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Lead Counsel for Plaintiffs

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

| | | | |
|----|----------------------------------|---|-----------------------------------|
| 11 | In re UTSTARCOM, INC. SECURITIES |) | Master File No. C-04-4908-JW(PVT) |
| 12 | LITIGATION |) | |
| 13 | _____ |) | <u>CLASS ACTION</u> |
| 14 | This Document Relates To: |) | DECLARATION OF CHRISTOPHER P. |
| 15 | ALL ACTIONS. |) | SEEFER IN SUPPORT OF PLAINTIFFS' |
| 16 | _____ |) | OPPOSITION TO UTSTARCOM |
| | |) | DEFENDANTS' MOTION FOR ORDER TO |
| | |) | REPUBLISH CLASS NOTICE AND |
| | |) | REAPPOINT LEAD PLAINTIFF |

17 DATE: June 5, 2006
 18 TIME: 9:00 a.m.
 19 COURTROOM: The Honorable
 20 James Ware

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1 I, CHRISTOPHER P. SEEFER, declare as follows:

2 1. I am an attorney duly licensed to practice before all of the courts of the State of
3 California. I am a member of the law firm of Lerach Coughlin Stoia Geller Rudman & Robbins
4 LLP, one of the counsel of record for plaintiffs in the above-entitled action. I have personal
5 knowledge of the matters stated herein and, if called upon, I could and would competently testify
6 thereto.

7 2. Attached are true and correct copies of the following exhibits:

8 Exhibit 1: *In re LeapFrog Enters., Inc. Sec. Litig.*, No. C-03-05421 RMW, Order
9 Granting Motion for Administrative Relief Whether Cases Should Be Related
10 Pursuant to Civil Local Rules 3-12 and 7-11 and Ordering Plaintiffs to
Publish Notice of Their Amended Complaint Under the PSLRA (N.D. Ca.
July 5, 2005);

11 Exhibit 2: *Miller v. LeapFrog Enters., Inc., et al.*, No. C-03-05421 RMW, Corrected
12 Order Consolidating Related Cases, Appointing Cupples and Sullivan as
Lead Plaintiff, and Approving Selection of Lead Counsel (N.D. Cal. Apr. 6,
13 2005);

14 Exhibit 3: *In re Krispy Kreme Doughnuts, Inc., Sec. Litig.*, 1:04CV00416, Order
(M.D.N.C. Apr. 20, 2005); and

15 Exhibit 4: *Hevesi v. Merck & Co.*, No. 04-CV-5866 (SRC), Transcript of Proceedings
16 (D.N.J. Mar. 21, 2005).

17 I declare under penalty of perjury under the laws of the State of California that the foregoing
18 is true and correct. Executed this 15th day of May, 2006, at San Francisco, California.

19 _____
20 /s/
CHRISTOPHER P. SEEFER

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I further certify that I caused this document to be forwarded to the following designated Internet site at: <http://securities.lerachlaw.com/>.

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Exhibit 1

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E-FILED on 7/5/05

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re LEAPFROG ENTERPRISES, INC.
SECURITIES LITIGATION

No. C-03-05421 RMW

ORDER GRANTING MOTION FOR
ADMINISTRATIVE RELIEF WHETHER
CASES SHOULD BE RELATED PURSUANT
TO CIVIL LOCAL RULES 3-12 AND 7-11
AND ORDERING PLAINTIFFS TO PUBLISH
NOTICE OF THEIR AMENDED
COMPLAINT UNDER THE PSLRA

[Re Docket No. 111]

This Document Relates To:

ALL ACTIONS.

William Sullivan and Alice Cupples ("the Cupples Movants") are lead plaintiffs in *In re LeapFrog Enterprises Securities, Inc. Litigation* ("*LeapFrog*"), pending before the court. The Parnassus Fund and the Parnassus Equity Fund ("Parnassus") are lead plaintiffs in a securities class action against LeapFrog Enterprises pending in the San Francisco Division of the Northern District of California ("*Parnassus*"). The Cupples Movants seek an order relating the two cases. Parnassus opposes the motion. The parties also dispute whether, if the court relates the cases, it must re-visit the selection of a lead plaintiff under the

ORDER GRANTING MOTION FOR ADMINISTRATIVE RELIEF WHETHER CASES SHOULD BE RELATED PURSUANT TO CIVIL LOCAL RULES 3-12 AND 7-11 AND ORDERING PLAINTIFFS TO PUBLISH NOTICE OF THEIR AMENDED COMPLAINT UNDER THE PSLRA—C-04-05421 RMW
DOH

1 Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C.A. § 78u-4(a). For the reasons set forth
 2 below, the court relates the cases and requires the Cupples Movants to republish notice for a new lead
 3 plaintiff selection process.

4 I. BACKGROUND

5 The court heard oral argument on lead plaintiff selection in four related and consolidated class
 6 actions in *LeapFrog* on March 19, 2004. The complaints alleged that LeapFrog made misleading
 7 statements about sales and market share. Collectively, the cases alleged a class period between July 24,
 8 2003 and February 10, 2004. While the lead plaintiff motions were under submission, LeapFrog allegedly
 9 made more false claims, causing its stock price to drop in March and October 2004. On April 6, 2005 the
 10 court named the Cupples Movants lead plaintiffs.

11 On April 25, 2005 Parnassus filed an action in the San Francisco Division against LeapFrog on
 12 behalf of purchasers of LeapFrog securities between February 11, 2004 and October 18, 2004. The
 13 Parnassus complaint alleges that LeapFrog falsely claimed to have remedied deficiencies with its supply
 14 chain and IT system. On June 17, 2005 the Cupples Movants filed an amended complaint that alleges a
 15 class period between July 24, 2003 and October 18, 2004. The amended complaint includes new
 16 allegations about LeapFrog's supply chain and IT system.

17 II. ANALYSIS

18 A. Whether the Court Should Relate the Cases

19 Local Rule 3-12 allows courts to relate matters where they (1) "concern substantially the same
 20 parties, property, transaction or event" and (2) "[i]t appears likely that there will be an unduly burdensome
 21 duplication of labor and expense or conflicting results if the cases are conducted before different judges."
 22 Here, the amended *LeapFrog* complaint completely overlaps with *Parnassus* complaint. Both name the
 23 same defendants, make similar factual allegations, and seek redress for violation of the same sections of the
 24 Securities and Exchange Act. In addition, the *LeapFrog* amended complaint's class period encompasses
 25 the *Parnassus* complaint's class period: the latter is February 11, 2004 through October 18, 2004, the
 26 former is July 24, 2003 through October 18, 2004. It would be unfair to LeapFrog to require it to defend
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1 similar lawsuits in two Divisions of the same court at the same time. Thus, the court orders the cases
2 related.

3 **B. Whether the Court Should Revisit Lead Plaintiff Selection**

4 The PSLRA establishes a comprehensive scheme for selecting lead plaintiffs in securities class
5 actions:

6 (i) In general

7 Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs
8 shall cause to be published, in a widely circulated national business-oriented publication
9 or wire service, a notice advising members of the purported plaintiff class—

10 (I) of the pendency of the action, the claims asserted therein, and the purported class
11 period; and

12 (II) that, not later than 60 days after the date on which the notice is published, any member
13 of the purported class may move the court to serve as lead plaintiff of the purported class.

14 (ii) Multiple actions

15 If more than one action on behalf of a class asserting substantially the same claim or claims
16 arising under this chapter is filed, only the plaintiff or plaintiffs in the first filed action shall
17 be required to cause notice to be published in accordance with clause (i).

18 (iii) Additional notices may be required under Federal rules Notice required under clause
19 (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil
20 Procedure.

21 15 U.S.C. § 78u-4(a)(3)(A)

22 The Cupples Movants argue that "[c]ourts have routinely rejected the notion that amending a class
23 action complaint to extend the class period and alleging additional new facts that are *closely related* to
24 those alleged for the original class perio[d] . . . provides a justification to revisit the lead plaintiff contest."
25 Mot. at 4:3-5 (emphasis in original). The Cupples Movants cite *In re Rite Aid Corp. Sec. Litig.*, 1999
26 U.S. Dist LEXIS 19753 at *4 (E.D. Pa. 1999), *Lax v. First Merchs. Acceptance Corp.*, 1997 U.S. Dist.
27 LEXIS 12432 at *15 (N.D. Ill. 1997), *Greenberg v. Bear Stearns & Co.*, 80 F. Supp. 2d 65, 69 (E.D.
28 N.Y. 2000), *In re Krispy Kreme Doughnuts, Inc. Sec. Litig.*, Case No. 1:04CV00416, slip op. (M.D.
N.C. 2005) and comments from oral argument in *Hevesi v. Merck & Co.*, No. 04-CV-5866 (SRC) (D.
N.J. Mar. 21, 2005) for support.

29 However, *Rite Aid*, *Lax*, *Greenberg*, and *Krispy Kreme* stand only for the sensible proposition
30 that minor amendments to complaints or differences between complaints in related cases do not warrant
31 republication or revisiting the lead plaintiff contest. *See Rite Aid*, 1999 U.S. Dist. LEXIS 19753 at *4

1 ("[t]he only material distinction cited by plaintiff . . . between its complaint and the complaint in the [related
 2 cases] is that of the class period); *Lax*, 1997 U.S. Dist. LEXIS 12432 at *13-*14 ("the complaints were
 3 based on substantially the same the same claims, despite that they alleged different class periods);
 4 *Greenberg*, 80 F. Supp. 2d at 69 (merely amending a complaint to add additional defendant does not
 5 require new lead plaintiff contest); *Krispy Kreme*, Case No. 1:04CV00416 at *3-*7 (refusing to sever
 6 consolidated actions or to revisit the lead plaintiff contest when the operative complaint "includes the same
 7 allegations regarding press releases, SEC filings, and insider transactions" as the moving party's complaint).¹

8 Here, conversely, the Cupples Movants' amended complaint vastly expands their original
 9 complaint. Indeed, the Cupples Movants' twenty-one page original complaint alleged that defendants made
 10 rosy statements about LeapFrog's financial outlook when, in fact, retailers were not placing an expected
 11 number of orders and the company stood to lose ground to a competitor's product. Complaint at ¶¶ 39-
 12 44. The consolidated class period spanned about six months. *Id.* at ¶ 1. The Cupples Movants' one
 13 hundred and thirty-five page amended complaint includes new allegations about LeapFrog's distribution and
 14 supply chain and alleges a class period of fifteen months. Amended Complaint at ¶¶ 1, 44-111. Unlike the
 15 amended complaints in the Cupples Movants' authority, the amended complaint here dramatically alters the
 16 contours of the lawsuit.

17 *Teamsters Local 445 Freight Division Pension Fund v. Bombardier, Inc.*, 2005 WL 1322721
 18 (S.D. N.Y. 2005) is on point. In that case, plaintiffs initially filed a class action defining a class of all
 19 purchasers of defendant's 2000-A Certificates between January 7, 2000 and May 6, 2004. Plaintiffs then
 20 amended their complaint to include purchasers of several other Certificates and enlarged the class period by
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 24 ¹ From what the court can divine from the transcript in *Hevesi*, the issue there was whether
 25 extrinsic events subsequent to lead plaintiff selection—Merck's pulling Vioxx from the
 26 market—necessitated reconsidering who best represented the class. *Hevesi* Transcript at 14, 46-53. The
 27 party who sought to be belatedly named lead plaintiff apparently did not do so "in a timely manner." *Id.* at
 50. Here, conversely, there was no way for Parnassus to move to be appointed lead plaintiff in *LeapFrog*
 because *Parnassus*' class period fell completely outside that of *LeapFrog*. Accordingly, the concerns of
 endless rounds of new lead plaintiff selection that caused the court in *Hevesi* to decline to revisit the lead
 plaintiff issue are not present here.

1 about seven months. *Id.* at *1. The court held that the policy considerations undergirding the PSLRA
2 mandated that plaintiffs re-publish notice and proceed through the lead plaintiff selection process again:

3 It is entirely possible that other well-qualified lead plaintiffs would have moved had they
4 been notified that they were potential class members. [¶] Allowing plaintiffs in this case
5 to proceed without publishing a new notice reflecting their additional claims would
6 potentially exclude qualified movants from the lead plaintiff selection process. Although
7 appointment is certainly easier—and thus more efficient—when there is only one movant,
8 it is contrary to the spirit of the PSLRA to achieve that efficiency by failing to notify
9 potential movants of their rights. Where membership of a class is substantially expanded
10 by the filing of an amended complaint that adds new claims, fairness dictates that those new
11 class members ought to be informed of the existence of pending claims that may affect their
12 rights.

13 *Id.* at *2-*3; see also *In re Select Comfort Corp. Sec. Litig.*, 2000 U.S. Dist. LEXIS 22697 at *22 (D.
14 Minn. 2000) (republishing necessary where lead plaintiffs amended complaint to "add new claims and new
15 allegations"). Just as in *Teamsters*, where the court required new notice after a substantially amended
16 complaint to ensure that the best plaintiff for the its new class period and new allegations represented the
17 class, the new claims and new scope of the Cupples Movants' amended complaint necessitates new notice
18 and lead plaintiff selection. The fact that Parnassus claims to be an institutional investor with losses of over
19 \$10 million, while the Cupples Movants are individuals with alleged losses of only approximately \$36,000
20 reinforces the conclusion that Parnassus may be better-suited to represent the class under the amended
21 *LeapFrog* complaint. Thus, the Cupples Movants must give notice of their amended complaint in
22 accordance with the PSLRA.
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III. ORDER

1. The court orders the *LeapFrog* and *Parnassus* cases related.
2. The Cupples Movants must republish notice in accordance with the PSLRA.

DATED: 7/5/05 /s/ Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

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17 Counsel are responsible for distributing copies of this document to co-counsel that have not registered for
18 e-filing under the court's CM/ECF program.

19 **Dated:** 7/5/05 DOH
 20 Chambers of Judge Whyte

Exhibit 2

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E-FILED on 4/6/05

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JERRY MILLER, On Behalf of Himself and All
Others Similarly Situated,

Plaintiff,

v.

LEAPFROG ENTERPRISES, INC., TIMOTHY
M. BENDER, JAMES P. CURLY, MARK B.
FLOWERS, THOMAS J. KALINSKE,
ROBERT W. LALLY, JAMES L.
MARGGRAFF, PAUL A. RIOUX, and
MICHAEL C. WOOD

Defendants.

No. C-03-05421 RMW
C-03-5481 RMW
C-03-5486 RMW
C-03-5593 RMW

**CORRECTED ORDER CONSOLIDATING
RELATED CASES, APPOINTING CUPPLES
AND SULLIVAN AS LEAD PLAINTIFF,
AND APPROVING SELECTION OF LEAD
COUNSEL**

**[Re: Docket Nos. 7, 19, 20, 28 & 39 (C-03-
5421; 6 & 9 (C-03-5481); 6 & 9 (C-03-5486);
and 7 & 10 (C-03-5593)]**

Arlene Medlyn ("Medlyn"); Analytic Financial Solutions, Inc. ("Analytic"); Alice Cupples and William Sullivan ("Cupples Movants"); and Carol Weil, Robert Retke, Kirk Saleme and Lawrence Hecox, and Ted Hicks ("Hicks Movants") move for consolidation of related cases, appointment of lead plaintiff and approval of selection of lead counsel. The motion was heard on March 19, 2004. Thereafter, on November 16, 2004 Analytic withdrew its request to be appointed lead counsel. For the reasons set forth below, the court: (1) grants the motion for consolidation of related cases; (2) appoints Cupples Movants as lead plaintiff; and (3) approves Cupples Movants' selection of lead counsel.

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I. BACKGROUND

LeapFrog Enterprises, Inc. ("LeapFrog") is a Delaware corporation with its principal executive offices in Emeryville, California. LeapFrog designs, develops and markets technology-based educational products to retail outlets and schools. During the class period from July 24, 2003 through February 10, 2004, defendants allegedly failed to disclose that retail orders were less than LeapFrog had forecast. It is further alleged that LeapFrog knew that its third quarter 2003 projections would not be met because retail customers' orders were less than expected, and some retail customers had delayed shipment until the fourth quarter of 2003. On October 21, 2003 LeapFrog announced that its third quarter 2003 projections had not been met. Am. Compl. at 7-8. Plaintiffs contend that as a result, LeapFrog's stock fell 25% to close at \$34.89 per share on October 22, 2003; LeapFrog's stock had sold for \$46.54 per share on the previous day.

After the close of the market on February 10, 2004, LeapFrog released its financial results for the fourth quarter and fiscal year 2003. Plaintiff alleges that this disclosure revealed that LeapFrog failed to meet analysts' consensus earnings estimates and experienced a significant increase in accounts receivable. *Id.* at 2. On February 11, 2004 LeapFrog's shares dropped from \$30.40 per share to \$27 per share, on volume of nearly 6.3 million shares. *Id.* at 9.

Plaintiff Jerry Miller filed an initial a complaint on December 2, 2003 and an amended complaint on February 18, 2004, as *Miller v. LeapFrog Enter., Inc. et al.*, C-03-05421. The amended complaint set forth a federal securities class action on behalf of purchasers of publicly traded LeapFrog securities, alleging false and misleading statements, a fraudulent scheme, false financial reporting and insider trading.

A notice of this first complaint by Miller was published on December 10, 2003. Four sets of movants made motions to consolidate the action and for appointment as lead plaintiff. Medlyn claims \$581 in damages; Analytic claims \$143,752 in damages; Cupples Movants claim \$35,950 in damages; and Hicks Movants initially claimed \$30,457 in damages.

The Hicks Movants made an amended motion for appointment of lead plaintiff on February 18, 2004. The amended motion sought to add Ted Hicks to the Hicks Movants. Hicks Movants assert that since the Amended Complaint expanded the class period and added insider trading claims, Mr. Hicks

1 should be added to represent the expanded class. Hicks Am. Mot. for Appointment of Lead Pl. ("Hicks
2 Mot.") at 2; Hicks Reply at 3. Mr. Hick's claim for damages of \$998,375 increases the Hicks Movants'
3 damage claims to \$1,028,832.

4 Hicks Movants subsequently filed an opposition to the other movants' motions to be appointed lead
5 plaintiffs, arguing that they had the largest financial interest in the case. The Cupples Movants, Analytic and
6 the Hicks Movants filed replies each arguing for appointment as lead plaintiff. The Cupples Movants and
7 Analytic argue that the Hicks Movants cannot add Mr. Hicks because the statutory time requirement
8 expired before he was added.

9 Three additional securities class action lawsuits were brought against LeapFrog, including *Weill v.*
10 *LeapFrog Enter., Inc., et al.*, C-03-05481 (RMW) on December 4, 2003; *Abrams v. LeapFrog*
11 *Enter., Inc., et al.*, C-03-05486 (RMW) on December 4, 2003; and *Ornelas v. LeapFrog Enter., Inc.*
12 *et al.*, C-03-05593 (RMW) on December 12, 2003. Each of these actions alleges claims for violations of
13 the Exchange Act and Securities and Exchange Commission (SEC) Rule 10b-5 on behalf of investors who
14 purchased or otherwise acquired LeapFrog common stock during the class period. Cupples Mot. for
15 Appointment of Lead Pl. ("Cupples Mot.") at 3. All movants seek consolidation of the related cases.
16 Defendants agree that the four complaints are appropriate for consolidation pursuant to Fed. R. Civ. P.
17 42(a). Def.'s Resp. to Mot. for Consolidation at 5. They disagree over who should be appointed lead
18 plaintiff.

19 **II. ANALYSIS**

20 Section 21D of the Securities Exchange Act of 1934, amended by the Private Securities Litigation
21 Reform Act of 1995 ("PSLRA"), establishes procedures that govern the appointment of lead plaintiffs. 15
22 U.S.C. § 78u-4(a)(3)(B). Through a three step process, the PSLRA provides a presumption that the most
23 "adequate plaintiff" to serve as lead plaintiff is the "person or group of persons" that:

- 24 (aa) has either filed the complaint or made a motion in response to a notice;
- 25 (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
- 26 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

1 The most adequate plaintiff is selected as the lead plaintiff to oversee class actions brought under the federal
2 security laws. *In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002).

3 The selection process begins once the first plaintiff files an action and publicizes the pendency of the
4 action, the claims made and the purported class period. 15 U.S.C. § 78u-4(a)(3)(A). Notice is published
5 to inform the class members of their right to file a motion for appointment of lead plaintiff.¹ All motions must
6 be filed "not later than 60 days after the date on which the notice is published." 15 U.S.C. §
7 78u-4(3)(A)(i)(II). The PSLRA is unequivocal and allows for no exceptions. *In re Telxon Corp. Sec.*
8 *Litig.*, 67 F. Supp. 2d 803, 818 (N.D. Ohio 1999); *see Ferrari v. Gisch*, 225 F.R.D. 599, 603
9 (C.D.Cal. 2004). "The plain language of the statute precludes consideration of a financial loss asserted for
10 the first time in a complaint, or any other pleading, for that matter, filed *after* the sixty (60) day window has
11 closed." *Id.* (emphasis in original). The obvious intent of these provisions is to ensure that the lead plaintiff
12 is appointed at the earliest possible time and to expedite the lead plaintiff process. *Telxon*, 67 F.Supp 2d
13 at 818-819. Thus, filing the complaint or a timely motion is the threshold requirement to serve as lead
14 plaintiff.

15 The second determining factor requires choosing the "one who has the greatest financial stake in the
16 outcome of the case." *Cavanaugh*, 306 F.3d at 729. The court "must compare the financial stakes of the
17 various plaintiffs and determine which one has the most to gain from the lawsuit" through "accounting
18 methods that are both rationally and consistently applied."² *Id.* at 730. Upon determining the movant with
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21 ¹ Plaintiff must publish notice to the class within 20 days after the initial action is filed. 15
22 U.S.C. § 78u-4(a)(3)(A)(i)(I).

23 ² Despite the proposition that courts reject impermissible aggregations designed only to
24 inflate the movant group's financial losses, Congress was primarily concerned with preventing overly large
25 and unorganized classes being controlled by lawyers. *In re Network Associates, Inc., Securities*
Litigation, 76 F.Supp. 2d 1017, 1022-1024 (N.D. Cal. 1999).

26 In determining which prospect for lead plaintiff status in a securities fraud class action satisfies the
27 statutory requirement that it have the largest financial interest in relief, the court is to consider (1) the
28 number of shares purchased during the class period, (2) the number of net shares purchased during the
class period, (3) the total net funds expended during the class period, and (4) the approximate losses
suffered during the class period. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The opposing movants do not dispute
each others' financial interests in relief on these grounds.

1 the largest financial interest, the court "must then focus its attention on that plaintiff and determine ... whether
2 he satisfies the requirements of Rule 23(a)." *Id.*

3 In addition, the Exchange Act requires that, at the outset of the litigation, the lead plaintiffs must also
4 "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. §
5 78u-4(a)(3)(B)(iii)(I)(cc). Rule 23(a) requires satisfaction of four factors to serve as a class representative:

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

11 Fed. R. Civ. P. 23(a). The typicality and adequacy requirements of Rule 23 are the main focus of step
12 three of the PSLRA. *See Cavanaugh*, 306 F.3d at 730. Examination of the remaining requirements are
13 deferred until the lead plaintiff moves for class certification. The test of typicality "is whether other members
14 have the same or similar injury, whether the action is based on conduct which is not unique to the named
15 plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v.*
16 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citing *Schwartz v. Harp*, 108 F.R.D. 279, 282
17 (C.D. Cal. 1985)). The adequacy requirement is met if there are no conflicts between the representative
18 and class interests and the representative's attorneys are qualified, experienced and generally able to
19 conduct the litigation. Fed. R. Civ. Pro. 23(a)(4); *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir.
20 2003). The plaintiff with the largest financial stake in the controversy that satisfies the typicality and
21 adequacy requirements is presumed to be the most adequate plaintiff. *Cavanaugh*, 306 F.3d at 730.

22 The third step of the process is to "give other plaintiffs an opportunity to rebut the presumptive lead
23 plaintiff's showing that it satisfies Rule 23's typicality and adequacy requirements." 15 U.S.C. §
24 78u-4(a)(3)(B)(iii)(II); *Cavanaugh*, 306 F.3d. The presumption of adequacy "may be rebutted only upon
25 proof ... that the presumptively most adequate plaintiff" does not satisfy the adequacy or typicality
26 requirements of Rule 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II); *Cavanaugh*, 306 F.3d at 729 n. 2.

27 If the presumptive lead plaintiff does not meet the typicality or adequacy requirement, the court
28 determines whether the plaintiff with the next highest stake in the litigation has made a prima facie showing
of typicality and adequacy. *Cavanaugh*, 306 F.3d at 731. "If so, it must declare that plaintiff the

1 presumptive lead plaintiff and repeat step three of the process by giving other plaintiffs an opportunity to
2 rebut that showing. This process must be repeated sequentially until all challenges have been exhausted."

3 *Id.*

4 **A. Timing of Motion**

5 Analytic, Cupples Movants and Medlyn filed their motions for appointment of lead plaintiff within
6 the sixty day time limit. Although the Hicks Movants timely filed an initial motion, they subsequently invite
7 the court to allow an amended motion to add Ted Hicks as lead plaintiff. With this addition, the Hicks
8 Movants would have the largest financial interest in the outcome of the case. "The plain language of the
9 statute precludes consideration of a financial loss asserted for the first time in a complaint, or any other
10 pleading, for that matter, filed *after* the sixty (60) day window has closed." *Telxon Corp.*, 67 F. Supp. 2d
11 at 818 (did not allow addition of members to perspective lead plaintiff group after the sixty day time
12 restriction expired, even though the amended complaint was filed after the expiration of the time limit)
13 (emphasis in original). Allowing potential lead plaintiffs to "manipulate the size of their financial loss
14 would[,] by enlarging the class period or adding additional persons to a 'group' in supplemental pleadings ...
15 effectively render the strict time lines set forth in the PSLRA meaningless, and would nullify Congress'
16 attempt to expedite the lead plaintiff approval process." *Id.*

17 The Hicks Movants argue there was just cause for adding Mr. Hicks after the sixty day time limit.
18 They assert that Mr. Hicks could not qualify as a lead plaintiff under the original complaint because he
19 bought stock after the original class period of July 24, 2003 to October 21, 2003. However, because the
20 amended complaint expanded the original period to July 24, 2003 to February 10, 2004, the new class
21 period then gave Mr. Hicks standing to bring suit. Therefore, the Hicks Movants argue that the amended
22 motion for lead plaintiff, which adds Mr. Hicks to the Hicks Movants, should be permitted due to Mr.
23 Hicks' circumstances.

24 The situation in *Telxon* is materially similar to the case at hand. Just as in this case, an amended
25 complaint, which expanded the class period, was filed after the sixty day time limit. *See Telxon Corp.*, 67
26 F. Supp. 2d at 806. A potential lead plaintiff amended its previously filed motion for appointment of lead
27 plaintiff on the basis of losses allegedly suffered during the expanded class period, which would have given
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1 that movant the largest amount in controversy. *Id.* The amended motion was filed after the sixty day time
2 limit. *Id.* Despite the movant's good motives, the *Texlon* court denied the movants request to add on the
3 additional amount. The court explained that

4 [t]he motives of the [movant], however, are irrelevant to the fact that
5 supplementation is not contemplated by the PSLRA, and do not alter the fact
6 that supplementation after the expiration of the sixty(60) day period would not
only be inconsistent with the language and purposes of the PSLRA, but would
effectively nullify the time limits expressly provided therein.

7 *Id.* at 819.

8 The court finds the reasoning in *Texlon* applicable to the case at hand.³ Although the Hicks
9 Movants' motives are to add a lead plaintiff that could not move under the original complaint, any motives
10 are likewise irrelevant to the PSLRA's strict time requirement. Thus, the court declines the Hicks Movants'
11 request to consider Mr. Hicks as a lead plaintiff, which puts Hicks Movants' financial interest to \$30,457 at
12 stake.

13 **B. Financial Interest in the Controversy**

14 "[T]he Reform Act provides in categorical terms that the *only* basis on which a court may compare
15 plaintiffs competing to serve as lead is the size of their financial stake in the controversy." *Cavanaugh*, 306
16 F.3d at 732 (emphasis in original). The Cupples Movants have the largest financial interest of the two
17 remaining contestants. Therefore, they are appointed lead plaintiff. Their choice of counsel is appropriate
18 and approved.

19 **III. ORDER**

20 **A. Motion to Consolidate Related Cases**

21 1. The following actions pending in the Norther District are, until further order of this court,
22 consolidated for all purposes pursuant to Rule 42(a) of the Federal Rules of Civil Procedure before the
23 Honorable Ronald M. Whyte: *Miller v. LeapFrog Enter., Inc., et al.*, C-03-05421 (RMW), *Weill v.*

24

25

26 ³ The Hicks Movants cite an unpublished case, *Schulman v. Lumenis, Ltd.*, which allowed
27 lead plaintiffs to amend their motion for appointment after the sixty day time limit because they had
28 previously timely filed a motion. 2003 U.S. Dist. LEXIS 10348 at *15-16 (S.D.N.Y. June 2003).
However, as this is an unpublished case, the court will follow *Texlon's* broad proposition of requiring strict
time limits.

1 *LeapFrog Enter., Inc., et al.*, C-03-05481 (RMW); *Abrams v. LeapFrog Enter., Inc., et al.*,
2 C-03-05486 (RMW); and *Ornelas v. LeapFrog Enter., Inc. et al.*, C-03-05593 (RMW).

3 2. These actions shall be referred to herein as the "Consolidated Actions." This Order shall
4 apply to the Consolidated Actions and to each case that is subsequently filed in this court or transferred to
5 this court that relates to the same subject matter as in the Consolidated Actions:

6 a. The short caption of the Consolidated Actions shall be "In re LeapFrog
7 Enterprises, Inc. Securities Litigation." Any other action now pending or hereafter filed in this District as a
8 class action on behalf of acquirers of LeapFrog Enterprises, Inc. between July 24, 2003 through February
9 10, 2004, inclusive, which arises out of the same facts as alleged in the Consolidated Actions, shall be
10 consolidated for all purposes as soon as it is brought to the court's attention.

11 b. All related actions that are subsequently filed in, or transferred to, this District
12 shall be consolidated into this action for pretrial purposes. This Order shall apply to every such related
13 action, absent order of the Court. A party that objects to such consolidation, or to any
14 other provision of this Order, must file an application for relief from this Order within thirty (30) days after
15 the date on which a copy of the Order is mailed to the party's counsel.

16 c. This Order is entered without prejudice to the rights of any party to apply for
17 severance of any claim or action, for good cause shown.

18 d. The docket in Civil Action No. C-03-05421(RMW) shall constitute the Master
19 Docket for this action.

20 e. Every pleading filed in the consolidated action shall bear the following caption:

21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA
23 SAN JOSE DIVISION

24 In re LEAPFROG ENTERPRISES, INC., No. C-03-05421 (RMW)
25 SECURITIES LITIGATION And Related Cases
26 CLASS ACTION

27 This Document Relates to:

28 ORDER CONSOLIDATING RELATED CASES, APPOINTING CUPPLES MOVANTS AS LEAD PLAINTIFF, AND APPROVING
SELECTION OF LEAD COUNSEL

C-03-05421 RMW

JTH

1 f. A Master Docket and a Master File are hereby established for the
2 Consolidated Actions under Master File No. C-03-05421 (RMW). When a pleading is intended to be
3 applicable to all actions to which this Order is applicable, the words "All Actions" shall appear immediately
4 after the words "This Document Relates To:" in the caption set out above. When a pleading is intended to
5 be applicable only to some, but not all, of such actions, the court's docket number for each individual action
6 to which the paper is intended to be applicable and the last name of the plaintiff in such action shall appear
7 immediately after the words "This Document Relates To:", the docket number for each individual action to
8 which the document applies, along with the last name of the first-listed plaintiff in said action (e.g., "No.
9 C-03-05421 (RMW) (Miller))."

10 g. When a pleading is filed and the caption shows that it is to be applicable to "All
11 Actions," the Clerk shall file such pleading in the Master File and note such filing in the Master Docket. No
12 further copies need be filed or docket entries made. When a pleading is filed and the caption shows that it
13 is to be applicable to fewer than all of the Consolidated Actions, the Clerk need file such pleading only in
14 the Master File but, nonetheless, shall note such filing in both the Master Docket and in the docket of each
15 such action.

16 h. When a case that relates to the subject matter of the Consolidated Actions is
17 hereafter filed in this court or transferred here from another court, the Clerk of the court shall:

- 18 1. place a copy of this Order in the separate file for such action;
- 19 2. mail a copy of the Order of assignment to counsel for plaintiffs and to
20 counsel for defendants in the Consolidated Actions;
- 21 3. mail to the attorneys for the plaintiff(s) and to any new defendant(s) in the
22 newly filed or transferred action a copy of this Order; and
- 23 4. make an appropriate entry in the Master Docket.

24 i. The court requests the assistance of counsel in calling to the attention of the Clerk
25 of this court the filing or transfer of any case that might properly be consolidated as a part of In re
26 LeapFrog Enterprises, Inc. Securities Litigation.

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1 j. Lead plaintiff shall serve upon defendants a single, consolidated, amended class
2 action complaint (the "Complaint"). The Complaint shall be served within thirty (30) days of the entry of an
3 Order appointing lead plaintiff and lead counsel for plaintiffs and the class, or such other time as may be
4 mutually agreed by the parties. The Complaint shall supersede all existing complaints in the actions. No
5 defendant is required to answer, move, or otherwise respond to any of the initial complaints filed in the
6 Action. Defendants shall answer, move, or otherwise respond to the Complaint within thirty (30) days after
7 its service on them, or such other time as may be mutually agreed upon by the parties. In the event that
8 defendants move to dismiss the Complaint, plaintiffs shall have thirty (30) days or such other time as may be
9 mutually agreed upon by the parties to oppose such motion and defendants shall have thirty (30) days from
10 the date of service of the opposition to reply.

11 k. This Order shall apply to each case subsequently filed in this court or transferred to
12 this court, unless a party objecting to the consolidation of such case or to any other provision of this Order
13 files, within thirty (30) days after the date upon which a copy of this Order is mailed to counsel for such
14 party, an application for relief from this Order or any provision herein and this court deems it appropriate to
15 grant such application.

16 **B. Motion to Appoint Lead Plaintiff and Approval of Lead Counsel**

17 1. Alice Cupples and William Sullivan are appointed as lead plaintiff for the putative class and
18 any subsequently consolidated or related action to represent the interests of the putative class.

19 2. Lead plaintiffs' selection of lead counsel for the putative class is hereby approved. Patrick
20 J. Coughlin and Christopher Seefer of the law firm of Lerach Coughlin Stoia Geller Rudman & Robbins
21 LLP are appointed lead counsel pursuant to §21D(a)(3)(B)(v) of the Exchange Act.

22 3. Co-Lead counsel shall have authority to speak for all plaintiffs and putative class members
23 in all matters regarding the litigation including, but not limited to, pretrial proceedings, motion practice, trial,
24 and settlement, and shall make all work assignments in such a manner as to facilitate the orderly and
25 efficient prosecution of this litigation and to avoid duplicative or unproductive effort. Additionally, co-lead
26 counsel shall have the following responsibilities:

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- 1 a. to brief and argue motions and file opposing briefs in proceedings initiated by other
- 2 parties;
- 3 b. to initiate and conduct discovery proceedings, including, but not limited to, the
- 4 preparation of discovery materials and discussions or negotiations concerning discovery issues;
- 5 c. to direct and coordinate the examination of witnesses in depositions and on oral
- 6 interrogatories;
- 7 d. to act as spokespersons at court conferences and hearings;
- 8 e. to delegate responsibilities for specific tasks to other counsel in a manner to assure
- 9 that pretrial preparation for the plaintiffs is conducted effectively, efficiently, and economically;
- 10 f. to consult with and call meetings of plaintiffs' counsel when they deem it
- 11 appropriate;
- 12 g. to consult with and employ experts;
- 13 h. to negotiate with and enter into agreements with defendants' counsel with respect
- 14 to settlement and other matters;
- 15 i. to coordinate this action with any related state or Federal court proceeding that
- 16 involves issues similar to those raised in this consolidated action in order to avoid unnecessary duplication,
- 17 expense, and effort;
- 18 j. to conduct all pretrial, trial, and post-trial proceedings; and
- 19 k. to perform such other duties as they deem necessary, or as may be expressly
- 20 authorized by further order of the court.

21 3. Co-Lead counsel shall be responsible for coordinating all activities and appearances on

22 behalf of the putative class and for disseminating notices and orders of this court.

23 4. No motion, application or request for discovery shall be served or filed, or other pretrial

24 proceedings initiated, on behalf of lead plaintiff, except through co-lead counsel.

25 5. All notices, proposed orders, pleadings, motions, discovery, and memoranda shall be

26 served upon co-lead counsel by overnight mail service, telecopy, or hand delivery.

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1 6. Co-Lead counsel for the putative class shall be available and responsible for
2 communications to and from the court. Co-Lead counsel shall be responsible for the creation and
3 maintenance of a master service list of all parties and their respective counsel.

4 7. Defendants' counsel may rely upon all agreements made with co-lead counsel.

5 8. This Order shall apply to each case subsequently filed in this court or transferred to this
6 court, unless a party objecting to the consolidation of such case or to any other provision of this Order files
7 within thirty (30) days after the date upon which a copy of this Order is mailed to counsel for such party, an
8 application for relief from this Order or any provision herein and this court deems it appropriate to grant
9 such application.

10 **C. Pleadings and Motions**

11 1. Defendants are not required to respond to the complaint in any action
12 consolidated into this action, other than the consolidated complaint or a complaint designated as
13 the operative complaint.

14 2. Lead Plaintiff shall file a consolidated complaint within thirty (30) days after
15 filing the order designating the Lead Plaintiff unless otherwise agreed upon by the parties. The
16 consolidated complaint shall be the operative complaint and shall supersede all complaints filed
17 in any of the actions consolidated herein.

18 3. Defendants shall respond to the consolidated complaint within thirty (30) days
19 after service, unless otherwise agreed upon by the parties. If defendants file any motions
20 directed at the consolidated complaint, the opposition and reply briefs shall be filed within thirty
21 (30) days, of that response, unless otherwise agreed upon by the parties.

22 4. The parties shall serve all papers on each other by hand, by overnight delivery, or
23 (by prior agreement) by facsimile, unless otherwise agreed upon by the parties. Notwithstanding
24 the foregoing, defendants may serve plaintiffs' counsel, other than Lead Plaintiff's Counsel, by
25 first-class mail, unless otherwise agreed upon by the parties.

26 5. Plaintiffs shall file a motion for class certification within thirty (30) days after
27 service of the consolidated complaint. Counsel shall propose to the court a mutually agreeable
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1 schedule for class certification discovery and for briefing and hearing of such motion.

2 **D. Discovery**

3 1. The following definitions shall presumptively apply in all discovery issued in this
4 action:

5 a. Communication. The term "communication" means the transmittal of
6 information (in the form of facts, ideas, inquiries or otherwise).

7 b. Document. The term "document" is defined to be synonymous in meaning
8 and equal in scope to the usage of this term in Fed R. Civ. P. 34(a). A draft or non-identical copy is a
9 separate document within the meaning of this term.

10 c. Identify (with respect to persons). When referring to a person, "to identify"
11 means to give, to the extent known, the person's full name, present or last known address, and
12 when referring to a natural person, additionally, the present or last known place of employment.
13 Once a person has been identified in accordance with this subparagraph, only the name of that
14 person need be listed in response to subsequent discovery requesting the identification of that
15 person.

16 d. Identify (with respect to documents). When referring to documents, "to
17 identify" means to give, to the extent known, the (i) type of document; (ii) general subject
18 matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

19 e. Parties. The terms "plaintiff" and "defendant" as well as a party's full or
20 abbreviated name or a pronoun referring to a party mean the party and, where applicable, its
21 officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This
22 definition is not intended to impose a discovery obligation on any person who is not a party to
23 the litigation.

24 f. Person. The term "person" is defined as any natural person or any business,
25 legal or governmental entity or association.

26 g. Concerning. The term "concerning" means relating to, referring to,
27 describing, evidencing or constituting.

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- h. The following rules of construction apply to all discovery requests:
 - i. All/each. The terms "all" and "each" shall be construed as all and each.
 - ii. And/or. The connectives "and" and "or" shall be construed either

disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

- i. Number. The use of the singular form of any word includes the plural and vice versa.

2. All parties will comply with 15 U.S.C. § 78u-4(C)(i).

DATED: 4/6/05 /s/ Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

1 Notice of this document has been electronically sent to:

2

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Dated: 4/6/05 _____ /s/ DOH _____
Chambers of Judge Whyte

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Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

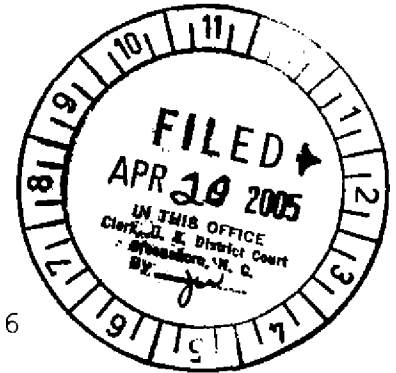
in re Krispy Kreme Doughnuts,)
Inc., Securities Litigation)

-----)

This Document Relates To:)

ALL ACTIONS)

1:04CV00416



O R D E R

Pending before this court is Plaintiff Bond Nichols' Motion to Sever. On January 14, 2005, Nichols filed an action on behalf of himself and all others similarly situated against Krispy Kreme Doughnuts, Inc. ("Krispy Kreme"), Scott Livengood, and Michael Phalen, alleging violations of the securities laws during the period from May 7, 2004, through January 4, 2005 (previously No. 1:05CV42). Specifically, Nichols alleges violations of Sections 10b-5 and 20(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated under § 10(b) of the Act, 17 C.F.R. § 240.10b-5. On February 3, the court consolidated Nichols' action with Eastside Investors v. Krispy Kreme Doughnuts, Inc., 1:04CV416 (filed May 12, 2004) (the "Consolidated Action"), pursuant to its order of June 14, 2004, that all similar actions filed after that date

should be consolidated. The Consolidated Action makes the same claims against more defendants and covers the period from January 24, 2003, through January 4, 2005. (First Am. Class Action Compl. Violation Fed. Secs. Laws at 1.) Nichols timely filed an opposition to the February 3 order with his pending motion.

Shortly after filing his complaint and in compliance with statutory requirements, Nichols sent press releases to a national business-oriented wire service describing his lawsuit and alerting potential class members that they had 60 days within which to move the court for appointment as lead plaintiff. In response to this notice, two parties or groups have requested to serve as lead plaintiff(s) in Nichols' action: (1) Akre Capital Management, L.L.C. ("Akre Capital") and (2) Privatinvest Bank AG, Lawrence D. Carrico, Todd Snider, Joseph P. Greenan, and Leonard Willig (the "Privatinvest Bank AG Group"). Additionally, PACE Industry Union-Management Pension Fund filed a notice with the court, seeking to preserve its right to move the court for appointment as lead plaintiff should the court decide to sever Nichols' action.

Rule 42 of the Federal Rules of Civil Procedure provides that "[w]hen actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated[,] and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or

delay." Fed. R. Civ. P. 42(a). A district court has "broad discretion" to consolidate cases pending before it. A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Co., 559 F.2d 928, 933 (4th Cir. 1977). The "critical question" for a district court in reviewing a motion to sever a consolidated action is

whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 193 (4th Cir. 1982), superseded, 712 F.2d 899, 906-07 (4th Cir. 1983) (en banc) (reversing, in part, the judgment of the panel based on the facts and circumstances of the case, but citing with approval to the panel's description of the balancing test).

Nichols' arguments in support of severing his action involve allegations of prejudice and conflicts of interest arising out of the procedural history of the complaints filed in the Consolidated Action. In the Consolidated Action, the court appointed in October 2004 a group of investors to serve as Lead Plaintiffs, and in November set a deadline for filing a consolidated complaint. (See Order of Oct. 6, 2004 at 3-4; Stipulation & Order Setting Deadlines Filing Consol. Compl. & Mot. Dismiss & Setting Briefing Schedule at 1.) On December 14, Lead Plaintiffs timely filed a Consolidated Class Action

Complaint for Violation of the Federal Securities Laws ("CCAC") that included within the "class period" only events through May 6, 2004. The CCAC included subsequent events occurring through November 22, 2004, in a section titled "Post-Class Period Events and Admissions." On January 21, 2005, Lead Plaintiffs filed a stipulation in which the parties agreed that in light of subsequently discovered information,¹ Lead Plaintiffs would amend the CCAC and the parties would adjust their briefing schedule regarding a motion to dismiss. (See Stipulation Re-Setting Deadlines Filing Consol. Compl. & Mot. Dismiss & Setting Briefing Schedule at 1-2.) This First Amended Class Action Complaint for Violation of the Federal Securities Laws ("FACAC") was timely filed on February 15, 2005, and extends the class period through January 4, 2005.

Plaintiff Nichols contends that when Lead Plaintiffs filed the CCAC in December with a class period through May 6, 2004, this evidenced their refusal to include investors injured after May 6 within their putative class, relegating their injuries to the status of non-redressable "post-class period events." (Mem. Law Opp'n Consol. & Supp. Mot. Sever or, Alternative Supp.

¹ This new information stemmed largely from Krispy Kreme's notice to the SEC on December 13, 2004, that it would delay filing its 10-Q report for the quarter ending October 31, 2004, and its press release of January 4, 2005, announcing that it would restate financial information for several quarters and fiscal year 2004.

Separate Representation KKD II Class at 8.) In addition, Nichols contends that the FACAC was an "about-face at the eleventh hour" and "lawyer-driven realignment," and is evidence of Lead Plaintiffs' "maneuvering" to absorb the class Nichols seeks to represent. (Id.) Nichols also argues that Lead Plaintiffs and their counsel might appear to have divided loyalties, i.e., their multiple complaints could show that their first allegiance lies with investors injured prior to May 6, 2004, and this "irreconcilable conflict of interest" should be avoided by allowing investors injured after May 6, 2004, to have separate representation. (Id. at 10.)

The court finds that Nichols' assertions of prejudice and conflicts of interest are without merit. Lead Plaintiffs filed the CCAC upon order of the court and, although they did not extend the class period, they included new information within the new complaint. Subsequent to this filing and on learning still more information relevant to their claims, they promptly and properly secured the agreement of Defendants to amend their complaint and update the briefing schedule for a motion to dismiss. This course of action does not evidence any divided loyalties or conflict of interest. On the contrary, Lead Plaintiffs appear to be diligently pursuing claims on behalf of all shareholders who may have been injured by purported violations of the securities laws allegedly committed by

Defendants, while simultaneously proceeding in an expeditious and efficient manner by seeking Defendants' agreement when possible.

Akre Capital has also opposed consolidation and moved to sever Nichols' action. Akre Capital argues that because Nichols' complaint focuses on financial statements, while the Consolidated Action focuses on the company's announcements regarding sales projections and its actions of closing stores and divesting a subsidiary, this differing focus could create a conflict of interest. (Mot. Akre Capital Mgmt. Sever, Appointment Lead Pl., & Approval Selection Lead Counsel Class Persons Who Purchased Secs. Krispy Kreme Doughnuts, Inc. During Period May 7, 2004-January 4, 2005, or, Alternative, Appointment Co-Lead Pl. & Appointment Counsel as Co-Lead Counsel, Class Persons Who Purchased Secs. of Krispy Kreme Doughnuts, Inc. During Period January 24, 2003-January 4, 2005 at 6-7.) The court finds Akre Capital's arguments to also be without merit. Nichols' complaint includes allegations of false and misleading statements in press releases and SEC filings regarding the 2004 fiscal year, but it also includes allegations of false and misleading statements surrounding purported insider transactions that occurred prior to May 2004. The FACAC includes the same allegations regarding press releases, SEC filings, and insider transactions as Nichols' complaint, along with more detail surrounding those events.

Thus, it appears that the complaints involve the same facts and are not distinct.

Both Nichols and Akre Capital also move, in the alternative, for appointment as co-lead plaintiff in the Consolidated Action. The only difference between Lead Plaintiffs and Akre Capital and Nichols is that Lead Plaintiffs purchased Krispy Kreme securities on or before May 7, 2004, while Akre Capital and Nichols purchased³ the company's securities after May 7, 2004. On this date, Krispy Kreme issued a press release that discussed its future earnings and related actions it would be taking in the following weeks. On that same day, the company's share price fell significantly. This event does not appear to change the nature of the claims brought against Defendants, nor does it lead to distinct pleading or discovery requirements for Lead Plaintiffs as opposed to later-injured plaintiffs. Rather, it appears to be the first date Defendants changed their position on the company and its potential, and was, therefore, the first sign that federal securities violations may have occurred. The fact that alleged violations continued and additional evidence of

³ The Privatinvest Bank AG Group has alleged that Akre Capital did not purchase any Krispy Kreme securities, but rather only made purchases on behalf of a mutual fund. (Mem. Law Opp'n Competing Lead Pl. Filings & Further Supp. Mot. Appointment Lead Pls. & Approval Selection Lead Counsel at 5.) Because the court will not sever Nichols' action and will deny all requests for appointment of co-lead plaintiffs, it need not address this issue at this time.

wrongdoing came to light after this time, or that still more such evidence may be discovered, does not change the nature of the allegations sufficient to warrant appointing additional lead plaintiffs.

Therefore,

IT IS ORDERED that Plaintiff Bond Nichols' Motion to Sever [59] is DENIED;

IT IS FURTHER ORDERED that the Motion of Akre Capital Management, L.L.C., to Sever, for Its Appointment as Lead Plaintiff, and for Approval of Its Selection of Lead Counsel for the Class of Persons Who Purchased Securities of Krispy Kreme Doughnuts, Inc. During the Period from May 7, 2004 through January 4, 2005, or, in the Alternative, for Its Appointment as Co-Lead Plaintiff and for Appointment of Its Counsel as Co-Lead Counsel, for the Class of Persons Who Purchased Securities of Krispy Kreme Doughnuts, Inc. During the Period from January 24, 2003 through January 4, 2005 [78] is DENIED. Akre Capital's request for oral argument is also DENIED;

IT IS FURTHER ORDERED that Privatinvest Bank AG, Lawrence D. Carrico, Todd Snider, Joseph P. Greenan, and Leonard Willig's Notice of Motion for Appointment of Lead Plaintiffs and Lead Counsel [81] is DENIED;

IT IS FURTHER ORDERED that PACE Industry Union-Management Pension Fund's Notice of Motion and Intent to File a Motion to be

Appointed Lead Plaintiff Pursuant to § 21D of the Private Securities Litigation Reform Act of 1995 [84] is MOOT.

This the 20th day of April 2005.


United States District Judge

Exhibit 4

1

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY
3 CIVIL ACTION NO. 04-CV-5866 (SRC)

4 ALAN G. HEVESI, COMPTROLLER OF
5 THE STATE OF NEW YORK, AS
6 ADMINISTRATIVE HEAD OF THE NEW
7 YORK STATE AND LOCAL RETIREMENT
8 SYSTEMS AND AS TRUSTEE OF THE
9 NEW YORK STATE COMMON
10 RETIREMENT FUND, individually
11 and on behalf of all others
12 similarly situated,

13 Plaintiff,

14 vs.

15 MERCK & CO., INC., KENNETH C.
16 FRAZIER, RAYMOND V. GILMARTIN,
17 RICHARD C. HENRIQUES, PETER S.
18 KIM, ALISE S. REICIN, EDWARD M.
19 SCOLNICK, MARY M. MCDONALD and
20 JUDY C. LEWENT,

21 Defendants.

22 _____
23 March 21, 2005
24 Trenton, New Jersey

25 B E F O R E: HONORABLE STANLEY R. CHESLER, USDJ

19 Pursuant to Section 753 Title 28 United States Code, the
20 following transcript is certified to be an accurate record
21 as taken stenographically in the above-entitled proceedings.

22 JACQUELINE KASHMER
23 Official Court Reporter

24 JACQUELINE KASHMER, C.S.R., C.R.R.
25 OFFICIAL COURT REPORTER
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1 THE COURT: Okay. I've got all your appearances.
2 I don't think we're going to go through the formal
3 appearances at this time, if nobody minds.

4 We do have applications for lead counsel in the
5 securities action and, if I recall correctly, the first
6 application is by Alan Hevesi.

7 MR. ABBEY: That's correct, your Honor, and I'm
8 speaking for Mr. Hevesi. Shall I start, your Honor?

9 THE COURT: Please proceed.

10 MR. ABBEY: Thank you. Good morning, your Honor.
11 Nice to be back. Arthur Abbey, speaking for Mr. Hevesi as
12 the trustee of the Common Retirement Fund of the State of
13 New York, and while it's true that we're here for lead
14 counsel but the application under the PSLRA this morning is
15 for lead plaintiff in the case.

16 THE COURT: Okay.

17 MR. ABBEY: That's a new, relatively new concept
18 that came about in 1995 with the passage of the PSLRA, and
19 what the courts have to pick is the lead plaintiff and then
20 the lead plaintiff with court approval picks a lead counsel.

21 I'd like to introduce this morning Alan Leibowitz,
22 who's sitting in the jury box. He is the general counsel to
23 Mr. Hevesi, to the comptroller, and to his immediate left is
24 Maureen Madden, who's also counsel in their office.

25 THE COURT: Good morning.

6

1 MR. ABBEY: I'm going to make the principal
2 argument and my co-counsel, Mr. Entwistle, will deal with
3 any rebuttal matters the Court may have.

4 So, if I may begin, my client is the second largest
5 public pension fund in the United States. It filed a
6 certification in this action claiming a loss of \$171 million
7 and what it seeks this morning is an order from your Honor
8 to be the sole lead plaintiff in the consolidated securities
9 action.

10 The MDL Panel, as your Honor knows, determined that
11 these cases, as well as the ERISA cases, should be
12 transferred to this Court, and your Honor graciously
13 accepted the transfer and we're here this morning to
14 proceed. And the reasons that the Panel gave was because
15 documents are here, witnesses are here, and it would serve
16 the convenience of the parties and the witnesses to be in
17 this jurisdiction.

18 Now, in making that determination, the principal
19 argument advanced by the Pringle plaintiffs to the Panel was
20 that their cases were advanced in Louisiana and they argued
21 principally because the only thing that had been done in
22 Louisiana was there had been an unopposed lead plaintiff
23 appointment. Those cases were started 11 months before the
24 cases that were filed before your Honor.

25 Now, the Panel had no problem in transferring the

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1 tort cases to Louisiana and that's where those cases --
2 although there were arguments for other jurisdictions. In
3 terms of the arguments that were made to the Panel for the
4 securities cases, there are only two jurisdictions that were
5 argued for. The Pringle people argued for Louisiana
6 principally on the grounds that their cases were advanced
7 and principally because of the lead plaintiff designation.

8 We, in turn, argued for this jurisdiction. I don't
9 think it's unfair to say that our action did two things,
10 Number one, it caused the defendants who originally in their
11 original papers agreed to Louisiana to change their position
12 and to argue for this Court, and their papers to the Panel
13 were very eloquent and they argued that it was because the
14 filing of our case, our plaintiff, the State of New York,
15 was a determining factor.

16 And frankly, because I made the principal argument
17 and I won that argument, I'd like to think that I convinced
18 those seven judges who heard the argument that it was our
19 case that caused this transfer to this Court.

20 THE COURT: Now I'm not sure whether or not I
21 should hold that against you or not.

22 MR. ABBEY: You had your choice. You could have
23 said to them you didn't want it and, as I understand, the
24 Panel doesn't send cases to judges who won't take them.

25 In any event, I just feel that that's sort of the

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1 foundation, that that's an imprimatur, if not an inference,
2 that these cases are fresh, they're not advanced, and that
3 your Honor should start today with a clean slate and, of
4 course, that would mean revisiting the lead plaintiff issue
5 and I hope appointing our client as the sole lead plaintiff.

6 Now, the pattern in this case is somewhat unique
7 and that is because there are plenty of cases where 90
8 percent or 95 percent of the disclosure comes out at one
9 point in time. There's a big drop in the stock. There's
10 the lead plaintiff arguments and then maybe there's little
11 dribbles of additional information and maybe the class is
12 extended for a matter of days, a matter of weeks, maybe even
13 a matter of a month or two.

14 In this situation 11 months expired. This is not
15 simply an extension. What happened here when Vioxx was
16 pulled was an entirely cataclysmic event. The stock
17 dropped. It dropped more than \$30 million. The losses as a
18 result of the '04 disclosure gave rise to a bunch of new
19 cases, and what I think is also somewhat telling about when
20 these cases – when the Court should, in effect, organize
21 these cases as we're saying now, is the fact that all these
22 ERISA cases, not one of them was started in '03. They all
23 came about, and those are cases for the employee
24 shareholders, they all came about in '04, none in '03, and
25 while there was some disclosures in '03, and a case may have

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1 been filed, the truth of the matter is that the stock only
2 reacted in a minimal way that came back shortly after that,
3 and while there was announcement about lead plaintiff, no
4 institution showed up. Only in the '04 cases did an
5 institution come. And I might add that Merck has over two
6 billion shares and 60 percent of those shares are owned by
7 institutions.

8 Merck is a true blue chip stock and it is just the
9 kind of case that I think the Congress had in mind when it
10 enacted the PSLRA, the kind of case that only an institution
11 could and should lead. And interestingly, all the
12 investigations, whether it's the FDA investigation, and
13 there were hearings for three days in Washington about
14 Vioxx, they all took place post the '04 announcement of the
15 pulling of Vioxx and, so, you may hear from my opposition
16 that it's common and ordinary for classes to get extended
17 and you don't revisit the lead plaintiff issue.

18 I submit to your Honor that that's not what this
19 case is. This is not a dribble of more news, very minor
20 additional market loss, and it's an extension of the earlier
21 case. This basically is not that.

22 And if you put it in that context, I submit that
23 what you're trying to do is to elevate the lawyers who filed
24 that case, and this is really a case about plaintiffs, not
25 about lawyers, it's really putting a square peg into a round

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1 hole.

2 Now, my client is very special and I will tell you
3 that the class is lucky, very lucky. They have come forward
4 to seek to be the sole lead plaintiff. They have an
5 extraordinary track record. They have recovered in the
6 cases that they have led more than any other plaintiff
7 who've ever filed securities cases.

8 They were the lead plaintiff before Judge Walls in
9 the \$3 billion Cendant case and they are, of course, the
10 lead plaintiff in the WorldCom cases, which are in the
11 newspaper everyday. The result there has produced for the
12 shareholders a more than six million dollar -- and this
13 morning before I left my office, I went through the Wall
14 Street Journal as I do, and this is as fresh as today's
15 newspaper and I'd like to hand it up to your Honor, and I'll
16 hand it out, the story about what happened on Friday in the
17 WorldCom case.

18 In the WorldCom case, which my client leads, the
19 directors have paid over \$20 million out of their own
20 pocket. That's something that they insisted upon even
21 though there's substantial D & L insurance.

22 Not only will my client seek to recover everything
23 that it can against the very excellent legal team that Merck
24 has put together, but I am sure that it will also seek some
25 corporate governance changes at Merck. It has great

11

1 expertise in financial and legal matters. Its resources do
2 not compare to the four individuals or to any individuals.
3 It is basically just like a hand fits a glove.

4 The Common Retirement Fund, Mr. Leibowitz, who's
5 been in court, we came down together, he's been in court on
6 the WorldCom case before Judge Cote almost nonstop for the
7 last two weeks. The case was supposed to go to trial. Last
8 week they were going to pick a jury. They settled the case
9 against the investment banks for more than two billion
10 dollars. They are experienced, knowledgeable and they bring
11 a dimension that is unparalleled.

12 I'd like to tell you that they have been working
13 for the class in other ways. For instance, we have entered
14 into, should we be successful in this case, a retainer
15 agreement. It is not binding on your Honor but it sets a
16 cap on us and I will tell you that the cap, depending on how
17 the case turns out, is a percentage which begins at low
18 double digit numbers and goes down to low single digit
19 numbers in terms of percentage, and we are bound by that
20 retainer agreement. You are not.

21 What that means is it will not be more than that
22 and it would be whatever your Honor awards, but they have --
23 that is part of the retention by them. They want counsel
24 working for the class.

25 It seems to me that the PSLRA, which is what we're

12

1 proceeding under, says it all when it says institutional
2 investors with large amounts at stake will represent the
3 interests of the plaintiff class more effectively than class
4 members with small amounts at stake.

5 Now, we have briefed almost ad nauseum, if you
6 will, to your Honor because not only were there briefs here
7 but there were briefs as well in Louisiana where we moved to
8 open up the lead plaintiff order, that the Louisiana
9 plaintiffs have serious Rule 23 infirmities; that is, that
10 the earlier cases may result in there being unique defenses
11 against those plaintiffs and that comes about because the
12 filing of the case in '03 is basically a party admission by
13 those plaintiffs, what could be construed as a party
14 admission, that after that period of time, that there was
15 full disclosure back in '03 and that, as a result, Merck
16 might not have liability in '04. Even though they've now
17 extended the class to go past '04, their pleadings at one
18 point, and they had three sets of pleadings because they're
19 on their fourth amended complaint in Louisiana, first three
20 pleadings ended in '03, and it is not far-fetched for a
21 court to conclude perhaps that if there was enough
22 information for the case to be filed in '03, that there was
23 enough information for investors who bought the stock after
24 '03 to be on notice.

25 We don't think that's the position that should be

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1 taken but it's a position that these plaintiffs have taken.

2 We would not take that position.

3 Our position is different. Our position is that

4 the case began in '04. Essentially that's when full

5 disclosure came out and, look, the stock market is an

6 efficient mechanism. Last time I was here, I gave your

7 Honor the chart on Merck which showed -- and I have it again

8 for you. Let no good deed go unpunished.

9 You can see the dip in '03, which is October, and

10 then the stock comes back. That's the second line on the

11 left coming down. And then, of course, you see the drop at

12 September 30, '04, it's the third line going down from the

13 right, and the red part of it is the volume, as you can see,

14 huge volume September 30, so, our position is that things

15 happened in '04, could have known that in '03 but,

16 nevertheless, they happened in '04. And we think that this

17 is not a situation where it's simply an extension, that what

18 happened in '04 is unique and should give rise to the issue

19 of lead plaintiff.

20 THE COURT: Let me ask you this, Mr. Abbey.

21 Forgetting about the issue of unique defenses, if I accept

22 your contention that the withdrawal of Vioxx from the market

23 is sufficient to essentially warrant reopening the lead

24 plaintiffs' selection process --

25 MR. ABBEY: Yes, your Honor.

14

1 THE COURT: -- how does this Court or any future
2 court draw the line as to when subsequent disclosures are
3 merely a continuation of disclosures which are coming into
4 the marketplace of ideas in dribs and drabs which we would
5 describe as being not uncommon in the "garden variety"
6 securities case from the situation where the disclosure is
7 so cataclysmic and so different from the prior disclosures
8 as to warrant reopening the process?

9 MR. ABBEY: I'm glad you asked that question
10 because I think that goes to the heart of what your Honor
11 has to determine in this case. In other words, it's almost
12 like why is this night different than all other nights, and
13 the reason that I am telling you that is almost all of the
14 cases that have extensions, the main disclosure, i.e.,
15 WorldCom, Enron, cases like that, the announcement that you
16 can't rely on the financials, that our books were not only
17 being cooked but they were being charbroiled, that all comes
18 out. There's a big drop.

19 There's a lot of cases and there are institutions
20 now who want to file these kinds of cases because they have
21 big holdings in those kinds of stock.

22 Merck is just like that, even though this is more
23 of a product wrong than it is a financial wrong but,
24 nevertheless, the pattern of what happened post the first
25 case in Enron, post the first case in WorldCom, post the

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1 first case in Cendant, those are multi-billion dollar
2 losses, is nothing like the pattern in this case.

3 In those cases almost all the market loss occurred
4 right at that first point in time and the dribs and drabs
5 would be more like, instead of restating for three years, we
6 now are going to restate for four years, or we now have
7 another quarter or two that our accountants are reviewing,
8 and the market generally reacts to those in a ho-hum kind of
9 way; that is, the air is already out of the tire, the tire's
10 flat, and basically there's not much more room till you get
11 down to sitting on the rim.

12 That never happened here. I understand that you
13 don't want to set a precedent that just because we come
14 along 11 months later, this is not a quarter, a month, a
15 week, two, three, or stuff like that, 11 months later, and
16 you say this is cataclysmic, none of the other cases fit
17 this pattern.

18 There have been many cases where there's been an
19 extension but the extension -- and the extension has not
20 resulted in a new lead plaintiff, but those extensions were
21 basically the tail wagging the dog. In this situation, you
22 have the dog wagging the tail. It's just the reverse and
23 what tells you that and what tells you what investors knew
24 or did not know or how much disclosure there was about Vioxx
25 and so on is this chart.

16

1 The stock market is run generally by people who
2 know what they're doing, not all the time, but they're not
3 dumb and they don't lose 30 or 35 billion dollars at the end
4 because they all knew about this at the beginning, so, your
5 question, while it's a perfectly valid question, and we've
6 asked this question in preparing for the argument and we've
7 talked it through and talked it through, this case I think
8 is sui generis.

9 I don't know, and the PSLRA has been around for ten
10 years, there certainly have been cases where lead plaintiff
11 has been revisited. The lead plaintiff turns out to be a
12 felon. He wants to take a hike. His trades turn out to be
13 bogus. There's all kinds of reasons why you might want to
14 revisit.

15 I know of no case that's as dramatic as this and in
16 this situation, I say to you that what you have to consider
17 first and foremost is what's best for the class in Merck,
18 and what's best for the class without any question is to
19 have what Congress wanted to run these cases, which is an
20 institution.

21 My client wasn't there 11 months ago. Nobody was
22 there in that 11-month period. They threw a party but
23 nobody showed up. The reasons are pretty obvious. There
24 were very little losses at that time and it's four
25 individuals who have really no experience, enough to match

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1 what my client has in this case.

2 We're all fiduciaries. You're a fiduciary here

3 because you stand in the place of all these absent class

4 members, and I will tell you that if you have to, if, and

5 the first question is do I open it, if you open it, I don't

6 think there's any question about who you have to pick.

7 I say that but for the grace of God, I could be on

8 that side because I also represent individuals, as do those

9 people, but in this situation I think that my client is

10 really deserving of this situation and I think that the fact

11 pattern here is not one where your Honor has to worry about,

12 you know, we're going to revisit and, you know, Rule 23

13 which has been on the books since 1966, all class -- and

14 before the PSLRA which created the concept of lead

15 plaintiff, you only had class rep. I mean, up until 1995 it

16 was the class rep who was the fiduciary.

17 There are legions of cases which hold that all Rule

18 23 decisions are interlocutory, that the court in the

19 interest of justice can always revisit a class decision and,

20 frankly, when the framers of the PSLRA decided to engraft

21 this lead plaintiff, they tied to Rule 23. They didn't say

22 that it was enough to just have large losses. They said you

23 have to have large losses and, part B, you have to qualify

24 under Rule 23. And we've raised issues about unique

25 defenses and whether or not they're typical in when they

18

1 file.

2 So, if your Honor gets to the question of
3 revisiting and, as I say, we're here today I hope with a
4 clean slate. I understand that a judge in Louisiana in a
5 non-opposition type of matter on a stipulation signed an
6 order. Eleven months went by before Vioxx was pulled.
7 There was no motions. There was no discovery in that case.
8 The only thing that happened was a stipulating order and, as
9 I said to the Panel, not once in the 11 months were the
10 parties before that court in Louisiana. They never once
11 entered the court room. There never was a status
12 conference.

13 THE COURT: Now, Mr. Abbey, would I be mistaken
14 that part of that inaction was as a result of the stay
15 provisions relating to the disposition of 12(b)(6) motions?

16 MR. ABBEY: There were no motions made.

17 THE COURT: 12(b)(6) motions?

18 MR. ABBEY: There were no motions made by
19 defendants. There was nothing done. There was no motion to
20 dismiss filed. It was only after we started our case that
21 they belatedly made a Rule 23 motion. That was the only
22 motion plaintiffs did, and the judge in Louisiana stayed
23 that motion.

24 There was no motion. There were no status
25 conferences. There was no attempt, as we did here, to try

19

1 to lift the stay. We have that before the magistrate. I
2 don't know whether we're going to get it or not but I will
3 tell you that for 11 months in Louisiana, other than
4 stipulating to lead plaintiff, and I kid you not, and
5 amended complaints as facts came out, zero, zero was done.
6 Not even in the courtroom. I don't think they ever met the
7 judge in those cases. I know that because the defendant's
8 counsel told me that they never met the judge and I assume
9 that the judge didn't have the plaintiffs in without the
10 defendants, unless they do it differently in Louisiana.

11 So, your Honor, I would say that we don't have an
12 issue anymore about bifurcated class. You know, there were
13 some people who said it's two cases. They're gone. It's
14 now one case for the whole class period. It's either us as
15 lead plaintiff or you keep them.

16 There's also an application for someone who's got a
17 client in a dividend reinvestment plan saying that they
18 should be a lead plaintiff. That's the Park East. There's
19 lots of cases which say that the lead plaintiff doesn't have
20 to have every claim, it doesn't have to have every security.
21 You don't want to bifurcate. You don't want to bring each
22 player in.

23 I think by far in the big cases, the Enrons and
24 WorldComs, there's been one lead plaintiff and the other
25 people can be there as a class representative later on but,

20

1 your Honor, in all fairness, you have an opportunity to
2 really help benefit the Merck shareholders, this class, by
3 selecting my client, and I hope you do that. Thank you very
4 much, your Honor.

5 THE COURT: Thank you. At this point before we
6 hear from counsel for the Pringle plaintiffs, let me hear
7 the Park East application also at this point.

8 MR. ROSEN: Thank you, your Honor. My name is
9 Samuel Rosen from the Wechsler Harwood firm representing
10 Park East. Park East was the plaintiff in the first class
11 action filed under sections 11 and 15 of the Securities Act.
12 That action was filed on behalf of the participants in
13 Merck's dividend reinvestment plan for shares received by
14 them under that plan during the period April 26, 2002
15 through September 30, 2004. That complaint was filed in the
16 Eastern District of Louisiana on December 1, 2004, and Park
17 East timely filed its motion to be lead plaintiff for that
18 class.

19 At the time of filing, the Park East action was the
20 only action claiming violations of sections 11 and 15 of the
21 Securities Act. As of now, to the best of our knowledge,
22 there's only been one other action filed by a plaintiff
23 purporting to have received shares under that plan; namely,
24 Rhoda Kanter, who, for reasons which I'll discuss later,
25 would not be as adequate a plaintiff for the class as would

21

1 Park East.

2 Neither New York State, nor the Louisiana
3 plaintiffs, claim to have acquired shares under that plan.
4 Preliminary damage estimates are that the harm suffered by
5 the Section 11 class could exceed \$100 million. This class,
6 therefore, is not a niche or subclass as it has been
7 demeaned by others seeking its representation.

8 It would not only be improper but it would be
9 unfair to combine the Exchange Act actions where a plaintiff
10 must meet not only the particularity requirements of Rule
11 9(b), but the specificity and scienter requirements of the
12 PSLRA and Section 10(b) with the Section 11 action.

13 In fact, the Supreme Court in Herman and McLean vs.
14 Huddleston, which was cited by the Louisiana plaintiffs, the
15 court said, and I quote, Section 11 and Section 10(b) claims
16 involve distinct causes of action and were intended to
17 address different types of wrongdoing. Such a combination
18 would harm from the very beginning of this action the
19 chances of success of the absent members of the class Park
20 East seeks to represent. Protection of the Section 11 class
21 from the very earliest stage of the litigation is not, as
22 New York State has claimed in its papers, completely
23 inappropriate, particularly at this stage of the litigation.
24 To the contrary, because of the extensive harm that could be
25 caused if New York State or the Louisiana plaintiffs lead

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1 the Section 11 class, its protection is both appropriate and
2 necessary at the earliest stage of this litigation.

3 Significantly, neither the Louisiana plaintiffs,
4 nor New York State, sought at first to represent the Section
5 11 class. It was only when Park East filed its complaint
6 that they each saw a new cause of action and they tried to
7 grab it. In fact, counsel for the Louisiana plaintiffs has
8 sought to grab it twice on behalf of either the Louisiana
9 plaintiffs or Rhoda Kanter.

10 Seeking to represent Miss Kanter is significant.
11 It is an admission by counsel for the Louisiana plaintiffs
12 that the Section 11 claim is entitled to separate
13 representation now. It is wrong under the law to permit
14 them to represent both the 10(b) and Section 11 classes and,
15 frankly, it would just be wrong to reward them for their
16 overreaching.

17 THE COURT: Let me stop you for one second, which
18 is, my question is, apart from Chill vs. Green Tree, in what
19 other case has your type of application been granted?

20 MR. ROSEN: There have been very few situations
21 where there were both Section 11 and 10(b) claims where the
22 lead plaintiffs' group did not at least have a cause of
23 action under Section 11. Without having a cause of action
24 under Section 11, they simply don't have standing to bring
25 the action. They don't have standing to represent a class

23

1 where they don't have a shareholder in their group who
2 purchased in the offering. The cases just don't arise.

3 THE COURT: And their argument, as I see it, is
4 that the lead plaintiff need not personally possess every
5 cause of action, that as long as there are class
6 representatives who are ultimately certified at the Rule 23
7 certification process, that is adequate and that the cases
8 they cite seem to stand for the proposition that a lead
9 plaintiff need not have every single cause of action in his
10 or her arsenal before being appropriately designated as lead
11 plaintiff.

12 Now, what's wrong with that argument?

13 MR. ROSEN: What's wrong with that is they lacked
14 standing, both constitutional and prudential standing under
15 the cases cited in our memoranda.

16 THE COURT: They certainly would lack
17 constitutional and prudential standing to be class
18 representatives on those causes of action. Where is there
19 a requirement under the PSLRA that the lead plaintiff have
20 standing to represent every single class claim before those
21 plaintiffs can be appointed as lead plaintiff?

22 MR. ROSEN: The PSLRA does not, I respectfully
23 suggest, repeal those provisions of the constitution dealing
24 with standing and the courts have stated, and I'm quoting
25 from a case cited in our brief, *Louis against Casey*, even

24

1 named plaintiffs who represent a class must allege and show
2 that they personally have been injured, not that injury has
3 been suffered by another unidentified member of the class.

4 Another court said standing issue bears directly on
5 the constitutional power of this court to decide the issue
6 at all. Standing cannot be acquired through the back door
7 of a class action.

8 THE COURT: They are not contesting that
9 proposition at all from what I see. They are simply saying
10 that at the time that class certification is sought, there
11 will indeed be class representatives who are put forward who
12 will be representatives on those claims, that those people
13 need not be part of the lead plaintiff group and, quite
14 frankly, I don't see any case law which stands for the
15 proposition they do have to be part of the lead plaintiff
16 group.

17 MR. ROSEN: The most critical time where the
18 Section 11 plaintiffs need representation is at the very
19 early stage of the litigation in response to the motion to
20 dismiss. The papers that we have seen indicate that, and
21 the presentation that Mr. Abbey just made where he spent, of
22 his approximately 25 minutes addressing the Court, he spent
23 about 15 seconds dealing with the Park East class, there is
24 at the early stage of the litigation a requirement that
25 somebody zealously represent only that class.

25.

1 The reason is for them to come in as a third party
2 representing this class is not giving this class the best
3 representation it can. The absent class members are being
4 represented by absent counsel.

5 THE COURT: All right. Anything further?

6 MR. ROSEN: I would turn to the other Section 11
7 movant who I would suggest based on our papers is a far less
8 adequate representative for the Section 11 class than is
9 Park East and, again, I would say that in seeking separate
10 representation for that class, the Louisiana plaintiffs'
11 counsel would be in a conflicted position and, indeed, would
12 be in a conflicted position in representing both classes
13 from the outset of the litigation.

14 THE COURT: And why is that?

15 MR. ROSEN: Why are they in a conflicted position?

16 THE COURT: Yes.

17 MR. ROSEN: Because they have a far more stringent
18 test to meet under Rule 10(b)(5), and they're going to be
19 spending in the heat of litigation the vast bulk of their
20 time working on the 10(b)(5) part of the action. By having
21 one other counsel representing another class with a hundred
22 million dollars of damages will give those absent class
23 members the zealous representation to which they're
24 entitled.

25 The papers that have been submitted on behalf of

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1 Miss Kanter do not give any indication that the great effort
2 that will be needed in this case can be mounted by someone
3 representing both classes.

4 THE COURT: One of the reasons why we do this is so
5 you can educate me. My recollection is that your claims are
6 easy to make, among other things, because the scienter
7 requirement is less. Correct?

8 MR. ROSEN: That's correct, your Honor.

9 THE COURT: Okay. So, I don't understand how a
10 group of claimants whose claim is easier to make because
11 there need not be the same demonstration of scienter are
12 going to be prejudiced by having lead counsel working on the
13 10(b) claims which do require scienter but which will
14 necessarily result in the discovery of information and
15 material which would ipso facto be supporting your claims.
16 Now, am I missing something?

17 MR. ROSEN: They're different classes, your Honor.
18 There are requirements under both sections that have to be
19 met, that have to be proved, and there will be separate
20 discovery relating to the contents of materials, some of
21 which are outside the class period which the 10(b)
22 plaintiffs are seeking to represent.

23 Our claims go back to September of 2002, which
24 means delving into the contents of the registration
25 statement that was written back then on which the members of

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1 the Section 11 class relied in purchasing – in obtaining
2 their securities under the stock incentive plan.

3 THE COURT: You see, I just don't understand the
4 logic of your argument. In short, if I had lead plaintiffs
5 who are only filing your claims, then there might be an
6 argument which is they would have no incentive to, in fact,
7 do the work which was required to make the demonstration of
8 scienter called for on a 10(b)(5) claim; that that would be
9 something which would be presenting difficulties and they
10 might not be motivated to make the effort, but you're still
11 not demonstrating to me why, in the process of pursuing the
12 10(b)(5) claims, ipso facto your claims would not be
13 furthered.

14 MR. ROSEN: Because they're not motivated to go
15 back to the earlier registration statement which isn't in
16 their class period.

17 THE COURT: Anything further?

18 MR. ROSEN: No, your Honor. Thank you, your Honor.

19 THE COURT: All right. Since I guess we're dealing
20 with this issue, does counsel for the Kanter plaintiff wish
21 to be heard independently on this issue?

22 MS. GROSS: Good morning, your Honor. Deborah
23 Gross, counsel for plaintiff Kanter, who filed the brief
24 with the Milberg Weiss firm.

25 We have done this before in the past and I know a

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1 specific case where we actually filed a dividend
2 reinvestment plan and there was a previous 10(b)(5) case and
3 the plaintiff was just brought in at the class certification
4 stage. I also know that that case is in DQE in the Western
5 District of Pennsylvania.

6 There was also a case where there was a 10(b)(5)
7 class action and a separate Section 11 case as well and when
8 there was a concern with the conflict, there was -- I know I
9 stepped forward to represent the Section 11 plaintiffs in
10 the discussion of the damage calculation, so that I agree
11 with your Honor in that you don't need a separate counsel at
12 the beginning of the case. You may need separate counsel to
13 make sure these claims are represented at the end of the
14 cases but not at the beginning, your Honor.

15 THE COURT: Thank you very much. All right. Mr.
16 Weiss.

17 MR. BRICKFIELD: Good morning, your Honor. My name
18 is Paul Brickfield. I'm from the firm of Brickfield &
19 Donahue. I'm New Jersey co-counsel for plaintiffs Levan,
20 Nathanson, Haber and Reynolds. I am representing the
21 plaintiffs who have filed the original suit in November of
22 2003 and who have been serving as lead plaintiffs pursuant
23 to the order of the U. S. District Court Judge Engelhardt in
24 the Eastern District of Louisiana.

25 Arguing the principal motion today will be Melvin

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1 Weiss of the firm of Milberg & Weiss. Also with him today
2 is Jules Brody, also co-plaintiff lead counsel from the firm
3 of Stull, Stull & Brody. David Brower from Milberg Weiss is
4 also present along with Bruce Bernstein and Richard Weiss.
5 So, unless there's further questions, Mr. Weiss will present
6 the principal argument.

7 THE COURT: Thank you, Mr. Brickfield.

8 MR. BRICKFIELD: Thank you, Judge.

9 MR. WEISS: Good morning, your Honor. I guess I'm
10 somewhat confused by Mr. Abbey's arguments because they seem
11 to veer from his main argument and he said a lot of things,
12 including that we weren't diligent in the way we've been
13 pursuing these claims. But what he hasn't really addressed,
14 your Honor, is the plain language of the statute.

15 He said in 1995 the PSLRA was an innovative, new
16 statute and it was, and it very carefully proscribed the
17 time frame for different things to happen in the case and,
18 as your Honor pointed out, there were many cases where there
19 are partial revelations, and to attack a lawsuit that was
20 started because of a partial revelation, albeit with a
21 subsequent revelation that might shed more light, doesn't
22 change the fact that the PSLRA states that within 60 days
23 after the first notice is given, the selection of lead
24 plaintiff door is closed. You have to present yourself
25 within that period of time.

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1 The statutory record is that there should be a
2 preference for institutional investors, but the term
3 institutional investor doesn't appear in the statute. Mr.
4 Abbey, the last time he appeared before your Honor, made it
5 very clear that New York State Retirement takes the
6 position, as we do, that this is one case.

7 If you recall, Mr. Barroway from Schiffrin &
8 Barroway at that time made an argument that there might be a
9 subclass for the post period after the first lawsuits were
10 filed, and Mr. Abbey trashed that argument, saying this is
11 one case, and he comes before this Court and he says there
12 should be one lead plaintiff.

13 THE COURT: Distinguishing it from, for example,
14 the Lucent situation in which there was Lucent 1 and
15 Lucent 2.

16 MR. WEISS: Exactly. And which my firm was one of
17 the lead counsel. Also, distinguishing it from Xerox and
18 Computer Associates, which were two other examples where
19 there were different kinds of revelations that occurred in
20 the second cases and the court saw it as appropriate to
21 appoint separate lead plaintiff for that case, or additional
22 lead counsel to join with the original lead counsel.

23 But this application by the New York State
24 Retirement Fund makes it very clear they're not interested
25 in co-litigating this case. They want it solely for

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1 themselves. So, they want to, in effect, ignore the ruling
2 of another court that had the same jurisdiction as this
3 court does in terms of the PSLRA and made its
4 determinations.

5 Now, just to clear the record up front about what
6 we did there, we all know as securities litigators with a
7 lot of experience that there will be a stay motion, a motion
8 for dismissal that will automatically stay discovery. We
9 also know that we have to do a lot of our own investigation
10 in order to overcome the hurdles of the pleadings standards
11 in the PSLRA, and we did that.

12 We didn't just rely upon what we read in the
13 newspapers. We have been investigating and talking to
14 lawyers who have been prosecuting claims arising out of the
15 Vioxx product for years now, for years, and I don't think
16 the New York State Retirement Fund has done that.

17 They came in after a major revelation, true, and
18 they basically did the same thing as we did 11 months
19 before. Your Honor, all you have to do is look at the two
20 notices that were published in the two time frames and you
21 will see a remarkable identity of the way the case is
22 described.

23 Our notice when we filed in Louisiana and the
24 second notice which wasn't even a New York State Retirement
25 Fund notice but was issued in another case, uses almost

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1 identical language to describe what this case is all about.

2 Another disturbing thing about this new application
3 is that it sees fit to trash the claims as asserted in the
4 first case as being timely. Now, we know that there's a big
5 issue of loss causation in these 10(b)(5) cases. Dura
6 Pharmaceutical is a case that's now under consideration in
7 the Supreme Court of the United States.

8 We checked and we looked to see what New York State
9 Retirement Fund's trading activity has been during the class
10 period, and it's not surprising to find that within weeks
11 after our original cases were filed in Louisiana, New York
12 State Retirement Fund sold 650,000 shares and was a net
13 seller because it was buying and selling at the same time of
14 about 350,000 shares.

15 Now, we believe as lead plaintiffs we have a
16 fiduciary duty to protect the interests of all potential
17 class members in this, as Mr. Abbey put it, seamless
18 five-year period. If what Mr. Abbey says is true, it could
19 lead to a determination that there was no damage suffered by
20 people who sold after the first lawsuit because there was no
21 loss causation. There was no disclosure of anything that
22 was potentially grounds for liability.

23 We think that that is not what lead plaintiffs
24 should be doing at this stage of the case. We have to make
25 a sincere attempt to protect the interests of all people who

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1 bought and sold during the class period if there were
2 partial revelations that caused the drop in the stock and
3 there was a drop of about six and a half billion dollars in
4 market cap at that time.

5 So, we, in effect, don't think it's proper for
6 somebody to come into court and say we want to be lead
7 plaintiff but not for everybody, and really buried in their
8 argument is that very position.

9 Another thing that I think is very clear, your
10 Honor, is that the largest shareholder presumption in the
11 PSLRA is not an open-ended presumption, that the largest
12 stakeholder can take control at any time in the litigation,
13 and that's language out of the Christman case, Judge
14 Gottschall in the Northern District of Illinois.

15 Another thing that I think is pretty clear is that
16 just because subsequent events disclose a lot more
17 information about a situation doesn't mean that that should
18 trigger a new round of lead plaintiff motions, and that was
19 stated in the WorldCom case, the case where New York State
20 Retirement Fund is the lead plaintiff.

21 Judge Cote rejected that very argument. It was
22 made by one of the other counsel and the argument was
23 precisely the same, that there were much more extensive
24 revelations about WorldCom subsequently and, therefore, that
25 whole process should be extended.

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1 Another concern that we had was the Statute of
2 Limitations. As your Honor knows, as an experienced jurist,
3 a defendant will latch onto any argument that it can that
4 the Statute of Limitations has tolled for certain claimants
5 because the world has been put on inquiry notice.

6 We couldn't abandon the rights of people who
7 bought, let's say, five years or four years or three years
8 before, more than three years before the partial disclosure
9 if we really believed that that partial disclosure was
10 enough to put people on inquiry notice.

11 New York State Retirement Fund itself is seeking to
12 represent the very class members at the beginning of our
13 class period which would have been -- which claims would
14 have been barred had our lawsuit not be brought, so, instead
15 of giving us credit for protecting people whose claims would
16 otherwise have been barred, we are being accused of
17 prematurely bringing an action.

18 How premature was it, your Honor? There were lots
19 of things that were going on that maybe New York State
20 Common Retirement Fund is unaware of concerning Vioxx.
21 Personal injury actions were started a couple of years ago,
22 long before our case was started as a securities case.

23 Your Honor himself had a case dealing with this
24 very issue and threw it out on grounds totally unrelated to
25 the issues that we're talking about, but the very facts that

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1 gave rise to our claims were in that complaint. And if your

2 Honor recalls, there was a learned intermediary issue --

3 THE COURT: I remember my cases very well.

4 MR. WEISS: So, on balance, your Honor, it comes

5 down to a very simple issue. There's a statute. There's a

6 60-day jurisdictional time limit. We complied with

7 everything we were supposed to comply with. We're diligent

8 lawyers. There's not been any attack on our diligence as

9 lawyers except in the last few minutes, which I was sort of

10 surprised at.

11 I have the utmost respect for the New York State

12 Common Retirement Fund and its management. They're clients

13 of mine. I deal with them on a regular basis. They are an

14 excellent institution to be lead plaintiff in cases, perhaps

15 the best that I've come across. They're hands on. They do

16 have an extensive staff. But they're not timely in this

17 case. And when it comes to collecting money from directors,

18 your Honor, I did it in the Salomon Brothers case years ago.

19 I got \$14 million from Goodfriend and Merriweather and

20 Strauss and I was accused by one of my colleagues at one of

21 the defense firms, he said to me, it was one of the most

22 evil things I ever did in my life. That's how he

23 characterized what I did when I got the money without

24 insurance from them and they were insured, so, it doesn't

25 have to be New York State Common Retirement Fund that's

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1 handling the case to get the right thing done, and I don't
2 think anybody would ever accuse my firm of not being the
3 most diligent in terms of pursuing rights to the class
4 members.

5 THE COURT: Mr. Weiss, let me ask you what may be
6 to the Retirement Fund system the \$64 question, which is, do
7 I have jurisdiction to in fact revisit lead plaintiff
8 appointments as the lawsuit goes forward?

9 MR. WEISS: I think that only under very narrow
10 circumstances, and I think actually Mr. Abbey discussed them
11 with your Honor. If it turns out that the lead plaintiff is
12 somebody other than who the Court believed it was at the
13 time of the appointment, if the lead plaintiff decides to
14 abandon the role, I think your Honor has an important role
15 to protect the class members, but those are circumstances
16 that are far different from these, and that leads me to this
17 also.

18 So there's no misunderstanding about it, we have
19 two individual plaintiffs. I was talking to my colleagues
20 this morning and I asked them how many times have you
21 communicated with our lead plaintiffs so far and they said
22 over 20 times. They've had a conference call together with
23 the Union fund in Europe, and let me just say this. We put
24 them forward not as a lead plaintiff. We made them a
25 plaintiff because they may be a potential class rep and, as

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1 your Honor has pointed out, there's a difference between
2 lead plaintiff and class reps.
3 That fund in Germany has \$110 billion and, as we
4 pointed out in our papers, their loss during the period
5 subsequent to our original lawsuits is greater than anybody
6 else's who has presented themselves. We are doing
7 everything that we have to do to protect all the interests
8 of these class members and the people who are acting as lead
9 plaintiffs are very diligent. The money they lost is
10 important to them, and we take care of them and their
11 interests on a daily basis and we communicate with them
12 regularly and they communicate with us. And I apologize for
13 them not being here today but the gentleman in Florida just
14 couldn't do it. He had another engagement, as did the
15 gentleman in California. They were prepared to come on a
16 different date, but we thought that it was more important to
17 hold to your Honor's calendar than to force them to do
18 something that dramatic in their lives to come to this
19 hearing.

20 THE COURT: Mr. Weiss, let me ask you a question
21 and it may be stretching this to a reductio ad absurdum, but
22 suppose at some point in time there was one individual who
23 contended that he or she had been injured by Vioxx; in
24 short, had had a heart attack or whatever caused by
25 ingestion of Vioxx, filed an individual personal injury

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1 suit which got a fair degree of publicity as sometimes
2 happen when people file personal injury suits, and an
3 individual shareholder with ten shares of stock noticed this
4 and said I think this is going to be really impacting the
5 value of Merck in the future that they are concealing the
6 danger that this product poses to the company, and files a
7 10(b)(5) claim at that point, posts the appropriate notice.
8 All the other investors in Merck ignore it because they
9 think the case doesn't stand and doesn't have any real merit
10 at that point in time.

11 Lo and behold, that plaintiff is appointed lead
12 plaintiff. And let's take, since we're going to do a
13 reductio ad absurdum, we're going to have a lead plaintiff
14 who has one share of stock in Merck. Go back to the days
15 when class representatives had one share of stock. All
16 right, Mr. Weiss.

17 Lo and behold, then we have the subsequent
18 revelations. All right. Can I revisit lead counsel, lead
19 plaintiff appointment?

20 MR. WEISS: I think that might fall into the
21 category of what we were talking about before when you have
22 a lead plaintiff who's totally inadequate, you might have
23 the ability to remove that person and to replace him.

24 And I would make another argument. Would you say,
25 as an example, that the Statute of Limitations didn't start

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1 tolling at that point in time? I mean, there's a lot of
2 rights that are implicated when such a lawsuit is filed. It
3 tolls the Statute of Limitations for all members of the
4 class whether or not that person is adequate at that point
5 in time.

6 Now, I would guess that under those circumstances
7 the defendant would quickly move to dismiss the action and
8 take care of that problem, but I think your Honor has to
9 judge whether this is that situation. I mean, here there
10 were many lawsuits being filed in a lot of different places.
11 Information started to percolate into the public domain.
12 There was a disclosure that, of course, the six and a half
13 billion dollar market drop.

14 I come from the days, your Honor, when if the
15 market dropped \$50 million, I got excited if somebody came
16 into my office and wanted me to represent them. Six and a
17 half billion dollars are numbers that are staggering,
18 staggering. Maybe they don't look staggering relative to
19 \$30 billion, but six and a half billion dollars is still a
20 lot of bucks.

21 So, you know, what your Honor described is not what
22 happened in '03. There was a published article entitled
23 Merck to cut 4400 jobs which revealed that sales of Vioxx
24 were declining due to data suggesting it might raise the
25 risk of heart attacks and the growing perception that Vioxx

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1 did not have any greater efficacy than other traditional
2 drugs.

3 There was a lot of information out there. This is
4 not a case that was brought by somebody with one share. One
5 of our clients lost over \$100,000. That's a lot of money to
6 that person. So, I think your Honor has to respect that
7 this was not a frivolous action and, in addition, you know,
8 we have much more stringent pleading standards under the
9 PSLRA.

10 People who bring actions today, lawyers who bring
11 actions who are experienced know that there's a potential of
12 violations of rules that can cause us to be fined and
13 censured, and we have a heightened degree of responsibility
14 under the PSLRA, so, I think your Honor has to take all of
15 those things into account. And there was nothing said by
16 the judge sitting in Louisiana at that time that would
17 indicate in the slightest degree that he didn't think this
18 was a legitimate case that required his exercise of
19 jurisdiction under the case law --

20 THE COURT: Mr. Weiss, Mr. Abbey also essentially
21 argued that your clients are subject to the unique defense.
22 I gather it's been articulated as essentially your earlier
23 pleadings in some manner or other can be deemed or argued to
24 be an admission relating to a truth on the market type of
25 defense; in short, that the disclosures that were made at

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1 the time that you filed the suit would undercut any future
2 class period of claims.

3 MR. WEISS: Your Honor, I think that that argument
4 has been discredited in so many courts. I was one of the
5 lawyers who argued Ablackey against Barrack in the Ninth
6 Circuit way back in the '70s, where that same argument was
7 made that every day is a change in circumstances and if you
8 bought on one day, you can't represent people who bought
9 later or before, and the courts just don't accept that
10 because in securities cases you would never have a class
11 that could be certifiable as a class action if that were the
12 case.

13 It happened in almost every situation we have that
14 kind of circumstance, and even in WorldCom, there were
15 different revelations at different points of time. So, I
16 think that, you know, our briefs cover all the cases that
17 are legion that permit a class representative, let alone a
18 lead plaintiff, but even a class representative to represent
19 all people who bought and sold during a class period or even
20 held at the end of the class period in one case, and I'll
21 never forget the judge in the Ninth Circuit looked down at
22 my adversary when he made this argument and the judge said,
23 you know, if a ship goes down in flames and there's
24 passengers on the ship and they die from either asphyxiation
25 or shrapnel or drowning, what's the difference what killed

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1 them from those events. They all have a common genesis.

2 And the common genesis here is that Merck did not
3 tell the truth in a timely fashion about the risks of Vioxx
4 and that, as Mr. Abbey put it, is a single seamless case
5 starting in 1999.

6 THE COURT: Thank you, Mr. Weiss. Mr. Entwistle,
7 you're doing the rebuttal?

8 MR. ENTWISTLE: I am doing the rebuttal, your
9 Honor. I think probably the best place to start is perhaps
10 with the question you asked Mr. Weiss, which is do you have
11 the power to revisit the issue. This is a 1407 transfer and
12 the law is well-settled that when we have a 1407 transfer,
13 that this Court is now invested as the transferee court with
14 full power and authority to vacate or modify or otherwise
15 request any predecessor order, and the law that's developed
16 in that area, and I'm thinking of the Upjohn case out of the
17 Sixth Circuit because it's the leading case even though it's
18 a 1981 case, clearly says you can go back, and do that and
19 what you do in that situation is you look at what happened
20 before and you determine whether you need to revisit those
21 issues.

22 Now, in that case protective orders were at issue.
23 The court looked at -- the district court looked at the
24 protective orders. It undid the relief that had been
25 granted in three out of eight district courts that had

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1 addressed the issue and we went forward with that case.

2 I would submit to your Honor that the situation is
3 no different here. It's no different than cases that have
4 looked at the class certification issue anew or other issues
5 and, in fact, that law as it's evolved in the Section 1407
6 transfer area is perfectly consistent with the Court's
7 obligation under Rule 23 and under the PSLRA as a fiduciary
8 for the class to always be in a position to revisit these
9 issues.

10 When you asked where we draw the line in these
11 types of cases, your Honor, I think the answer is in this
12 case at least, we're not drawing a line in just because
13 there are restatements. We've got to look at the context in
14 which it arises.

15 This case has been transferred to you anew. We've
16 got two cases which now stand in, relatively speaking, a
17 similar posture. Yes, it's true, the Pringle case from
18 Louisiana has amended its way through five amendments to get
19 to the point where the New York State's case is in its
20 original filing here, but now they stand in relatively the
21 same place.

22 In fact, if anything, this case is a little bit
23 more advanced because we have already gotten relief from
24 Magistrate Hughes to serve subpoenas and 29 have been served
25 in the New York State case so far on nonparties. We've

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1 gotten the defendant's agreement to preserve documents, and
2 this is relief which was never obtained in the Louisiana
3 case, so, if anything, we're perhaps a little bit more
4 advanced.

5 But as a practical matter, you have the power to
6 revisit the issue under 1407, which is how the case comes to
7 to be here. You have the power to do that under Rule 23 and
8 under the PSLRA and, so, that brings us then to where we
9 stand currently.

10 THE COURT: Are you suggesting that in any
11 securities case in which a lead plaintiff has been appointed
12 prior to consolidation in another district, that the
13 district in which the cases are ultimately consolidated as a
14 matter of course should be revisiting previously decided
15 lead counsel determinations?

16 MR. ENTWISTLE: The answer is, your Honor, is that
17 the district has the power to do it. Whether it does it or
18 not will depend on the unique circumstances of that case.
19 And it depends. For example, in the WorldCom case, the
20 court that had determined the issue of lead plaintiff
21 happened to be the court that it was transferred to. In
22 that case when the issue was raised, the court said, look,
23 I've determined this issue. I haven't heard anything that
24 would warrant changing it. We have New York State as an
25 institutional lead plaintiff. The case is well-developed at

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1 this point and Judge Cote determined not to alter her prior
2 decision, but she certainly had the power to do it and was
3 requested to do it.

4 The same thing happened in the Duke case in a
5 slightly different context where there had been a prior
6 determination and, so, the fact of the matter is that there
7 are going to be circumstances where, after transfer, courts
8 are going to be asked to revisit that issue, which is why
9 there's a suggestion at least in the PSLRA that these
10 matters get held in abeyance until after consolidation is
11 dealt with, although it doesn't specifically address the
12 Panel issue, and there are some courts who said we don't
13 have to wait for the Panel.

14 In this case, of course, what happened in Louisiana
15 happened long before we're dealing with here and if we look
16 at what Upjohn says, Upjohn says, look, we're not going
17 to -- you know, these arguments related to comity or law of
18 the case have some superficial appeal, but that's not the
19 proper analysis.

20 Under 1407, when you get the case, you look at the
21 issues anew. Yes, look at the context in which the original
22 decision was made. And I think we can do that here.

23 Judge Engelhardt, when he was dealing with this
24 case originally, had a vastly different case, a vastly
25 different case. He had a 39-page complaint. The Pringle

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1 claimants had come into the court. It was not a contested
2 motion. There was very little publicity. Yes, notice had
3 been published but there was very little publicity and
4 clearly we know the difference in the events.

5 Compare and contrast what happened then with what
6 happened now. We've got 11 notices, new motions. You've
7 got five times the amount of publicity or more than you had
8 at that time and, in fact, you've got front-page news
9 articles. Merck Vioxx is on everyone's lips. The landscape
10 has so changed so dramatically that we can't help but be in
11 a position where, confronted with these applications as
12 they've arisen here in the context of these new cases, that
13 it's appropriate to look at these matters anew, for this
14 Court to look at them and revisit them anew.

15 THE COURT: Let me ask you this. Suppose I were to
16 appoint your client as lead plaintiff and four months from
17 now the FDA revoked the approval for Vioxx to be on the
18 market. Presumably that would cause an even larger stir in
19 terms of the reactions of the stock market and, as a result
20 of that, CalPERS decided that they were interested in
21 pursuing claims here.

22 I'm sure the New York Retirement Fund is extremely
23 large. I have a suspicion that CalPERS might be larger.
24 You can tell me whether or not my suspicion is right or
25 wrong.

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1 MR. ENTWISTLE: It is.

2 THE COURT: All right. So, suppose CalPERS
3 decides, you know, now we're interested, they've gotten our
4 attention, and there's been this further huge revelation.
5 Should I revisit it again?

6 MR. ENTWISTLE: And the answer there, your Honor,
7 is no, you shouldn't, and the reason why is that we have
8 again a very different situation. You do, of course, have,
9 always have the ability, always have the ability and the
10 obligation to look at the issue of the appropriateness of
11 the representation in the case, the adequacy of the
12 representation under all of the circumstances, always, at
13 every point in time through the case, and were CalPERS to
14 come in at that point, I would argue to your Honor that if
15 you had appointed New York, that there would be no reason
16 for CalPERS to be appointed. But that situation is
17 different than it is here.

18 Of course, you always have the ability to revisit
19 the issue and you should, because that's an obligation you
20 have under Rule 23 and under the PSLRA, but the question at
21 that point is to look at the adequacy of the representation,
22 and I don't think there's anyone who suggests that the state
23 of New York, having obtained five results over the past five
24 years with in excess of almost \$11 billion in recoveries, is
25 probably the most experienced institutional investor in this

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1 context with a staff that's purely and exclusively devoted
2 to monitoring, exercising, litigating and directing these
3 types of litigation. And so, in that context, you have an
4 adequate lead plaintiff, and that's a far different
5 circumstance than four individuals who have not even come to
6 the court today.

7 THE COURT: Okay. Thank you. Anything further?

8 MR. ENTWISTLE: Your Honor, I just note one or two
9 quick points on some issues raised by Mr. Weiss. The
10 trading information that he's related, and it's stated in
11 their briefs, related to New York State following the
12 Pringle action is simply wrong. The fact is that we're a
13 net purchaser. He's cherry picked some dates there or
14 someone in his office has, but if you go out one quarter to
15 the first full quarter after the Pringle disclosures, we're
16 a net purchaser of almost a million shares, so, I'm not sure
17 how they get that calculation. I don't think it's relevant
18 here other than the fact that the record ought to be
19 corrected there.

20 There was some mention of Union. Union has been
21 put forward as a named plaintiff in the last of the Pringle
22 amendments. Union has its own infirmities, as your Honor is
23 aware from a case that you had here in your court. Union is
24 a lead plaintiff in an earlier Merck case which is now on
25 appeal to the Third Circuit and has yet to be heard or

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1 decided. It has some overlapping class periods with this
2 one.

3 There is some significant issues with regard to
4 Union's participation, if any, in this case, leaving aside
5 whatever other issues there might be, but that's also worth
6 noting.

7 And other than that, your Honor, unless you've got
8 other questions, I'm going to leave it to you.

9 THE COURT: Thank you.

10 MR. BRODY: Can I just make --

11 THE COURT: First let's do this nice and orderly.

12 Let me get counsel for Park East, anything further?

13 MR. WEISS: No, your Honor.

14 THE COURT: Counsel for Kanter?

15 MR. ROSEN: I'm Park East. I remember who I am.

16 Mr. Weiss seems to have thought he was Park East.

17 I just want to suggest, your Honor, that because of
18 the issues involved, the potential constitutional issues
19 involved, that Park East as the sole representative of the
20 Section 11 claims should have a seat at the table in
21 drafting the consolidated amended complaint so that at the
22 end of the day no one can come along if the case is
23 successful, no objector, no one in the Third Circuit can
24 come along and say the Section 11 claims were not from the
25 beginning properly represented and do something to overthrow

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1 a settlement or another positive result for the plaintiff

2 class.

3 THE COURT: Thank you. Counsel for Kanter?

4 MS. GROSS: No, your Honor.

5 THE COURT: All right.

6 MR. BRODY: Your Honor, I have no further comments.

7 I just was going to amplify one of Mr. Weiss's points: Just

8 very simply, defendants said they can make a motion to

9 dismiss. Each amendment was an attempt to cure the issue

10 that the Court wouldn't have to bother with them hopefully

11 with a motion to dismiss. I think that was your Honor's

12 question, among other things, what we did during the period

13 and the expectancy, I think most cases if defendants say

14 they're going to make a motion to dismiss, you don't force

15 the motion and you try to work it out with proper pleading.

16 THE COURT: Thank you. The Court has been

17 listening very carefully to counsel and has very carefully

18 considered the papers which they've submitted.

19 It is clear to the Court that the New York City --

20 let's get it exactly straight -- New York State --

21 MR. ABBEY: New York State Common Retirement Fund.

22 THE COURT: Thank you. -- and Alan Hevesi would

23 indeed be proper and appropriate lead plaintiff in this case

24 if that application had been made in a timely manner. The

25 real question before the Court is in view of the purposes

1 and function of the PSLRA, whether or not an application
2 made now, many months after a lead plaintiff has already
3 been appointed in a class action which indeed essentially
4 covers the precise claims that Mr. Hevesi's cause of action
5 covers, should be entertained by the Court.

6 The Court is further satisfied that it has
7 jurisdiction to revisit the issue of appointment of lead
8 plaintiff and has that jurisdiction at any time during the
9 pendency of the lawsuit. The question is not whether it has
10 that authority and jurisdiction. The question is whether or
11 not under the circumstances of this case, it should exercise
12 that authority and discretion.

13 The lead counsel provisions of the PSLRA were
14 created to deal with two recurring problems in class action
15 litigation. One was the situation in which class
16 representative plaintiffs, lead plaintiffs, were selected
17 and did not have any substantial economic interest in the
18 outcome of the lawsuit, thereby by default placing the
19 entire conduct of the lawsuit in the hands of counsel.

20 The provisions of the PSLRA which presumptively
21 direct the court to appoint as lead plaintiff the plaintiff
22 which suffered the greatest economic injury were designed to
23 deal with that issue.

24 There was a second issue, however, which the PSLRA
25 was designed to deal with and that was, quite frankly, the

1 mad scramble to the courthouse, the chaotic situation in
2 which competing lawyers and plaintiffs descended sometimes
3 in hordes on the courthouses throughout the country and then
4 engaged in what could at best be described as an unseemly
5 scramble to be appointed to the lead plaintiff and lead
6 counsel position.

7 The PSLRA was designed to cure that problem by
8 creating a process in which the first plaintiff to the
9 courthouse and the first lawyer to the courthouse did not
10 thereby stake a claim on the entire lawsuit, and created
11 provisions under which before a lead plaintiff could be
12 appointed, notice had to be published and an opportunity for
13 other potential plaintiffs to make an application to that
14 position, including plaintiffs who had a more substantial
15 economic interest in the lawsuit if they were interested.

16 The Court firmly believes that while it has the
17 power to revisit the appointment of lead plaintiff at any
18 point during the pendency of a lawsuit, the mere fact that a
19 plaintiff with greater losses than the originally appointed
20 lead plaintiff subsequently develops an interest in a
21 lawsuit is an insufficient basis to disturb the original
22 appointment of the lead plaintiff. It would destroy the
23 process which the PSLRA was designed to initiate. It would,
24 in fact, create the potential for continued unending
25 struggles between plaintiffs and their counsels to secure a

1 piece of a litigation once it became clear that it had more
2 possible merit than was originally perceived.

3 In short, as the Court indicated in *In Re*:
4 *WorldCom, Inc. Securities Litigation*, 294 F. Supp 2d, 392,
5 Southern District of New York, 2003, "The time for the
6 selection of lead plaintiff is over. While the PSLRA
7 certainly envisions appointment of co-lead plaintiffs, there
8 was no competitor or group of competitors for the position
9 of lead plaintiff that presented any serious challenge on
10 the merits to the application made in that case by the
11 NYSCRF when measured by the standards that applied to the
12 selection of lead plaintiff."

13 The Court is satisfied that same analysis applies
14 here. The Court is more than satisfied that counsel for the
15 lead plaintiff is eminently qualified to pursue a litigation
16 of this significance. The Court is further satisfied that,
17 indeed, there are no unique defenses which are applicable to
18 the lead plaintiff which are sufficient to warrant its
19 disqualification under Rule 23.

20 As counsel for the lead plaintiff has indicated in
21 its moving papers or opposing papers, the issue of a truth
22 on the market defense ends up being a factual issue which
23 has to be decided on the basis of the evidence which will
24 ultimately be adduced either at trial or in motion practice
25 but, in particular, it is not a defense which is unique to

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1 that particular plaintiff.

2 Indeed, it is a defense which would apply to all
3 purchasers who were covered by the pleadings as they were
4 initially drafted. In short, it would apply to all of the
5 purchasers who purchased at that point in time. That's not
6 a unique defense by any stretch.

7 The Court is not satisfied that the concept that
8 there might be an implied admission by the filing of the
9 original complaint is sufficient to create such a
10 substantial unique defense as to warrant disqualification of
11 the Pringle plaintiffs.

12 The Court has further carefully considered the
13 argument of Park East that there should be a separate niche
14 lead plaintiff. Suffice it to say, as the Court noted in
15 argument, there are virtually no cases which support such a
16 position. Indeed, the court in *In Re: WorldCom, Inc.*
17 *Securities Litigation*, 294 F.Supp.2d, 392 at 422, noted,
18 "The argument that the NYSCRF did not and does not have
19 standing in this lawsuit because it does not have standing
20 to bring claims based on the 2000 and 2001 offerings blinks
21 reality and requires no further discussion. The underwriter
22 defendants have not shown that there is any legal bar to a
23 lead plaintiff asking other plaintiffs to join a lawsuit as
24 named plaintiffs in order to represent more broadly the
25 interests of the class at the time of the filing of the

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1 consolidated class complaint."

2 Decisions by district courts in other cases have
3 likewise reached that same conclusion. Weinberg vs. Atlas
4 Air Worldwide Holdings, Inc., 216 FRD 248 at 284, Southern
5 District of New York, 2003, and Aronson vs. McKesson, 79
6 F.Supp 2d, 1146, Northern District of California, 1999.

7 In short, if at the time that class certification
8 is sought it is appropriate to consider the designation of
9 subclasses, the Court can and will consider that issue at
10 that time.

11 For the reasons which the Court has indicated, the
12 applications by Park East and Mr. Hevesi to be appointed
13 lead counsel are denied in all respects.

14 Is there anything further which we have to do at
15 this point in these proceedings?

16 MR. ENTWISTLE: No, your Honor.

17 THE COURT: Then I will see you gentlemen at 1:00.
18 We're going to take up some interesting issues as to how
19 we're going to proceed in the future, including with our
20 colleagues on the ERISA cases. I believe they've been
21 invited to attend that also so that you can explain to me
22 how we can coordinate these matters. I'll see you at one.
23 Thank you.

24 (Whereupon the proceedings are adjourned.)

25

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 UNITED STATES DISTRICT COURT
 DISTRICT OF NEW JERSEY
 TRENTON

Minutes of Proceedings
JUDGE STANLEY R. CHESLER

DATE OF PROCEEDING: 3/21/05

CIVIL DOCKET NO. 04-5866(SRC)
05-1151(SRC)

COURT REPORTER : Jackie Kashmer
 DEPUTY CLERK : Dana Sledge

TITLE OF CASE:

In re: *Merck*

APPEARANCES:

William Stein, Esq., for Merck & Co., Inc.
Roberta Koss, Esq., for Merck & Co., Inc.
Will Coronato, Esq., for Merck & Co., Inc.
Stephen Oestreich, Esq., for the State of NY Common Retirement Fund
Arthur Abbey, Esq., for plaintiff, NY State Common Retirement Fund
Andrew J. Entwistle, Esq., for plaintiff, Alan Hevesi & the State of NY Common Retirement Fund
Robert Cappucci, Esq., for plaintiff, Alan Hevesi & the State of NY Common Retirement Fund
Joseph J. Depalma, Esq., for plaintiff
Judith Spanier, Esq., for NY State Common Retirement Fund
Nancy Kaboolian, Esq., for NY State Common Retirement Fund
Melvin I. Weiss, Esq., for lead plaintiff in Pringle Action
David P. Brown, Esq., for lead plaintiff in Pringle Action
Samuel K. Rosen, Esq., for plaintiff, Park East, Inc.
Jules Brody, Esq., (related matter)
Edward Cerasia II, Esquire, for Merck & Co. & Erisa
Michael Natello, Esquire for Muriel Kaufman
Mark Levine, Esquire for Lead Plaintiffs
Robert D. Joffe, Esquire for Merck
Deborah R. Gross, Esquire for Rhoda Kantor
Richard Weiss, Esquire for Plaintiffs
Kevin Landau, Esquire for Muriel P. Kaufman
Scott W. Fisher, Esquire for Muriel P. Kaufman
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Rebekah R. Conroy, Esquire for Plaintiff
Paul Brickfield, Esquire for Plaintiffs
Jeffrey Fink, Esquire for Doris Staehr
William W. Silcott, Esquire for Merck & Co., Inc.

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NATURE OF PROCEEDING:
Oral argument hearing held.

Motion to Consolidate Cases to be Appointed Lead Plaintiff & for Approval of Lead Plaintiff's Selection of Co-Lead Counsel is Denied. Motion to Strike, Motion to Consolidate Cases 3-1- is Moot. Motion to Appoint Counsel and Lead Plaintiff is Moot. Motion to Consolidate Case to be Appointed Lead Plaintiff & for Approval of Selection of Co-Lead Counsel is Denied. Motion to Appoint Counsel is Denied.

TIME COMMENCED 11:00 a.m. **TIME ADJOURNED** 12:15 p.m.

—s/—
DEPUTY CLERK
Dana Sledge