

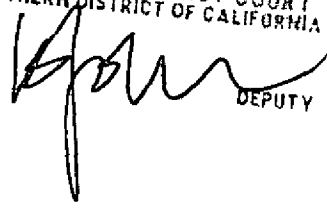


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3:02-CV-00870 PEREGINE SYSTEMS INC V.
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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 02cv870-J (RBB)

ORDER:

IN RE PEREGRINE SYSTEMS, INC.
SECURITIES LITIGATION

(1) GRANTING THE LORAN GROUP'S MOTION FOR APPOINTMENT AS LEAD PLAINTIFF AND ITS MOTION FOR APPROVAL OF ITS CHOICE OF LEAD COUNSEL; [Doc. No. 8]

This Document Relates to: All Actions

(2) GRANTING STATE UNIVERSITY RETIREMENT SYSTEM OF ILLINOIS' MOTION FOR APPOINTMENT AS LEAD PLAINTIFF AND ITS MOTION FOR APPROVAL OF ITS CHOICE OF LEAD COUNSEL; and [Doc. No. 55]

(3) DENYING COMPETING MOTIONS FOR APPOINTMENT AS LEAD PLAINTIFF. [Doc. Nos. 5, 15, 17, 21, 26, 29, 33, 36, 39, 47, 58, 60, 65, 86]

Before the court are sixteen motions for appointment as lead plaintiff and approval of choice of counsel. After reviewing the papers filed, the court determined that the issues presented were appropriate for decision without oral argument and vacated the October 7, 2002 hearing date pursuant to Civil Local Rule 7.1.d.1. [Doc. No. 127]. For the reasons set forth below, the court grants the Loran Group's motion for appointment as lead counsel with respect to the section 11 plaintiffs and the State Universities Retirement System of Illinois' motion for appointment as lead counsel with respect to the section 10(b)

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1 plaintiffs. The court also approves the Loran Group's and the State Universities Retirement System of
2 Illinois' choice of counsel.

3 *Background*

4 The above-captioned case consolidated thirty-two complaints filed by investors against Peregrine
5 Systems and its various officers, board members and Peregrine's accounting firm alleging violations of
6 federal securities laws and regulations. The complaints were filed in response to the company's May 6,
7 2002 press release that it was conducting an internal investigation into accounting inaccuracies and its
8 May 23, 2002 statement that it would restate its finances for previous years. Plaintiffs have identified
9 various overlapping class periods, each of which fits into the three year period beginning June 29, 1999
10 and ending May 22, 2002.

11 There are two groups of plaintiffs. In the first group are those who made "open market"
12 purchases of stock in Peregrine Systems in reliance on the material misstatements. These plaintiffs seek
13 recovery under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("SEA"), 15 U.S.C. §§
14 78j(b) and 771(a) ("the section 10(b) plaintiffs" or "the section 10(b) actions"). In the second group are
15 those who obtained Peregrine Systems stock in connection with mergers that took place during the
16 relevant time period, also in reliance on the misstatements regarding Peregrine Systems' financial status.
17 Those plaintiffs seek recovery under sections 11 and 12(a) of the Securities Act of 1933, 15 U.S.C. §§
18 77k and 771(a)(2) ("the section 11 plaintiffs" or the "section 11 actions"). Since the filing of this action,
19 Defendant Peregrine Systems, Inc. has filed Chapter 11 bankruptcy and arranged, subject to the
20 bankruptcy court's approval, to sell its Remedy business unit. (LG Reply Br., Supp. Cera Decl. Ex. B).

21 The following sixteen individuals and institutions, either individually or in groups, have moved
22 to be appointed lead plaintiff in the consolidated case: (1) *Henry Frankel*, [Doc. Nos. 5, 6]; (2) David
23 Levy, Leighton Powell, David Schenkel, John Virden, Conrad Willemse, Bill Holman, Bob Benesko,
24 Michael Slavitch, Richard Maheu and Mark Rollins ("*The Loran Group*"), [Doc. Nos. 8, 9]; (3)
25 Srinivas Bikkina, Francisco Gonzales and M. Wesley Swearingen ("*The Bikkina Group*"), [Doc. Nos.
26 15, 16]; (4) John F. Shoch, Harvey C. Jones, Ron F. Fior, George de Urioste, Daniel Weller and Doug
27 Mueller ("*The Remedy Group*"), [Doc. Nos. 17, 18]; (5) Mateo Camarillo, Beverly Jolly, Fred Gattas
28 and John Williams ("*The Camarillo Group*"), [Doc. Nos. 21, 22]; (6) Michele Voth, Victoria Jibaja

1 Miller, Marijo A. Clemons, Pamela Molennor, Phillip J. Turner, Jon Houg, Wendy Wallace, Theresa
2 Marinelli, Freda Ramey, Celeste Damron, Patrick Pernet, Danielle Legg, Kenneth Kacperski, Denise
3 Haines and Susan Leahy ("**The Employee Group**"), [Doc. Nos. 26, 27]; (7) Societe General Asset
4 Management International, Ltd. ("**Societe General**"), [Doc. Nos. 29, 30]; (8) **Robert Cannon**, [Doc.
5 Nos. 32, 33]; (9) **James Poe**, [Doc. Nos. 31, 105]; (10) Teachers' Retirement System of Louisiana and
6 the Policemen & Firemen Retirement System of the City of Detroit, ("**The Retirement Systems**"), [Doc.
7 Nos. 36, 37]; (11) Vicki Lamb and Alan Hylton ("**The Section 11 Claimants**"), [Doc. Nos. 39, 40]; (12)
8 Martin R. Goldstein and Arthur Goldstein ("**The Goldstein Group**"), [Doc. Nos. 47, 49]; (13) **David**
9 **Cranford**, [Doc. No. 58]; (14) StoneRidge Investment Partners, LLC ("**StoneRidge**") [Doc. Nos. 60,
10 61]; (15) State Universities Retirement System of Illinois ("**SURSI**"), [Doc. Nos. 65, 66]; and (16) **The**
11 **Needham Growth Fund**, [Doc. Nos. 86, 87].¹

12 Also before the court are opposition briefs from the **Remedy Group**, [Doc. No. 88]; **James Poe**,
13 [Doc. No. 90]; **The Loran Group**, [Doc. No. 91]; **StoneRidge**, [Doc. No. 93]; **The Goldstein Group**,
14 [Doc. No. 95]; **SURSI**, [Doc. No. 97]; **The Retirement Systems**, [Doc. No. 99]; and **Societe Generale**,
15 [Doc. No. 103]. **The Bikkina Group** has filed an opposition to certain motions and support for the
16 application of Societe Generale. [Doc. No. 102].

17 The following documents have been filed in reply: a brief from **Societe Generale**, [Doc. No.
18 104]; a brief from **Heywood Waga**, [Doc. No. 113]; a reply brief from **The Retirement Systems**, [Doc.
19 No. 114]; a brief from **The Loran Group**, and Maheu, Benesko, Holman, Willemse, Virden, Rollins,
20 Schenkel, Slavitch, Powell, and Levy declarations in support thereof, and a supplemental Cera
21 declaration in support thereof, [Doc. Nos. 129-135]; a brief from **SURSI**, [Doc. No. 119]; a brief from
22 **The Needham Growth Fund** and supporting Gray declaration, [Doc. Nos. 117, 118]; a brief from **The**
23 **Remedy Group** and supporting Schoch, Fior and Mueller declarations, [Doc. Nos. 120-123]; and a brief
24

25 ¹ Plaintiff Heywood Waga filed a "Motion (1) to Affirm that the Selection of Lead Plaintiff for
26 the Harbinger Class is Premature or, in the Alternative; (2) Appointing Heywood Waga Lead Plaintiff
27 for the Harbinger Class and Approving his Selection of Lead Counsel," before consolidation in *Waga v.*
28 *Peregrine Systems, Inc., et al.*, 02cv1095-L (LSP). Judge Lorenz issued an "Order Striking Motion
Papers," in which he instructed Mr. Waga "to re-file the motion in accordance with Judge Jones' "Pre-
answer Case Management Order #1. In doing so, Plaintiff shall give consideration to whether any of the
arguments previously made in his motion papers are now moot." [Doc. No. 15]. Mr. Waga did not refile
his opposition brief, although he did file a reply brief.

1 from *James Poe* and supporting Bain declaration. [Doc. No. 115, 116].

2 *Discussion*

3 **I. Legal standard**

4 This court's task is delineated in the recent Ninth Circuit opinion *In re Cavanaugh*, No. 01-
5 70772, 2002 WL 31051543 (9th Cir. Sep. 16, 2002), which sets out the standard and process for
6 appointing lead plaintiff under the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §
7 78u-4.

8 The PSLRA requires that plaintiffs who have filed class action complaint alleging securities
9 violations publicize notice "in a widely circulated national business-oriented publication or wire service"
10 that publicizes (1) the pendency of the action; (2) the claims made; (3) the class period; and (4) the right
11 of any class member to move the court to serve as lead plaintiff. *See* 15 U.S.C. §§ 78u-4(a)(3)(A)²; *see*
12 *also In re Cavanaugh*, at *2. The statute further requires that the court consider motions by purported
13 class members for appointment as lead plaintiff filed within ninety days of a publicized notice,
14 regardless of whether the movant is a plaintiff in any complaint filed in the case. *See* 15 U.S.C. § 78u-
15 4(a)(3)(B)(i).³ When there is more than one putative class asserting substantially the same claim under
16 the PSLRA, the court should defer appointment of lead plaintiff until as soon as practicable after
17 consolidation. *See* 15 U.S.C. § 4(a)(3)(B)(ii).

18 Section 78u-4 requires that this court appoint as lead plaintiff of this consolidated action the
19 plaintiff who is the "most capable of adequately representing the interests of class members." *See* 15

20
21 ² (I) In general ¶ "Not later than 20 days after the date on which the complaint is filed, the
22 plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented
23 publication or wire service, a notice advising members of the purported plaintiff class--¶ (I) of the
24 pendency of the action, the claims asserted therein, and the purported class period; and ¶ (II) that, not
25 later than 60 days after the date on which the notice is published, any member of the purported class may
26 move the court to serve as lead plaintiff of the purported class. ¶ (ii) Multiple actions ¶ If more than one
27 action on behalf of a class asserting substantially the same claim or claims arising under this chapter is
28 filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be
published in accordance with clause (i). *See* 15 U.S.C. § 78u-4(a)(3)(A).

26 ³ (i) In general ¶ Not later than 90 days after the date on which a notice is published under
27 subparagraph (A)(i), the court shall consider any motion made by a purported class member in response
28 to the notice, including any motion by a class member who is not individually named as a plaintiff in the
complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported
plaintiff class that the court determines to be most capable of adequately representing the interest of the
class members (hereinafter referred to as the "most adequate plaintiff") in accordance with this
subparagraph.

1 U.S.C. § 78u-4(a)(3)(B)(i). The PSLRA defines the “most capable plaintiff” as “the plaintiff who has the
2 greatest financial stake in the outcome of the case, so long as he meets the requirements of Rule 23.” *See*
3 *In re Cavanaugh*, at *2. That determination requires a sequential process. *See* 15 U.S.C. §§ 78u-
4 4(a)(3)(A), 78u-4(a)(3)(B)(iii)(I) and (II); *see also In re Cavanaugh*, at *2-3.

5 The court first decides which of those individuals or groups who, as purported class members,
6 moved to serve as lead plaintiff is presumptively the most adequate plaintiff.⁴ That threshold
7 determination involves two considerations: (1) which applicant has the largest financial interest; and (2)
8 whether that applicant has presented in its complaint and sworn certification a prima facie case that it
9 otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See* 15 U.S.C.
10 §§ 78u-4(a)(3)(B)(iii)(I)⁵; *see also In re Cavanaugh*, at *2-3. “[T]he *only* basis on which a court may
11 compare plaintiffs competing to serve as lead is the size of their financial stake in the controversy. Once
12 it determines which plaintiff has the biggest stake, the court must appoint that plaintiff as lead, unless it
13 finds that he does not satisfy the typicality or adequacy requirements.” *See In re Cavanaugh*, at * 4.
14 “That the district court believes another plaintiff may be ‘more typical’ or ‘more adequate’ is of no
15 consequence. So long as the plaintiff with the largest losses satisfies the typicality and adequacy
16 requirements, he is entitled to lead plaintiff status, even if the district court is convinced that some other
17 plaintiff would do a better job.” *Id.*

18
19 ⁴ (B) Appointment of lead plaintiff ¶ (i) In general ¶ Not later than 90 days after the date on
20 which a notice is published under subparagraph (A)(i), the court shall consider any motion made by a
21 purported class member in response to the notice, including any motion by a class member who is not
22 individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the
23 member or members of the purported plaintiff class that the court determines to be most capable of
24 adequately representing the interests of class members (hereafter in this paragraph referred to as the
25 “most adequate plaintiff”) in accordance with this subparagraph. ¶ (ii) Consolidated actions ¶ (ii) If more
than one action on behalf of a class asserting substantially the same claim or claims arising under this
chapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for
trial, the court shall not make the determination required by clause (i) until after the decision on the
motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall
appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this
paragraph. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i) and (ii).

26 ⁵ (iii) Rebuttable presumption ¶ (I) In general ¶ Subject to subclause (II), for purposes of
27 clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action
28 arising under this chapter is the person or group of persons that -- ¶ (aa) has either filed the complaint or
made a motion in response to a notice under subparagraph (A)(i); ¶ (bb) in the determination of the
court, has the largest financial interest in the relief sought by the class; and ¶ (cc) otherwise satisfies the
requirements of Rule 23 of the Federal Rules of Civil Procedure. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

1 Rule 23 requires in pertinent part that the lead plaintiff's claims are typical of those of the class
2 and that the lead plaintiff will adequately and fairly protect the interests of the class. *See* Fed. R. Civ. P.
3 23(a). "The district court has latitude as to what information it will consider in determining typicality
4 and adequacy." *See In re Cavanaugh*, at *4; *see also Berger v. Compaq Computer Corp.*, 257 F.3d 475,
5 478 (5th Cir. 2001). The lead plaintiff, through its counsel, is charged with vigorously representing the
6 interests of the entire class. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998).

7 Rule 23 provides in part that "[o]ne or more members of a class may sue . . . as representative
8 parties on behalf of all only if . . . (2) the claims or defenses of the representative parties are typical of
9 the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect
10 the interests of the class." *See* Fed. R. Civ. P. 23(a). The typicality requirement "refers to the nature of
11 the claim or defense of the class representative, and not to the specific facts from which it arose or the
12 relief sought. The test of typicality is whether the action is based on conduct which is not unique to the
13 named plaintiffs and whether other class members have been injured by the same course of conduct."
14 *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citations and quotations omitted).

15 Adequacy is determined by considering two factors: (1) whether the movant appears able to
16 prosecute the action vigorously through qualified counsel;⁶ and (2) whether the movant has interests
17 antagonistic to or in conflict with those of the class. *Lerwill v. Inflight Motion Pictures*, 582 F.2d 507,
18 512 (9th Cir. 1978); *see also Berger*, 257 F.3d at 479-80 (citing *Amchem Products, Inc. v. Windsor*, 521
19 U.S. 591, 625 (1997)).

20 Next, the competing movants may *present evidence* to rebut the presumptive lead plaintiff's
21 prima facie showing that it satisfies Rule 23's typicality and adequacy requirements. *See* 15 U.S.C. §§
22 78u-4(a)(3)(B)(iii)(II); *see also In re Cavanaugh*, at *2 n.2, 3. If that rebuttal is successful, the court
23 must then repeat the process.

24 **II. Lead plaintiff**

25 The PSLRA provides that the district court shall determine which prospective lead plaintiff has
26 the largest financial interest in the relief sought by the class, but does not specify what factors to

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28 ⁶ *In re Cavanaugh* cautions that "the court must keep firmly in mind that the inquiry is not into the adequacy or fitness of counsel but into the adequacy of plaintiff, and the choice of counsel is only an indicator--and a relatively weak one at that--of plaintiff's fitness." *In re Cavanaugh*, at *5.

1 consider when making that determination. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). Courts considering
2 the issue have focused in on one of two approaches. The first considers the following factors: (1) the
3 number of shares the movant purchased during the class period; (2) the total net funds expended by the
4 plaintiffs during the class period; and (3) the approximate losses suffered by the plaintiffs. *See In re*
5 *Cendant Corp. Litig.*, 264 F.3d 201, 262 (3rd Cir. 2001). *See also In re Olsten Corp. Secur. Litig.*, 3
6 F.Supp.2d 286, 297 (E.D.N.Y. 1998); *In re Nice Sys. Secur. Litig.*, 188 F.R.D. 206, 217 (D.N.J. 1999).
7 “These factors are useful, because they look to relatively objective indicators, such as number of shares
8 purchased or sold, rather than to the ultimate question of damages.” *See Aronson v. McKesson HBOC,*
9 *Inc.*, 79 F.Supp. 2d 1146, 1158 (N.D. Cal. 1999). Other courts look to the various movants’ potential
10 recovery and focus on the net shares purchased during the class period. *In re Network Assocs., Inc.*
11 *Secur. Litig.*, 76 F.Supp.2d 1017, 1027 (N.D. Cal. 1999). This approach may be supplemented by
12 factoring in the losses suffered by selling shares during the class period on the rationale that those losses
13 are recoverable under the PSLRA. *See In re Critical Path, Inc. Secur. Litig.*, 156 F.Supp.2d 1102, 1108
14 (N.D. Cal. 2001). “Any time the question appears genuinely contestable, . . . a district court would be
15 well within its discretion in requiring that competing movants submit documentation as to their holdings
16 in the defendant company or companies and in seeking further information if it deems the original
17 submissions to be an inadequate basis for an informed decision.” *In re Cendant Corp. Litig.*, 264 F.3d at
18 262.

19 Movants have not systematically applied either approach but have best approximated the latter
20 approach, implicitly agreeing that net loss, which is based on the number of shares purchased and sold
21 during the class period, is the relevant figure. The Reform Act requires that the court engage in “speedy
22 consideration of the lead plaintiff question so as not to delay further proceedings.” *In re McKesson*
23 *HBOC, Inc. Secur. Litig.*, 97 F.Supp.2d 993, 996 (N.D. Cal. 1999). With that goal in mind and given the
24 absence of any *dispute* regarding the methods used by the parties, the court considers the following
25 alleged losses in determining which movant suffered the largest financial loss: (1) The Remedy Group
26 (approximately from \$35.8 million to \$47.4 million), (P&A at 8:6; Ranchod Decl. ¶ 2; Opp. Br. at 1
27 n.2); (2) The Loran Group (approximately \$22.5 million), (P&A at 4:13-14; Cera Decl. Ex. A); (3) The
28 Retirement Systems (approximately \$18.5 million), (P&A at 1:4 n.1; DeLange Decl. Exs. A-D); (4)

1 Societe Generale (approximately \$6,735,204), (P&A at 2:16); (5) The Needham Growth Fund
2 (\$2,134,824), (P&A at 6:15); (6) StoneRidge Investment Partners, LLC (\$2,017,492), (P&A at 7:21); (7)
3 SURSI (\$1,815,498), (P&A at 2:16); (8) James Poe (approximately \$1,386,135), (P&A at 8:13); (9)
4 Goldstein Group (approximately \$930,000), (P&A at 1:4); (10) Bikkina Group (approximately
5 \$335,000), (P&A at 1 n.1); (11) Henry Frankel (\$285,800), (P&A at 1:9); (13) David Cranford
6 (approximately \$153,000), (P&A at 4:22); (14) Peregrine Employees (\$126,830), (P&A at 2:20); (15)
7 Section 11 Claimants (approximately \$73,000), (P&A at 4:4); and (16) Camarillo Group (\$66,510),
8 (P&A at 10). Robert Cannon alleges that he purchased 450 thousand shares during the class period but
9 does not state his loss in a dollar amount. (P&A at 9:7).

10 A. The Remedy Group

11 The Remedy Group is comprised of former directors, officers, founders and securities holders of
12 Remedy Corporation, a public company acquired by Peregrine Systems, Inc. on August 27, 2001. (P&A
13 at 8:2-5). The Remedy Group's exact losses are in dispute, in part because the Remedy Group itself has
14 not settled on one figure, but the court will assume for the purposes of argument that it has the largest of
15 the movants' losses.⁷ Even the Loran Group, with the next largest losses, estimates The Remedy Group's

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17 ⁷ In its reply brief, the Remedy Group claims financial losses of \$45.2 million after removal
18 of the unvested Peregrine options. (RG Reply Br. at 1:5-6). Its members certify that they acquired a
19 collective 1,226,258 shares and 912,614 options, and that they sold 35,000 shares and 39,357
20 options/shares. (Ranchod Decl. Exs. C-H). The individual members of the Remedy Group certify that
21 the bulk of their shares were acquired through the Peregrine/Remedy Merger Exchange in the form of
options, which some of them later exercised. Only a small number of shares were acquired on the open
market. They calculated a \$47.5 million collective loss by multiplying the number of options received by
the closing price on August 27, 2001, and concede that a net value calculation would substantially
reduce their claimed approximate loss. (P&A Exs. C n.1, D n.1, E n.1, H n.1). They nonetheless allege in
their opposition brief that their loss is at least \$35.8 million. (Opp. Br. at 1 n.2).

22 The Retirement Systems contend that The Remedy Group's losses are impossible to calculate
23 because it did not provide critical information, such as the exercise prices, whether the options were
vested, and their expiration dates, and that the Remedy Group arrived at the overstated \$35.8 million
24 figure by valuing the options as shares. (RG Opp. Br. at 7:1-9). The Loran Group also argues that The
Remedy Group's losses are overstated because it used the gross value of options acquired by members
of the Remedy Group at the time the company was acquired by Peregrine, ignoring the exercise price of
the options. (LG Opp. Br. at 9:8-21). The Loran Group approximates The Remedy Group's losses at
25 \$36.8 million, using net values. (*Id.*). The Loran Group argues that the Remedy Group's alleged losses
cannot include those of its member Robert Mueller, who has a conflict of interest because he is
26 employed by Peregrine in an executive capacity. (LG Opp. Br. at 4:3-4). The Loran Group estimates that
the remaining members of the Remedy Group lost an approximate \$15.5 million by subtracting
27 Mueller's loss from the \$36.8 million. (LG Opp. at 9:20-22). The Goldstein Group describes the
Remedy Groups damages calculations as "highly suspect or inaccurate" because they are derived from
28 their acquisition of options to purchase Peregrine shares. It explains that the damages calculations cannot
be correctly calculated because the Remedy Group has not provided the court with the cost of acquiring

1 loss to be \$36.8 million if Mueller's losses are included.⁸

2 The PSLRA provides that the most capable of adequately representing the interests of class
3 members "is the one who has the greatest financial stake in the outcome of the case, *so long as he meets*
4 *the requirements of Rule 23.*" See *In re Cavanaugh*, at *2. Assuming that the Remedy Group suffered
5 the greatest loss, the court must now focus on it and determine whether "based on the information [it]
6 provided in [its] pleadings and declarations, . . . satisfies the requirements for Rule 23(a), in particular
7 those of 'typicality' and 'adequacy.'" *Id.*

8 In its pleadings and declarations, the Remedy Group, presents the following case for typicality.
9 First, members of The Remedy Group acquired Peregrine securities at artificially inflated prices as a
10 result of false and misleading financial statements for the years 2000, 2001 and 2002. (P&A at 13:9-15).
11 Thus, their claims arise from the same event or course of conduct giving rise to the other class members'
12 claims. Second, the members of The Remedy Group are the only movants who can satisfy Rule 23's
13 requirements as to the subclass of Remedy shareholders because they acquired their Peregrine securities
14 pursuant to a registration statement, proxy statement and prospectus, as well as per market purchases.
15 Thus, they have standing to assert the section 11 claims, while the open-market purchasers do not. (*Id.* at
16 13:19-25).

17 The Remedy Group claims to satisfy the adequacy requirement because they have indicated that
18 they will protect the interests of the class by providing certification to that effect and retaining counsel
19 with considerable experience in the prosecution of class action and federal securities law claims. (*Id.* at
20 14:6-9; Ranchod Decl. ¶¶ 5-11). The Remedy Group claims that it meets the criteria established by the
21 Securities and Exchange Commission ("SEC"), which is used as a benchmark for determining when the
22 group is small enough to effectively manage the litigation and lawyers, because it has five individual
23 members with pre-existing relationship in that they all served as officers, directors or founders of
24 Remedy and most of them evaluated and recommended Peregrine's proposed acquisition of Remedy to
25 _____
26 the options. (GO Opp. Br. at 5 n. 4).

27 ⁸ The Remedy Group has not requested that the court consider it as a viable candidate for
28 lead plaintiff without Mueller. Rather, the Remedy Group requests that if the court concludes that a
group may not be appointed lead plaintiff that it consider Mueller for lead plaintiff because he is the
individual with the greatest losses. For reasons set forth in this opinion, the court finds that Mueller
would not sufficiently represent the interests of the class. (Reply Br. at 3:10-12).

1 Remedy's shareholders. (P&A at 14:28-15:3).

2 Competing movants contend that the Remedy Group does not fulfill either of the Rule 23
3 requirements at issue here for the following reasons: (1) the Remedy Group is not a typical plaintiff
4 because its members obtained the bulk of their Peregrine shares through a merger transaction, which
5 would make them privy to non-public information and subject them to unique defenses because they did
6 not acquire their shares solely in reliance on the market price, (SG Opp. Br. at 4; GO Opp. Br. at 5 n.4;
7 RS Opp. Br. at 2:15-23; 12:22-13:22; Poe Opp. Br. at 9:10-10:1; SURSI Opp. Br. at 4:3-28; 5:9-17; BG
8 3:23-5:3);⁹ (2) the members of the Remedy Group will not adequately represent the remaining class
9 members because they formed a group for the purpose of aggregating their losses and have not
10 demonstrated that it has the ability to function together in the litigation, communicate effectively,
11 monitor counsel and direct the litigation, (RS Opp. Br. at 10:21-11:3; 12:5-12; SURSI Opp. Br. At 5:19-
12 7:5; BG at 5:5-13); (3) The Remedy Group will not adequately represent the interests of the class
13 members because the interests of Doug Mueller, the member of the Remedy Group with the single
14 largest loss, are in conflict with those of the remaining class members because Mueller is currently
15 employed by Peregrine in its "Remedy's Management Team"; (RS Opp. Br. at 13:23-14:1; LG Opp. Br.
16 at 2:2-24, 3:26-4:20); (4) Mueller's involvement as lead plaintiff would trigger any "insured versus
17 insured" exception in Peregrine's officers and directors' insurance policy, placing out of the remaining
18 class members' reach any insurance monies available to satisfy their claims, (LG Opp. Br. at 7:3-6); and
19 (5) the Remedy Group's relationship with Peregrine extends beyond the Remedy Group's investments in
20 that some members of the Remedy Group may have entered into new employment or consulting
21 relationships with Peregrine after Remedy was acquired. (Poe Opp. Br. at 10:2-9). The court finds it
22 necessary to address only movants' arguments regarding unique defenses and conflict of interest.

23 **1. Unique defenses**

24 The Remedy Group replies that "most" of its members "had no access to financial information at
25 all. Those that did relied on public financial information that contained the reporting errors that are the
26 subject of this suit." (Reply Br. at 5:19-22). The Remedy Group supports that argument with

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28 ⁹ Where necessary, the court has used abbreviations in citations to the movants' briefs.
"SG" refers to Societe General, "GO" to the Goldstein Group, "RS" to the Retirement Systems, "BG" to
the Bikkina Group, "LG" to the Loran Group and "RG" to the Remedy Group.

1 declarations from only three of its six members: Douglas Mueller, John Shoch and Ron J. Fior. Mr.
2 Mueller was the founder of Remedy Corporation. (Shoch Decl. ¶ 2). After the merger, he was made
3 Chief Scientist and reported to Jim Peterson, the Vice President of Engineering at Remedy. (Mueller
4 Decl. ¶ 3). There were two reporting levels between Mr. Peterson and defendant Stephen Gardner. (*Id.*).
5 In June 2002, changes were made and Mueller reported to Larry Garlick, who reported to the head of
6 Peregrine. (*Id.*). On April 1 2002, Mr. Mueller's title was changed to "Fellow, which was a senior
7 technical role." (*Id.*). Mr. Mueller states that he "was involved in the due diligence review of the
8 Peregrine/Remedy merger. However, [he] was only involved from a technology standpoint and had no
9 interaction with financial data. Company finances were never discussed with [him]. [He] was told about
10 the Peregrine/Remedy merger on only the Wednesday prior to the weekend merger date." (*Id.* ¶ 5). Mr.
11 Shoch was an original investor and on the Board of Directors of Remedy Corporation. (Shoch Decl. ¶ 2).
12 He makes no statement regarding his knowledge of financial information at the time of the merger. Mr.
13 Fior became the Chief Financial Officer at Remedy Corporation several years prior to the merger after
14 another of the Remedy Group's members, George de Urioste, left the company. (*Id.*). He "participated
15 directly in financial due diligence near the date of the Peregrine/Remedy Merger. . . . [He] and Remedy's
16 auditors . . . reported directly to Remedy Group members John Shoch and Harvey Jones, who were both
17 on the Remedy Board of Directors." (Fior Decl. ¶ 5). He nonetheless contends that "[i]n performing
18 financial due diligence, our investigation was grounded in the public financial data." (*Id.* ¶ 6) (emphasis
19 added). The remaining three members of the Remedy Group--Harvey Jones, who sat on the Board of
20 Directors; George de Urioste, the Chief Financial Officer, and Daniel Weller, founding engineer of
21 Remedy Corporation--have not submitted declarations to overcome competing movants' rebuttal.

22 At this initial stage, the court has the job of protecting the interests of the class and may decline
23 appointment of a prospective lead plaintiff, as not meeting Rule 23's typicality requirement and/or the
24 requirement of 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(bb), on the grounds that such appointment may affect
25 the class at later stages in the lawsuit because the movant has not presented sufficient evidence of the
26 information on which it did rely in obtaining its shares. The most instructive case on this point is *In re*
27 *Critical Path, Inc. Secur. Litig.*, 156 F.Supp.2d at 1110-11. In *Critical Path*, the court denied
28 appointment of a movant that had "submitted a declaration stating that it 'did not rely on non-public

1 information in making the decision to exchange [its] PeerLogic shares for Critical Path shares. Rather
2 [its] investment decision was based on publicly available information that was known to the entire
3 market.” *Id.* at 1110. The court then noted that the movant “does not elaborate on the information upon
4 which it relied. It claims it is a typical class member on the theory that a searching inquiry under Rule 23
5 is not appropriate at this state in the litigation,” and that its conclusory declaration was sufficient to
6 entitle it to “most adequate plaintiff” status. *Id.* The court rejected that argument, finding that
7 “[a]ppointing as lead plaintiff one who acquired its shares in a private transaction invites lengthy
8 litigation both at the class certification state and thereafter of whether that plaintiff is subject to unique
9 defenses. Certainly the court should not appoint as lead plaintiff one whose appointment will invite
10 scrutiny of the details of a private transaction.” *Id.* at 1110-11. In sum, the conclusory declarations,
11 devoid of any information regarding the information on which movant did rely in obtaining its shares,
12 were insufficient to establish compliance with Rule 23.

13 The declarations offered here by the Remedy Group are also insufficient to demonstrate the
14 absence of issues unique to it which may sidetrack litigation at a later stage. “Whether the information to
15 which these individuals had access would be relevant to a decision to purchase [Peregrine] securities,
16 and whether plaintiffs actually relied on such information in their decision to purchase, are difficult
17 factual questions which cannot be resolved at this stage of the litigation. However, whether these
18 defenses will be successful is of no matter. The fact that plaintiffs will be subject to such defenses
19 renders their claims atypical of other class members.” *See Landry v. Price Waterhouse Chartered*
20 *Accountants*, 123 F.R.D. 474, 476 (S.D.N.Y. 1989).

21 The Remedy Group has offered declarations from only three of its six members. Of those three,
22 only one, Mr. Mueller, the founder of Remedy Corporation, definitively states that he had only public
23 financial information. Mr. Shoch makes no statement at all on the point. Mr. Uriost’s statement that the
24 investigation in which he was involved was “grounded in” public information is too equivocal to satisfy
25 the court that the Remedy Group is not subject to unique defenses. The exact financial knowledge held
26 by these individuals at the time they acquired their shares will no doubt be fleshed out during discovery
27 and issues unique to the Group raised at that time. Those issues loom too large for the court to determine
28 at this preliminary stage that the Remedy Group is able to adequately represent the interests of the

1 remaining class members.

2 **2. Mueller's conflict of interest**

3 The competing movants raise the issue of whether Mueller has a personal conflict of interest with
4 the remaining class members as a result of his position with Peregrine. Competing movants argue that
5 because he is employed by Peregrine and because he has an interest in continuing his employment and in
6 the continuing viability of his organization, that Mueller will have "conflicting duties and motives" that
7 render him an ineffective lead plaintiff. (LG Opp. Br. at 6:16-7:2).

8 The Remedy Group contends that neither Mueller, nor the Group, has interests that conflict with
9 those of the remaining class members because Mueller's employment with Peregrine is about to end as a
10 result of Peregrine's September 22, 2002 Chapter 11 bankruptcy filing and announcement that it will sell
11 the Remedy Unit to BMC Software Inc. (Reply Br. at 1:16-20). Mueller will therefore sever all ties with
12 Peregrine in the next 45 days. (*Id.* at 18-20). The Remedy Group further asserts that even if the sale were
13 not to take place that Mueller has no conflict of interest because he is only an executive of the Remedy
14 Unit and has no interaction with the Peregrine executive team. (*Id.* at 4:2-3). The Remedy Group
15 characterizes Mr. Mueller's position as that of only "an engineer" who has nothing to do with the
16 financial aspect of the company, but appears to be deliberately vague as to Mr. Mueller's actual role.¹⁰
17 (*Id.* at 4:8).

18 As an initial matter and based on the evidence presented thus far, the court is not convinced that
19 Mueller is no more than "an engineer" at Peregrine Systems' Remedy Unit. He the founder of Remedy
20 Corporation and acquired 1,096,854 Peregrine shares and options, the lions share of which he acquired
21 as a result of the merger. (Mueller Decl. ¶ 7). Remedy Corporation credits Mueller with "lead[ing]
22 Remedy's future technology direction. He is a co-founder of Remedy Corporation and has been involved
23 with the product architecture and development of the Action Request System and applications. Main
24 responsibilities include defining the product vision and direction." (RS Opp. Br. Ex. H). That Mueller
25 will sever all ties with Peregrine within the next forty-five days as a result of Peregrine's sale of the

26
27 ¹⁰ In his declaration, Mueller states that his "new title, Chief Technology Officer for the
28 Remedy Unit, is a title only and nothing more than that." (Mueller Decl. ¶ 4). He might have presented
the court with a comprehensive description of his position with the Remedy Unit, his responsibilities and
duties, but did not.

1 Remedy Group is of limited import. Court-supervised settlement negotiations are calendared for October
2 25, 2002, and it is expected that the lead plaintiff and its lead counsel will attend. [Doc. No. 125].

3 Another group member stated that the “Members of the group all communicate regularly about issues
4 that arise in this case. The most common form of communication is through e-mail, where all members
5 of the group are copied, though we sometimes speak on the phone as well. We communicate with our
6 counsel in the same manner. We can always have meetings or conference calls when necessary to
7 discuss something in person.” (Shoch Decl. ¶ 5). Presumably, as the member with the greatest alleged
8 losses of \$23.1 million, Mueller has played an active role in working with counsel and the other group
9 members to drive the litigation thus far. (Mueller Decl. ¶ 7). Mr. Mueller’s business, the Remedy
10 Corporation, and Mr. Mueller himself have relationships with Peregrine that, at the very least, create the
11 appearance that they are not able to adequately investigate and prosecute this action on behalf of the
12 absent members of this class. “A class action representative serves as a fiduciary to advance and protect
13 the interests of those whom he purports to represent; their interests are entrusted to the fiduciary’s
14 diligence and successful protection of the class depends upon the named plaintiff.” *See Landry*, 123
15 F.R.D. at 477; *see also In re Oxford Health Plans, Inc., Secur. Litig.*, 182 F.R.D. 42, 46-47 (1998)(citing
16 *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949)). The court finds that Mueller, and
17 therefore the Remedy Group, are not able to act as effective lead plaintiffs in representing remaining
18 class members.

19 **B. The Loran Group**

20 The court finds that the Loran Group is the is the “most capable of adequately representing the
21 interests” of the section 11 class members. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). The Loran Group consists
22 of former officers, directors and/or employees of the Loran Network Holding Corporation, Inc. who
23 obtained Peregrine common stock when Peregrine acquired the company. The Loran Group alleges an
24 approximate collective loss of \$22.5 million.¹¹ (LG P&A at 1:12-2:9, Ex. A). The Loran Group states

25
26 ¹¹ The Retirement Systems contends that the Loran Group lost between \$4 million and \$13
27 million and that it overstated its losses by not accounting for the fact that the stock it acquired was
28 unregistered and restricted. (RS Opp. Br. at 6:10-21). It arrives at the \$4 million figure by applying a
35% discount to the restricted shares and the \$13 million figure by using the market price of the stock on
the date Peregrine registered some of the shares it exchanged in the Loran Group transaction. (*Id.* at 6
n.9). The Retirements Systems does not, however, provide any explanation for the use of a 35% discount
or any basis for its indefinite conclusion that the Loran Group lost between \$4 and \$13 million. The

1 that it calculated the net losses attributed to options, or the value of the stock at the time the option was
2 acquired less the value of the stock at the time the option was exercised. (*Id.* at 9:13-15).

3 Appointment of the Loran Group as lead plaintiff is opposed by competing movants for the
4 following reasons: (1) the Loran Group, like the Remedy Group, is subject to unique defenses because
5 (a) its members relied on insider information in acquiring their Peregrine shares, (SG Opp. Br. at 4:17-
6 5:10; BG Opp. Br. at 4:15-18; RS Opp. Br. at 5:9-17; GO Opp. Br. at 5 n.4); (b) because the Loran
7 Group's members are bringing only section 11 claims, they do not have the incentive to advance the
8 section 12 claims, (RS Opp. Br. at 4:17-28), (c) the members agreed to indemnify Peregrine against
9 "certain liabilities" under United States law in return for Peregrine's agreement to register some of the
10 unregistered shares for resale pursuant to a separate Peregrine offering, (RS Opp. Br. at 14:2-10; RS
11 Opp. Br. at 5:1-8); (2) the Loran Group is an improper aggregation of members that has not adequately
12 demonstrated its ability to work as a cohesive unit to represent the class. (SG Opp. Br. at 3 n. 1; BG at
13 5:5-13; RS Opp. Br. at 5:19-7:5; Poe Opp. Br. at 10:12-11:3). The court will not address the
14 indemnification argument, finding that it is speculative because those who raised it have not presented
15 any evidence of what liabilities it concerns or how the agreement affects this case.

16 The Loran Group replies that its members have a relationship predating the filing of this lawsuit
17 and that they are able to operate a cohesive decision-making unit. To this end, they have designated
18 Leighton Powell and David Levy to act as its executive decision makers. (LG Reply Br. at 9:18-10:4).
19 The Group further argues that it is not atypical of the general class because its members relied on
20 nothing more than publicly-disseminated information--namely, copies of filings made by Peregrine with
21 the SEC--in obtaining their Peregrine shares. (*Id.* at 10:12-14; 11:11-16). "[T]here is no evidence that the
22

23 Retirement System's argument alone is insufficient, since those opposing appointment of a movant for
24 lead plaintiff are required to present evidence in support of their argument. *See* 15 U.S.C. § 78u-
4(a)(3)(B)(iii)(II).

25 The Goldstein Group also argues that the Loran Group's calculations are suspect, and that "*it*
26 *appears* that Levy, Powell and Holman of the Loran Group included proceeds from the sale of options in
27 their damages calculations; those proceeds are properly subtracted from damages, not added. It also
28 *appears* that the Loran Group . . . multiplied the number of Peregrine shares they acquired by the market
price of Peregrine shares on the closing day of the acquisition, which incorrectly overstates damages."
(GO Opp. Br. at 5-6 n.4) (emphasis added). However, the Goldstein Group has not provided the court
with any numbers, makes its argument in equivocal language and stops short of arguing that its claimed
errors would materially affect the court's analysis. Again, this proffers falls short of the evidentiary
requirement set forth in the PSLRA. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

1 Loran Group received **any** inside information, let alone inside information that was inconsistent with the
2 allegedly false and misleading statements regarding Peregrine's financial results that defendants had
3 publicly issued." (*Id.* at 13:7-9) (emphasis in original).

4 Unlike the Remedy Group, the Loran Group has proffered sufficient evidence to show at this
5 stage in the litigation that its members did not rely on private information in obtaining their Peregrine
6 stock. *In re Critical Path, Inc. Secur. Litig.*, 156 F.Supp.2d at 1110-11. Furthermore, the Loran Group is
7 not tainted by any conflict of interest such as that caused by Mueller's employment with Peregrine and
8 membership in the Remedy Group.

9 The Loran Group has also filed declarations from each of its ten members. David Levy,
10 Chairman of the Board of Loran Network Holding Corporation, Inc., and Leighton Powell, Chief
11 Executive Officer of Loran Network Holding Corporation, Inc., state that they were

12 personally involved in negotiating the transaction whereby Peregrine acquired Loran.
13 During the course of that negotiation, Loran was provided information from Peregrine
14 which consisted of copies of filings made by Peregrine with the [SEC]. These filings . . .
15 included Peregrine's Annual Report on Form 10-K for the fiscal year ended March 31,
16 2000. It was represented by Peregrine that the SEC Filings complied with all
17 requirements of the U.S. federal securities laws, and that they did not contain any untrue
18 statement of a material fact or omit to state a material fact required to be stated therein or
19 necessary to order to make the statements therein, in light of the circumstances under
20 which they were made, not misleading. The Loran executives who negotiated the merger
21 with Peregrine, including [ourselves], received no information about the business of
22 Peregrine other than what was reflected in the referenced SEC filings, and information
23 relating to Peregrine's intentions with regard to the integration of Loran's principal
24 software product into Peregrine's suite of product offerings.

19 (Levy Decl. ¶ 3; Powell Decl. ¶ 3). Mr. Levy and Mr. Powell state that they "negotiated the price for
20 Peregrine's acquisition of Loran based on what [they] believed to be the truthfulness of Peregrine's
21 representations in the SEC filings, and the integrity of the price of Peregrine common stock as traded on
22 the NASDAQ market system as reflecting all available material information regarding the status of
23 Peregrine's business." (Levy Decl. ¶ 4; Powell Decl. ¶ 4). The remaining members of the group affirm in
24 identically worded declarations the Group's ability to function as one decision making unit and state that
25 Mr. Levy and Mr. Powell have been designated the executive decision makers for the group in matters
26 related to this litigation. (Schenkel Decl. ¶ 2; Virden Decl. ¶ 2; Willemse Decl. ¶ 2; Holman Decl. ¶ 2;
27 Benesko Decl. ¶ 2; Slavitch Decl. ¶ 2; Maheu Decl. ¶ 2; Rollins Decl. ¶ 2). Mr. Levy and Mr. Powell
28 affirm the same. (Levy Decl. ¶ 6; Powell ¶ 6).

1 **1. Numerosity of the group**

2 “At some point, a group becomes too large for its members to operate effectively as a single
3 unit.” *See In re Cendant Corp. Litig.*, 264 F.3d at 267; *see also In re Advanced Tissue Sciences Secur.*
4 *Litig.*, 184 F.R.D. 346, 352 (S.D. Cal. 1998) (Gonzalez, J.) (denying lead plaintiff status to a group of
5 over 250 unrelated, individual investors, and another group of 165 unrelated, individual investors
6 because such appointment would “subvert the legislative intent behind the PSLRA and would threaten
7 the interest of the purported future class.”). The SEC counsels that groups with more than five members
8 are presumptively too large to work as a one decision making body. *In re Cendant Corp. Litig.*, 264 F.3d
9 at 267 (citing Brief for the Securities and Exchange Commission as Amicus Curiae at 17 n. 13). The ten
10 members of the Loran Group have a professional relationship predating this litigation and have each
11 declared that they have the ability to function as a group and have designated two members as the
12 group’s executive decision makers. Those two individuals, Leighton Powell, former Chief Executive
13 Officer, and David Levy, former Chairman of the Board, “coordinated the communications among the
14 Loran Group which led to the filing of its motion for appointment of Lead Plaintiff.” (Powell Decl. ¶ 6;
15 Levy Decl. ¶ 6). Based on these declarations, the court finds that the group of ten is not too numerous to
16 function as one decision making body and has demonstrated at this stage of the litigation that it is
17 sufficiently close-knit that it may work as a single decision making unit to direct the litigation and
18 effectively represent the remaining section 11 class members.

19 **2. Typicality**

20 Mindful that the typicality requirement “refers to the nature of the claim or defense of the class
21 representative, and not to the specific facts from which it arose or the relief sought,” *see Hanon*, 976
22 F.2d 497 at 508, the court finds that because the Loran Group is asserting section 11 claims it does not
23 satisfy the typicality requirement with respect to the section 10(b) class members.¹²

24
25 ¹² The Loran Group cites to *Realmonde v. Reeves*, 169 F.3d 1280 (10th Cir. 1999), in
26 support of its argument that movants obtaining stock in a privately-negotiated stock-for-stock merger are
27 not “atypical” of class members who acquired shares on the open market. (Reply Br. at 11:3-5).
28 *Realmonde* holds only that such movants may be included in the plaintiff class in a securities fraud class
action against defendants and does not address the issue of whether such plaintiffs may be appointed
lead plaintiff and assume the responsibility of directing litigation on behalf of themselves and class
members who did not acquire their stock in a privately-negotiated transaction, but who instead
purchased on the open market.

1 For typicality, the plaintiff's claims must arise from the same event or practice or course
2 of conduct that gives rise to the claims of the other class members, and his or her claims
3 must be based on the same legal theory. In these circumstances, the plaintiff will advance
4 the interests of the class members by advancing her or his own self-interest. The
alignment of interest is not the test for typicality; it is the result. The plaintiff and class
members have similar interests because they have similar claims.

5 See Newberg, et al., *Newberg on Class Actions* § 22.17, at 22-61 (3d Ed. 1993).

6 The elements of a section 10(b) claim are: 1) a false statement or an omission of a material fact; 2)
7 reliance; 3) scienter; and 4) resulting damages. See *Paracor Finance v. General Electric Capital Corp.*,
8 96 F.3d 1151, 1157 (9th Cir.1996). The plaintiff in a section 11 claim must demonstrate (1) that the
9 registration statement contained an omission or misrepresentation, and (2) that the omission or
10 misrepresentation was material, that is, it would have misled a reasonable investor about the nature of
11 his or her investment. See *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1995) (citing *In re VeriFone*
12 *Secur. Litig.*, 11 F.3d 865, 868-69 (9th Cir.1993)). Unlike a section 10(b) fraud claim, no scienter is
13 required for liability and defendants are liable for innocent or negligent material misstatements or
14 omissions. *Id.* (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983)). Although the
15 section 10(b) and 11 claims in this case are related such that they warrant consolidation, see "Order
16 Granting Plaintiffs' Motions to Consolidate all Related Cases," [Doc. No. 67], their differences raise
17 issues that cut against appointment of a section 11 plaintiff to lead litigation in which a substantial
18 portion of the class brings section 10(b) claims.

19 3. Appointment of co-lead plaintiffs

20 The court finds that these issues are appropriately addressed at this stage of the litigation by
21 appointment of co-lead plaintiffs, one to lead litigation with respect to the section 11 plaintiffs and
22 another to lead litigation with respect to the section 10(b) plaintiffs. *Cf. Smith v. Suprema Specialties*,
23 206 F.Supp.2d 627, 642 (D.N.J. 2002) (denying movant's request for appointment as co-lead plaintiff in
24 part because court had already found a lead plaintiff that had brought claims under both the Securities
25 Act and the Exchange Act and movant's interests were therefore adequately protected).

26 Legitimate concerns accompany the appointment of co-lead plaintiffs. A primary objective of the
27 PSLRA was to limit the influence of plaintiffs' counsel and delegate more control to the plaintiff. Some
28 courts, including this court, have rejected the appointment of co-lead plaintiffs, primarily because

1 “[i]ncreasing the number of Lead Plaintiffs would detract from the Reform Act’s fundamental goal of
2 client control, as it would inevitably delegate more control and responsibility to the lawyers for the class
3 and make the class representatives more reliant on the lawyers.” See *Gluck v. Cellstar Corp.*, 976
4 F.Supp. 542, 549 (N.D. Tex 1997) (citing *In re Donnkenny Inc. Secur. Litig.*, 171 F.R.D. 156, 157-58
5 (S.D.N.Y. 1997)); see also *In re Advanced Tissue Sciences Secur. Litig.*, 184 F.R.D. 346, 351 (S.D. Cal.
6 1998)(Gonzalez, J.); *Reiger v. Altris Software, Inc.*, No. 98cv528-J (JFS), 1998 WL 1986953 (S.D. Cal.
7 Sept. 14, 1998). Appointment of co-lead plaintiff would also reduce the responsibility and control of any
8 one lead plaintiff and cause an unnecessary growth of attorneys fees and costs. *Id.* However, those same
9 courts have (1) conceded that appointment of co-lead plaintiffs may be appropriate where the goals of
10 the PSLRA are not undermined and/or (2) limited their rejection of co-lead plaintiffs to the facts of the
11 case. See *Gluck*, 976 F.Supp. at 549-50; *In re Advanced Tissue Sciences Secur. Litig.*, 184 F.R.D. at 351
12 (finding that “the appointment of members from both moving groups would not serve to add any new,
13 unrepresented interests to the leadership of this suit”); *Reiger*, at *6 (holding that the appointment of co-
14 lead plaintiffs in that case would not further the purposes of the PSLRA).

15 The leading case supporting appointment of co-lead plaintiffs is *In re Oxford Health Plans, Inc.*
16 *Secur. Litig.*, 182 F.R.D. 42 (S.D.N.Y. 1998). The court granted the motions of two institutional
17 investors and a group of major investors to be appointed co-lead plaintiffs to better provide “the
18 proposed class with the substantial benefits of joint decision-making and joint funding” and because co-
19 appointment is consistent with the language of the language and purpose of the PSLRA. *Id.* at 45. The
20 statute directs the court to “appoint as lead plaintiff the member *or members* of the purported plaintiff
21 class that the court determines to be most capable of adequately representing the interests of class
22 members[.]” See 15 U.S.C. § 78u-4a(3)(B)(i)(emphasis added). “the House Conference Report on the
23 PSLRA stated that the lead plaintiff provisions were ‘intended to encourage the most capable
24 *representatives* of the plaintiff class to participate in class action litigation and to exercise supervision
25 and control of the lawyers for the class.’” See *In re Oxford Health Plans, Inc. Secur. Litig.*, 182 F.R.D. at
26 45(quoted H.R. Rep. No. 104-369 at 32 (1995) *reprinted in* 1996 U.S.C.C.A.N. 730). Here,
27 appointment of co-lead plaintiffs will better represent the class members’ varying and perhaps
28 conflicting interests. See *id.* at 47; *Yousefi v. Lockheed Martin Corp.*, 70 F.Supp.2d 1061, 1070 (C.D.

1 Cal. 1999) (appointing an individual and institutional investor to serve as co-lead plaintiffs). The court
2 therefore **GRANTS** the Loran Group motion, finding that it has the largest alleged loss and meets Rule
3 23's adequacy and typicality requirements as to the section 11 class members.

4 **C. The Retirement Systems**

5 The Retirement Systems consists of two institutional investors, the Teachers' Retirement system
6 of Louisiana and the Policemen and Firemen Retirement System of the City of Detroit, who collectively
7 lost an alleged \$18.5 million from the purchase of 1,599,000 shares of common stock in Peregrine. (RS
8 P&A at 1:2-6). The \$18.5 million figure is not disputed. Competing movants raise two objections to
9 appointment of the Retirement Systems: (1) the group consists of improperly amalgamated parties, the
10 Teacher's Retirement System's individual loss of \$13.8 million and the Police and Firemen Retirement
11 System's loss of \$4.7 million should be considered separately, (LG Opp. Br. at 3:16-17 n.5; 10:6-
12 11:16); (2) the Teacher's Retirement System of Louisiana is subject to the PSLRA's professional
13 plaintiff bar. (LG Opp. Br. at 11:19-14:2; SG Opp. Br. at 5:13-7:5; RS Opp. Br. at 15:21-17:10; Poe
14 Opp. Br. at 11:8-12:6).

15 The Retirement Systems replies that the professional plaintiff bar does not apply to institutional
16 investors, but that if the court finds that the Teachers' Retirement System of Louisiana is not a proper
17 lead plaintiff because of its past litigation experience, that it consider appointment of the Firemen
18 Retirement System of the City of Detroit alone. (Reply Br. at 2:17-20; 8:24-9:6). The Retirement
19 Systems does not address the issue of whether the two investors are improperly amalgamated for the
20 purpose of being able to allege a larger collective loss.

21 William Reeves, general counsel for the Teacher's Retirement System of Louisiana, and Ronald
22 Zajac, general counsel for the Firemen Retirement System of the City of Detroit, filed a joint declaration
23 providing no reason for their joint application other than that they "conferred and agreed that it would be
24 beneficial to have a joint prosecution of this action by Louisiana Teachers and Detroit P&F, both of
25 which are public institutions with many shared interest and with substantial losses." (Decl. ¶ 9).

26 The Retirement Systems has not provided any authority or rationale for its decision to combine
27 its losses. The court therefore assumes that the consolidation was for no other purpose than to gain
28 appointment over another movant, assuming they both satisfy Rule 23's adequacy and typicality

1 requirements, solely because the Retirement Systems allegedly suffered a greater loss. The PSLRA's
2 purpose for looking at the movant with the greatest financial loss is to favor institutional movants for
3 lead plaintiff status, but nothing in the PSLRA authorizes institutional plaintiffs to consolidate their
4 losses for the sole purpose of leapfrogging other movants. *See Aronson*, 79 F.Supp.2d at 1152-53 ("it
5 makes sense that one client will provide more control than a disjointed group concocted by plaintiffs'
6 counsel--even if the group consists of institutional investors"). The Court therefore declines to appoint
7 the Retirement Systems lead plaintiff. The court further declines to consider the request of the Firemen
8 Retirement System of the City of Detroit that the court consider it alone for lead plaintiff status because
9 its loss is less than that of competing movants who satisfy all of the PSLRA's requirements.

10 **D. Societe Generale**

11 Societe Generale is an investment company whose clients purchased 304,988 shares of Peregrine
12 stock and sustained an alleged collective loss of approximately \$6,735,204. (SG P&A at 2:2-4, 14-18;
13 7:11-13). None of those who filed an opposition brief disputed Societe Generale's alleged loss.
14 Competing movants do assert that Societe Generale is not adequate because (1) it is not a member of the
15 class as an investment advisor that did not purchase shares on its own and which has not shown that its
16 clients have authorized it to bring suit on their behalf. (RS Opp. Br. at 15:7-17:14; SURSI Opp. Br. at
17 8:13-9:11); (2) it submitted only bare claim forms, (SURSI Opp. Br. at 7:10-8:11); and (3) as a foreign
18 movant, its representation of other class members would be belabored with logistical problems. (Poe
19 Opp. at 12:9-13:4). The Bikkina Group endorses Societe Generale's appointment as lead plaintiff, a
20 move less altruistic than it may initially appear and which carries little weight with the court because the
21 two movants are represented by the same counsel. (BG Opp. Br. at 5).

22 In its reply brief, Societe General argues that its case is distinguishable from *Smith v. Suprema*
23 *Specialties, Inc.*, 206 F.Supp.2d 627 (D.N.J. 2002), the main case on which competing movants rely for
24 the proposition that an investment advisor may not act as lead plaintiff because it did not, itself, purchase
25 any shares but instead provided investment advice to its clients. Societe General also argues that being a
26 foreign investor whose clients purchased shares on the open market does not bar it from lead plaintiff
27 status as long as the court finds that logistical difficulties will not prevent it from efficiently prosecuting
28 the case.

1 In *Smith*, a movant in this case, StoneRidge Investment, an investment advisor and group
2 consisting of 22 unaffiliated client organizations, moved for lead plaintiff status. *Id.* at 633. The court
3 rejected StoneRidge's motion, finding that it "may not bring the action on behalf of its clients because it
4 did not function as a 'single investor' and it has not submitted any evidence that it received permission
5 to move on its clients' behalf. *Id.* at 634. Only money managers that qualify as a "single person" under
6 the PSLRA may serve as lead plaintiffs. *Id.* (citing *In re Waste Management, Inc.*, 128 F.Supp.2d 401
7 (S.D. Tex. 2000)(institutional investor was under the direction of a single individual)). The evidence
8 before the *Smith* court showed that StoneRidge Investment could not function as a "single person"
9 because (1) it "provided separate account management for individual investors, pension funds and profit
10 sharing plans, who were the actual purchasers of [the] stock;" (2) the "unaffiliated organizations . . .
11 undoubtedly ha[d] their own boards of trustees, and [were] subject to varying laws, rules and
12 regulations;" and (3) the clients were "under the control of many different management structures." *Id.*
13 The court found further fault with the motion because StoneRidge Investment did not provide evidence
14 that it was acting as attorney-in-fact for its clients and was authorized to bring suit. *Id.* "The clients'
15 mere grant of authority to an investment manager to invest on its behalf does not confer authority to
16 initiate suit on its behalf." *Id.* at 634-35.

17 Societe Generale replies that it "has represented to its proposed lead counsel that it has complete
18 investment authority and is the agent and attorney-in-fact with full power and authority to act in
19 connection with its investments. As the entity vested with legal responsibility for making the investment
20 decisions and authorized to act in connection with these investments as an attorney-in-fact, there can be
21 little dispute that Societe Generale is indeed an appropriate lead plaintiff candidate acting with full
22 authority of its clients." (Reply Br. at 6:9-14). What Societe Generale does not state is that it has
23 authority to institute suit and litigate on behalf of its clients. Neither has Societe Generale provided the
24 court with any evidence regarding the identity of its clients, their knowledge of or consent to Societe
25 Generale's lawsuit, or of any cohesive relationship between the clients other than that Societe Generale
26 advised them in making their investments. Given these issues regarding Societe Generale's
27 representation of its clients in this matter, the court finds that Societe Generale is not an appropriate lead
28 plaintiff as contemplated by the PSLRA.

1 **E. The Needham Growth Fund**

2 The Needham Growth Fund is “administered by a subsidiary of Needham & Company, a full
3 service specialty investment bank.” (P&A at 8:8-9). It alleges an undisputed loss of \$2,134,824 as a
4 result of its trades in Peregrine common stock. (*Id.* at 6:13-14). Competing movants oppose
5 appointment of the Needham Growth Fund because (1) like Societe Generale, it did not personally
6 purchase the shares but is a public mutual fund traded on NASDAQ that invests on behalf of its
7 thousands of shareholders, (SURSI Opp. Br. at 10:6-8); (2) its counsel filed duplicate lawsuits here and
8 in the United States District Court for the Southern District of New York and moved for lead plaintiff
9 and lead counsel status in both, thereby raising concerns regarding its squandering of resources and
10 desire to advance its own interests over those of the class; and (3) it is not clear that its client is aware
11 that counsel is seeking to prosecute a case in this court based on the Needham Growth Fund’s
12 Certification stating only that it had reviewed the complaint filed in the New York case. (SURSI Opp.
13 Br. at 10:5-11:17; ; RS at 17:16-18:11).

14 The Needham Growth Fund replies that it informed the New York court of pending actions in a
15 footnote in its motion for appointment as lead plaintiff in the New York case, (Reply Br. at 2:14-17;
16 Gray Decl. Ex. 1). The footnote states only that “A number of putative securities fraud class actions
17 against Peregrine Systems are pending in the United States District Court for the Souther District of
18 California.” (*Id.* Gray Decl. Ex. 1 n. 1). The Needham Growth Fund explains that it filed in New York
19 because it is in plaintiff’s best interest to litigate a securities case in the Second Circuit, which is
20 considered to have the most “lenient” pleading standard, whereas the Ninth Circuit standard is
21 considered one of the most onerous. (*Id.* at 2:22-3:12). The Needham Growth Fund provides no
22 substantive argument regarding its standing to initiate and manage litigation on behalf of its investors,
23 citing only to *In re Oxford Health Plans, Inc. Secur. Litig.*, 199 F.R.D. 119 (S.D.N.Y. 2001) and *In re*
24 *Federal-Mogul Corp. Secur. Litig.*, 166 F.Supp.2d 559 (E.D. Mich. 2001), for no specified point and
25 without even a page cite. Without more guidance, substantive argument and evidence, the court is unable
26 to discern any reason why the Needham Growth Fund is able to function as “a person” under the PSLRA
27 and finds that it is not an appropriate lead plaintiff for the same reasons that the court disqualified
28 Societe Generale.

1 **F. StoneRidge Investment Partners, LLC**

2 StoneRidge is an investment advisor that purchased Peregrine common stock in bulk and
3 allocated the shares to its managed accounts. (P&A at 2:11-13). It alleges that it has full discretion
4 regarding purchases for its customers' accounts and that it has a contractual right and fiduciary duty to
5 "take all actions appropriate to protect the investments." (*Id.* at 2:13-17). It purchased 135,495 shares of
6 Peregrine common stock during the class period and suffered an alleged loss of \$2,017,492. (*Id.* at 2:18-
7 19).

8 Competing movants argue that StoneRidge is an inappropriate lead plaintiff because, like Societe
9 Generale and the Needham Growth Fund, it is an investment advisor and did not purchase stock for
10 itself, but rather for its clients. (RS Opp. Br. at 15:27-16:5; SURSI Opp. Br. at 9:13-10:2; GO Opp. Br.
11 at 6: n.4; Poe Opp. Br. at 13:16-14:15). For the reasons set forth above, this court adopts the rationale of
12 *Smith*, in which the United States District Court of the District of New Jersey declined to appoint
13 StoneRidge as lead plaintiff in the case before it, finding that it "may not bring the action on behalf of its
14 clients because it did not function as a 'single investor' and it has not submitted any evidence that it
15 received permission to move on its clients' behalf. *Smith*, 206 F.Supp.2d at 634. Here, StoneRidge
16 Investment Partners has not filed a reply brief or filed any evidence showing that it is able to act as a
17 single investor in this case. For that reason, the court finds that StoneRidge Investment Partners is not an
18 appropriate lead plaintiff.

19 **G. SURSI**

20 For the reasons set forth below, the court finds that SURSI is the "most capable of adequately
21 representing" the interests of the section 10(b) class members. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i).
22 SURSI is a public pension fund organized under Illinois law which provides retirement benefits to
23 employees of Illinois' public higher education institutions. (P&A at 2:17-18). Its trustees, all state
24 governor appointees, have authorized it to move for lead plaintiff status. (*Id.* at 2:17-21). SURSI
25 purchased 120,199 shares of Peregrine common stock during the class period and alleges a loss of
26 approximately \$1,815,498. (*Id.* at 2:13-16).

27 Only Mr. Poe opposes SURSI's appointment as lead plaintiff. He asks that the court interpret the
28 "largest financial interest" requirement in section 78u-4(a)(3)(B)(iii)(I)(bb) as taking into consideration

1 the competing movants' loss proportionate to their net worth. He reasons that he has a larger financial
2 interest than the Needham Growth Fund because although its losses are slightly greater than his, he lost a
3 larger percentage of his total net worth. (Opp. Br. at 13:6-14). Tellingly, Mr. Poe cites to no authority for
4 this proposition, which the court rejects as inconsistent with the PSLRA's statutory purpose of attracting
5 institutional investors. *In re Cavanaugh*, at *8. Neither has Mr. Poe shown that his interests, as an
6 individual purchaser of Peregrine stock, will not be represented by an institutional investor in the role of
7 lead plaintiff.

8 The court finds that SURSI is the movant with the greatest financial stake in the litigation which
9 also meets Rule 23's typicality and adequacy requirements. As a large institutional investor, with
10 approximately \$10.75 billion in assets under management as of June 30, 2001, (P&A at 2:18-29), SURSI
11 is also the kind of plaintiff that the PSLRA sought enable. *See In re Cavanaugh*, at *8 (“[T]he
12 requirement that the plaintiff with the largest stake in the outcome of the case serve as lead plaintiff will
13 doubtless promote the goal of attracting institutional investors, and discourage opportunistic lawsuits by
14 shareholders with a tiny position in the security which is the subject of the litigation.”). SURSI has the
15 incentive and the means to effectively direct this litigation and to effectively serve the interests of the
16 section 10(b) class members. *See In re Network Associates, Inc. Secur. Litig.*, 76 F.Supp.2d at 1025
17 (quoting an SEC memorandum as stating that “the ‘most adequate plaintiff’ requirement was intended to
18 place responsibility for managing securities class action litigation in the hands of institutions. Such
19 investors . . . possess the sophistication, expertise and resources to manage securities litigation
20 efficiently.”) Accordingly, SURSI's motion for appointment as lead plaintiff is **GRANTED** as to the
21 section 10(b) class members.

22 **III. Appointment of counsel**

23 “The most adequate plaintiff shall, subject to approval of the court, select and retain counsel to
24 represent the class.” *See* 15 U.S.C. § 78u-4(a)(3)(B)(v); *see also In re Cavanaugh*, at *4; *Aronson*, 79
25 F.Supp.2d at 1159. The Loran Group has requested appointment of Gold Bennett Cera & Sidener LLP,
26 and SURSI has requested appointment of Berman DeValerio Pease Tabacco Burt & Pucillo. The record
27 contains no argument in favor of or reason to deny plaintiffs' choice of counsel. Accordingly, the
28 respective requests are **GRANTED**, but with the following caveats: (1) the court may revisit the issue of

1 whether co-lead plaintiffs are warranted in this case if there is good cause to do so; and (2) counsel shall
2 coordinate their efforts as to every step in this litigation to avoid duplicative costs and fees. Any motion
3 for an award of fees and costs will be scrutinized with the utmost care for unnecessary and/or duplicative
4 charges. *In re Donnkenny Secur. Litig.*, 171 F.R.D. at 158.

5 **Conclusion**

6 The court has reviewed the papers filed and given thorough consideration to the arguments
7 presented therein. Accordingly, the court

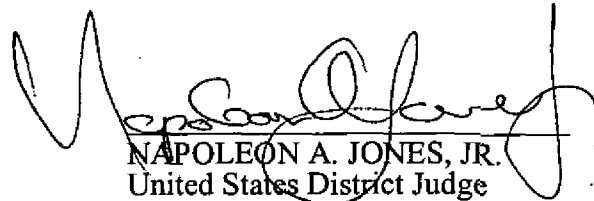
8 (1) GRANTS the Loran Group's motion for appointment as lead plaintiff and its motion for
9 approval of its choice of counsel; [Doc. No. 8]

10 (2) GRANTS State University Retirement System of Illinois' motion for appointment as lead
11 plaintiff and its motion for approval of its choice of counsel; and [Doc. No. 55]

12 (3) DENIES competing motions for appointment as lead plaintiff. [Doc. Nos. 5, 15, 17, 21, 26,
13 29, 33, 36, 39, 47, 58, 60, 65, 86]

14 **IT IS SO ORDERED.**

15 Dated October 9, 2002

16 
17 NAPOLEON A. JONES, JR.
United States District Judge

18 cc: Judge Brooks
19 All counsel of record in all related cases
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