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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ORIGINAL

CIVIL MINUTES - GENERAL

SCANNED

Case No. SA CV 07-65 PSG (MLGx); ✓  
CV 07-839 PSG (MLGx);  
SA CV 07-158 PSG (MLGx);  
SA CV 07-287 PSG (MLGx)

Date: June 13, 2007

Title: Crafton v. Powerwave Technologies, Inc., et al.

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy K. Hernandez

Not Present

n/a

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

**Proceedings:** (In Chambers) Both's Motion for Appointment as Lead Plaintiff and for Consolidation;  
Silbermann Group's Motion for Appointment as Lead Plaintiff and for Consolidation;  
Kabrey Group's Motion for Appointment as Lead Plaintiff and for Consolidation;  
Electrical Workers' Pension Fund's Motion for Appointment as Lead Plaintiff and for Consolidation

Before this Court are four motions for appointment as lead plaintiff and for consolidation. The Court heard oral argument on these motions on June 1, 2007, and now the Court finds the matter appropriate for decision without further oral argument. Fed. R. Civ. P. 78; Local R. 7-15.

I. BACKGROUND

Jerry Michael Crafton ("Crafton") has brought a class action lawsuit against Powerwave Technologies, Inc. ("Powerwave") and several individual officers of Powerwave (collectively with Powerwave, "Defendants"). Crafton filed his complaint on January 17, 2007 on behalf of all persons or entities that purchased or acquired Powerwave securities between May 2, 2005 and October 9, 2006 ("Class Period"). (Complaint, p. 1, lines 1-4). The complaint alleged that Defendants violated Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b) and

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78t(a)) and SEC Rule 10b-5. (Complaint, ¶ 9.) Specifically, Crafton alleges that Defendants disseminated a series of public statements during the Class Period that contained material misrepresentations and omitted material facts concerning Powerwave's financial results, business and operations. (Silbermann Group Brief, p. 2, lines 10-13.) The misrepresentations and omissions allegedly caused the price of Powerwave securities during the Class Period to be artificially inflated and resulted in damages to class members. (Id., lines 13-15.)

After Crafton filed his complaint on January 17, several other complaints were filed in the Central District of California with similar allegations against Powerwave. These cases include CV07-158, CV07-839, and CV07-287. Also, after the initial filing of his complaint, Crafton published a notice of pendency of the action over the national wire service MarketWire on February 1, 2007. (Id., p. 2, lines 16-17.) That notice advised potential class members of the existence of the lawsuit and described the claims asserted. (Id., p. 2, lines 18-20.)

Now, several plaintiffs and their attorneys have filed motions asking for the four related cases to be consolidated and to be appointed lead plaintiff and lead counsel under the Private Securities Litigation Reform Act of 1995 ("PSLRA"). These plaintiffs include John Both ("Both"), the Silbermann Group ("Silbermann"), the Electrical Workers Pension Fund ("EWPF"), and the Kabrey Group ("Kabrey"). Another party filed a similar motion but has now withdrawn its motion to be appointed lead plaintiff.

The Court grants the motions for consolidation and appoints John Both as lead plaintiff and his attorneys as lead counsel.

## II. MOTION FOR CONSOLIDATION

The PSLRA requires that, "[i]f more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not [appoint a lead plaintiff] until after the decision on the motion to consolidate is rendered." 15 U.S.C. § 78u-4(a)(3)(B)(ii). Federal Rule of Civil Procedure ("FRCP") 42(a) permits a court to consolidate cases for trial or other purposes when the actions "involv[e] common questions of law or fact." Fed. R. Civ. P. 42(a). Although district courts have discretion to determine

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whether consolidation is appropriate, they must consider the interest of judicial economy as well as the parties' interest in a fair and impartial procedure. Johnson v. Celotex Corp., 899 F.2d 1281, 1284-85 (2nd Cir. 1990).

Here, there is no doubt that common questions of law and fact exist between the four related actions. Each of the related actions is a shareholder class action alleging violations of federal securities laws by the same defendants and is brought on behalf of a class of shareholders who purchased Powerwave common stock during the Class Period. A review of the related complaints filed reveals that common allegations, relating to the defendants' alleged misrepresentations and omissions and the impact on the price of Powerwave common stock, predominate. Therefore, because common questions of law and fact are present in the related actions, consolidation under FRCP 42(a) is proper.

Furthermore, consolidation of the related lawsuits would avoid needless costs and delays. Consolidation would avoid duplication of effort by the parties during pretrial discovery and in trial. It would also allow for efficient administration of the litigation. Finally, no party has expressed opposition to consolidation. Therefore, the Court orders consolidation of the related cases.

III. APPOINTMENT OF LEAD PLAINTIFFS

A. Legal Standard for Appointment of Lead Counsel

Under the PSLRA, a plaintiff has 20 days from the date the complaint is filed to publish a notice of the putative class action's pendency, claims, and purported class period "in a widely circulated national business-oriented publication or wire service." 15 U.S.C. § 78u-4(a)(3)(A)(i). If more than one action is filed, only the plaintiff or plaintiffs in the first-filed action are required to publish the notice. 15 U.S.C. § 78u-4(a)(3)(A)(ii). Any member of the purported plaintiff class then has 60 days from the date on which the notice is published to file a motion to be appointed lead plaintiff. *Id.* Within 90 days of the published notice, the court must appoint as lead plaintiff "the member or members of the purported class that the court determines to be most capable of adequately representing the interests of class members" (the "most adequate plaintiff"). *Id.*, § 78u-4(a)(3)(B)(I).

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In choosing a lead plaintiff, courts are required to adopt a presumption that the most adequate plaintiff is “the person or group of persons that – (aa) has either filed the complaint or made a motion in response to [the publication of notice of the action], (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The presumption may only be rebutted “upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff - (aa) will not fairly and adequately protect the interests of the class; or (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

The Ninth Circuit has interpreted these provisions as setting forth a three-step process. In re Cavanaugh, 306 F. 3d 726, 729 (9th Cir. 2002). The first step involves publicizing the pendency of the action, the claims made, and the purported class period. Id. (citing 15 U.S.C. § 78u-4(a)(3)(A)). Second, “the district court must consider the losses already suffered by the various plaintiffs before selecting as the presumptively most adequate plaintiff – and hence the presumptive lead plaintiff – the one who has the largest financial interest in the relief sought by the class and otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.” Id. at 729-30 (internal quotation marks omitted). Once the district court has compared the various plaintiffs’ financial stakes and determined which one “has the most to gain from the lawsuit,” the court “must ... focus its attention on that plaintiff and determine, based on the information he has provided in his pleadings and declarations, whether he satisfies the requirements of Rule 23(a), in particular those of ‘typicality’ and ‘adequacy.’” Id. at 730. If the plaintiff with the largest financial stake meets Rule 23’s requirements, it becomes presumptively the most adequate plaintiff. Id. If it does not, “the court must repeat the inquiry, this time considering the plaintiff with the next-largest financial stake, until it finds a plaintiff who is both willing to serve and satisfies the requirements of Rule 23.” Id. Third and finally, the court must “give other plaintiffs an opportunity to rebut the presumptive lead plaintiff’s showing that it satisfies Rule 23’s typicality and adequacy requirements.” Id. Under Cavanaugh, courts must engage in “a straightforward application of the statutory scheme [which] provides no basis for comparing plaintiffs with each other on any basis other than their financial stake in the case.” Id. at 732. “Once that comparison is made and the court identifies the plaintiff with the largest stake in the litigation, further inquiry must focus on that plaintiff alone and be limited to determining whether he satisfies the other statutory requirements,” regardless of whether “the

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district court believes another plaintiff may be 'more typical' or 'more adequate.'" Id. Keeping these principles in mind, the Court now considers which moving plaintiff(s) should be appointed as lead plaintiff(s).

B. Lead Plaintiff in This Case

1. Step 1 - Timeliness of Motion

There is no question that all moving plaintiffs have met the requirements under the first step of the test. Under the Exchange Act, the plaintiff in the first-filed action must publish notice to potential class members. 15 U.S.C. § 78u-4(a)(3)(A)(ii). On February 1, 2007, Crafton provided notice through the MarketWire announcement. This triggered the 60 day time period within which other plaintiffs could move to be appointed lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(A)(I). All moving plaintiffs' motions were timely filed within sixty days.

2. Step 2 - Presumptive Lead Plaintiff With Largest Financial Stake and Who Satisfies Rule 23 Requirements

Both is the presumptive lead plaintiff because he asserts the largest financial stake in the lawsuit. To determine which plaintiff has the largest financial stake, many courts consider three factors: (1) the number of shares purchased during the class period; (2) the total net funds expended during the class period; and (3) the approximate losses suffered. See Ferrari v. Fisch, F.R.D. 599, 604 (C.D. Cal. 2004.) Both asserts that he purchased 381,763 shares during the Class Period by expending \$4,129,572. (Both's Reply, p. 2, Table.) Both also claims a loss of \$470,173 using the LIFO ("last in, first out") accounting method. (Both's Reply, p. 3, lines 13-14.) The other vying plaintiffs do not seriously dispute Both's contention that under factors 1 and 2, Both far exceeds the other plaintiffs in number of shares purchased and total funds expended during the class period.

Both further appears to satisfy the requirements under FRCP 23 of typicality and adequacy of representation. The typicality requirement of FRCP 23 is satisfied when the representative plaintiff's claims arise out of the same event or course of conduct as do the other class members' claims and are based on the same legal theories. Takeda v. Turbodyne

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Technologies, Inc., 67 F. Supp. 2d 1129, 1137 (C.D. Cal. 1999). Also, “[u]nder [Rule 23’s] permissive standards, representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). In this case, Both’s claims are substantially identical with those of the absent class members. Both claims that he was financially harmed by Defendants’ misrepresentations and omissions in violation of federal securities laws.

Additionally, Both satisfies the adequacy of representation requirement of FRCP 23. Both’s chosen counsel has extensive experience in handling class action securities litigation. (Decl. of Leigh Parker in Support of Both Motion, Exh. 4.) Also, Both’s interests are aligned with other class members because he seeks to recover funds for purchases of Powerwave common stock during the Class Period. Both has also signed a sworn statement affirming his willingness to serve as, and to assume responsibilities of, class representative. (Id., Exh. 2, p. 0013.)

3. Step 3 - Rebuttal by Other Plaintiffs

The other plaintiffs vying for appointment as lead plaintiff have also failed to convincingly rebut Both’s presumptive status as lead plaintiff. The Silberman Group assert losses in the aggregate losses of \$356,837.11. The Electrical Workers Pension Fund asserts losses of \$163,287.16, and the Kabrey Group asserts losses of \$87,737.88. (Both Opp., p. 2-3, Table.) All the competing plaintiffs’ financial losses are lower than Both’s, “the *only* basis on which a court may compare plaintiffs competing to serve as lead.” Cavanaugh, 306 F.3d at 732.

Silbermann questions Both’s capacity to serve as lead plaintiff because, initially, Both requested to be appointed lead plaintiff jointly with Farokh Etemadieh, who later withdrew from the “Both Group.” (Both Group’s Notice of Motion, p. 1, lines 5-10.) Silbermann claims that the Both Group never existed because Mr. Etemadieh never consented to join the Both Group, and therefore, Both’s motion should be disregarded because he missed the filing deadline for his motion for appointment as lead plaintiff. (Silbermann Opp., p. 14-15.)

However, this argument is unconvincing. Mr. Etemadieh apparently provided a signed statement to Both’s attorney representing that he was willing to join with Both in his complaint.

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(Decl. of Parker, Exh. 2, p. 0028.) Therefore, Mr. Etemadieh apparently did indicate his wish to join the "Both Group" initially, and Both's attorney was not at fault for including Mr. Etemadieh as a proposed lead plaintiff in Both's filings. The Court also does not find anything improper in Mr. Etemadieh's withdrawal from the "Both Group" because he had the right to withdraw from consideration as lead plaintiff. The remaining plaintiff, Both, did not constitute some drastically reconfigured plaintiff group cobbled together for strategic purposes. Instead, Both was the remaining lead plaintiff applicant after Mr. Etemadieh's withdrawal.

Silbermann and EWPF also argue that Both should be disqualified because he was a net seller during the class period. However, under the LIFO method of calculating damages, Both claims that he suffered substantial losses during the Class Period due to Defendants' actions despite the fact that he was net seller during that period. The LIFO method has been used by several courts to determine a party's financial interest. See, e.g., Johnson v. Dana Corp., 236 F.R.D. 349, 351-352 (N.D. Ohio 2006); In re Espeed, Inc. Sec. Litig., 232 F.R.D. 95, 100-101 (S.D.N.Y. 2005); Frank v. Dana Corp., 237 F.R.D. 171, 172 (N.D. Ohio 2006). Therefore, though there is some dispute about the propriety of Both's calculations, Both has a plausible claim that he suffered substantial damages despite his status as net seller during the Class Period.

EWPF's argument that Both should be disqualified as a day trader is similarly unavailing. Even if true, Both's status as a day trader would not necessarily disqualify Both from serving as lead plaintiff. See In re Host America Corp. Sec. Litig., 236 F.R.D. 102, 108 (D. Conn. 2006) ("the fact that a candidate for lead plaintiff engaged in day-trading does not necessarily render that individual or entity atypical or inadequate at representing the class ..."); In re CMS Energy Sec. Litig., 236 F.R.D. 338, 343 (E.D. Mich. 2006) ("a plaintiff who bought and sold in short order is similar enough to one who bought for the long term to be included.")

Furthermore, EWPF's argument that Both is subject to a disqualifying unique defense is unconvincing. EWPF claims that "[a]s a result of the timing of his trades, including the fact that almost all of his Class Period shares were liquidated *before* defendants' fraud was revealed on October 9, 2006, Mr. Both is subject to unique defenses." (EWPF's Opp., p. 14, lines 10-13.) EWPF quotes Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 342, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005) in which the Supreme Court hypothesizes that "if ... the purchaser sells the

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shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss." According to EWPF, Both is disqualified from serving as lead plaintiff because he will have trouble proving loss causation.

However, many courts have rejected the contention that Dura requires a corrective disclosure to prove loss causation. After the Dura decision, the Ninth Circuit has stated that a plaintiff can establish loss causation by "demonstrat[ing] a causal connection between the deceptive acts that form the basis for the claim of securities fraud and the injury suffered by the plaintiff." In re Daou Sys., Inc., 411 F.3d 1006, 1025 (9th Cir. 2005). See also In re Cardinal Health, Inc. Sec. Litig., 426 F. Supp. 2d 688, 760 (S.D. Ohio 2006) (collecting cases, and rejecting the contention that loss causation can only be triggered by a corrective disclosure); Brumbaugh v. Wave Sys. Corp., 416 F. Supp. 2d 239, 256 (D. Mass. 2006) ("Dura does not require that a corrective disclosure precede a stock's decline."). Therefore, Dura does not disqualify Both from serving as lead plaintiff.

Also, it is premature to determine loss causation at this stage. While the plaintiffs have identified a corrective disclosure from Defendants on October 9, 2006, that does not preclude the plaintiffs from later identifying other disclosures or events that may have caused the relevant truth to leak out.

Finally, the Ninth Circuit has expressly held that a district court can revisit a decision to appoint lead plaintiff. See Z-Seven Fund, Inc. v. Motorcar Parts & Accessories, 231 F.3d 1215, 1218 (9th Cir. 2000) ("the district court's order designating a lead plaintiff is not a conclusive, immutable determination of the issue. It can be revisited if the circumstances warrant.") Thus, if the Court should later determine that recoverable damages will be limited to shares retained at the end of the Class Period, it might be appropriate to reconsider appointment of lead plaintiff.

#### IV. APPOINTMENT OF LEAD COUNSEL

The PLSRA requires that the lead plaintiff shall, subject to court approval, select and retain counsel to represent the putative class. 15 U.S.C. § 78u-4(a)(3)(B)(v). A court may only override the lead plaintiff's choice of counsel where the court believes it necessary to "protect the interests of the class." Ferrari, 225 F.R.D. at 610 (citing Cavanaugh, 306 F.3d at 732 n. 11);

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Cavanaugh, 306 F.3d at 734 (citing 15 U.S.C. § 78u-4(a)(3)(B)(v)) (“While the appointment of counsel is made subject to the approval of the court, the [PSLRA] clearly leaves the choice of class counsel in the hands of the lead plaintiff.”) Here, Mr. Both has selected the law firms Weiss & Lurie and the Brualdi Law Firm as his lawyers. As noted previously, these attorneys have shown that they have extensive experience litigating securities class actions. Therefore, the Court appoints Weiss & Lurie and the Brualdi Law Firm as lead counsel.

V. CONCLUSION

For the foregoing reasons, the Court orders consolidation of the related cases CV-07-65, CV07-839, CV07-158, and CV07-287. The Court also appoints Mr. Both as lead plaintiff and his attorneys from the firms Weiss & Lurie and the Brualdi Law Firm as co-lead counsel. Therefore, the Court GRANTS Both’s Motion for Consolidation and for Appointment as Lead Plaintiff. The Court DENIES (1) the Silbermann Group’s Motion for Appointment as Lead Plaintiff, (2) the EWPF’s Motion for Appointment as Lead Plaintiff, and (3) the Kabrey Group’s Motion for Appointment as Lead Plaintiff.

The files of the consolidated cases will be maintained under the master file number CV07-65 PSG (MLGx). This consolidation is for all purposes, including discovery, pretrial and trial proceedings. Unless the parties otherwise agree, lead plaintiff shall file an amended and consolidated class action complaint on or before 60 days from the date of entry of this Order. Defendants shall file a responsive pleading on or before 60 days from the date the amended consolidated class action complaint is filed.

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