff because it has
24 submitted a defective certification and therefore has not complied

25
26 ⁵ Levin notes that Couchman has failed to cite any case
27 where an investment manager with the largest losses was deemed
28 inadequate simply because of its title as an investment
advisor. The Court agrees and finds Couchman's cases
unpersuasive in the instant matter.

1 with the procedural requirements of the PSLRA. See Opp'n. at 10-
2 11. Specifically, Couchman argues that Levin's certification is
3 fatally defective because it does not satisfy the requirements
4 enunciated in Section 78u-4(a)(2)(A), it does not include basic
5 information such as Levin's address and telephone number, it is
6 unsworn and is not signed under the penalty of perjury.⁶

7 The PSLRA requires each plaintiff who seeks to serve as a
8 representative party on behalf of a class to file a "sworn
9 certification" with his or her Complaint, which "states that the
10 plaintiff has reviewed the complaint and authorized its filing;"
11 "states that the plaintiff did not purchase the security that is
12 the subject of the complaint at the direction of plaintiff's
13 counsel or in order to participate in any private action arising
14 under this chapter;" "states that the plaintiff is willing to serve
15 as a representative party on behalf of a class, including providing
16 testimony at deposition and trial, if necessary;" "sets forth all
17 of the transactions of the plaintiff in the security that is the
18 subject of the complaint during the class period specified in the
19 complaint;" "identifies any other action under this chapter, filed

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21 ⁶ Couchman relies on In re Conseco Inc., Sec. Litig., 120
22 F.Supp.2d 729, 732 (S.D.Ind. 2000) to argue that bare
23 certification forms typically have been held to be
24 insufficient to justify a lead plaintiff appointment.
25 However, In re Conseco does not alter the Court's instant
26 ruling. In In re Conseco, the court merely noted that the
27 presumptively lead plaintiff had also submitted affidavits
28 indicating the prior relevant litigation experience of its
representatives. The other movants had simply submitted bare
bones certifications. Here, Levin has done more than submit a
bare bones certification. For example, Mr. Levin, Levin's
representative, has submitted a declaration indicating, among
other things, his understanding and familiarity with the
provisions of the PSLRA.

1 | during the 3-year period preceding the date on which the
2 | certification is signed by plaintiff, in which the plaintiff has
3 | sought to serve as a representative party on behalf of a class;"
4 | and, "states that the plaintiff will not accept any payment for
5 | serving as a representative party on behalf of a class beyond the
6 | plaintiff's pro rata share of any recovery, except as ordered or
7 | approved by the court." 15 U.S.C. § 78u-4(a)(2)(A)(i)-(vi). Case
8 | law has established that all proposed lead plaintiffs, in order to
9 | allow the court to adjudge their financial interest in the
10 | litigation and their capability of adequately representing the
11 | proposed class, must provide certifications of their eligibility in
12 | connection with the motion to be appointed lead plaintiff. See
13 | e.g. Chill v. Green Tree Financial Corp., 191 F.R.D. 398, 413 (D.
14 | Minn. 1998). However, this certification need not be filed
15 | concurrently with the motion for appointment as lead counsel. Id.
16 | Courts have afforded proposed lead plaintiffs additional time after
17 | filing a motion for appointment to file the required certification.
18 | Id. While Levin's certification complies with the majority of the
19 | requirements of §78u-4(a)(2)(A)(i)-(vi), it is not a sworn
20 | certification as required by § 78u-4(a)(2)(A). Accordingly, the
21 | Court affords Levin twenty days from the date of this order to file
22 | the appropriate certification.⁷

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26 | ⁷ The Court rejects Couchman's argument that Levin must
27 | include basic information such as its address and telephone
28 | number in the certification. Couchman has not cited any
support for this position and the relevant statutes do not
contain such any requirement.

1 **III. Appointment of Lead Counsel**

2 The PSLRA vests authority in the lead plaintiff to select and
3 retain lead counsel, subject to this Court's approval. See 15
4 U.S.C. § 78u-4(a)(3)(B)(v). Thus, the Court will not disturb the
5 lead plaintiff's choice of counsel unless necessary to "protect the
6 interests of the class." See 15 U.S.C. § 78u-4(a)(3)(B)(iii)
7 (II)(v). Here, Levin has selected the law firm of Abbey Gardy, LLP
8 to serve as Lead Counsel and Glancy & Binkow LLP to serve as
9 Liaison Counsel. Both firms have extensive experience in the area
10 of securities litigation and have successfully prosecuted numerous
11 securities fraud class actions on behalf of inured investors. See
12 Declaration of Nancy Kaboolian, Exh. C.

13 **IV. Conclusion**

14 Based on Congress' clear directive that the position of lead
15 plaintiff should be give to the plaintiff with largest financial
16 stake, unless the presumptive adequacy fo this plaintiff is
17 rebutted, the Court appoints John A. Levin & Co. as lead plaintiff.
18 The Court also approves Levin's choice of counsel, Abbey Gardy, LP,
19 and Glancy & Binkow LLP, as liaison counsel. Levin is to file a
20 certification in accordance with the Court's discussion above
21 within twenty days of this order. Accordingly, Couchman's motion
22 to be appointed lead plaintiff and for approval of choice of

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1 counsel is DENIED and Levin's motion to be appointed lead plaintiff
2 and for approval of counsel is GRANTED.

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4 SO ORDERED.

5 DATED: July 22, 2002

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8 AUDREY B. COLLINS
9 UNITED STATES DISTRICT JUDGE
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