

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 08-80055-CIV-HURLEY/HOPKINS

PAUL MASTRELLA, et al.,

Plaintiffs,

v.

WCI COMMUNITIES, INC., et al.,

Defendants.

**ORDER DENYING PLAINTIFFS' MOTION TO CONSOLIDATE
CASES, APPOINT LEAD PLAINTIFF, AND APPROVE CHOICE OF LEAD COUNSEL**

THIS CAUSE is before the court upon plaintiffs' motion to consolidate cases, for appointment of lead plaintiff and for approval of the lead plaintiff's choice of lead counsel pursuant to the Private Securities Litigation Reform Act [DE # 8].

BACKGROUND

This is a putative class action alleging violations of the Securities Act of 1933. Plaintiffs are purchasers of condominium units in the Resort at Singer Island, a hotel property developed by defendant WCI Communities, Inc. and its wholly-owned subsidiary, defendant The Resort at Singer Island Properties, Inc. The instant lawsuit is brought on behalf of all purchasers of hotel condominium units in the Resort. Plaintiffs allege that defendants failed to register the hotel units with the Securities and Exchange Commission, in violation of sections 12(a)(1) and 15 of the Securities Act, 15 U.S.C. § 771(a)(1) and 15 U.S.C. § 77o.

In the motion now before the court, plaintiffs request that any later-filed related actions be consolidated with this one; that the group of plaintiffs in this action (the "Mastrella Group") be

appointed lead plaintiff pursuant to 15 U.S.C. § 77z-1(a)(3); and that plaintiffs' counsel, Beasley Hauser Kramer Leonard & Galardi, P.A., be approved as lead counsel pursuant to 15 U.S.C. § 77z-1(a)(3)(B)(v).

DISCUSSION

1. Consolidation of Related Actions

As plaintiffs acknowledge, there are no related actions currently pending in this court. Pls.' Mot. at 4. Plaintiffs nevertheless ask that the court enter an order pre-emptively consolidating this action with any related actions that may be filed in the future.

The Federal Rules of Civil Procedure permit the court to consolidate multiple actions that "involve a common question of law or fact." Fed. R. Civ. P. 42(a). Because Rule 42(a) uses the plural "actions," its plain language appears to presuppose that the Rule is invoked only when more than one action has been filed. Moreover, before Rule 42(a) was amended in 2007 – a change intended as purely stylistic, *see* Fed. R. Civ. P. 42 advisory committee's note – it referred to actions "pending before the court." Federal courts have held that arbitration proceedings are not "pending before the court," and thus consolidation of arbitration proceedings is improper. *See Glencore, Ltd. v. Schnitzer Steel Products Co.*, 189 F.3d 264, 267 (2d Cir. 1999). Likewise, neither actions filed in other districts, *see Williams v. City of New York*, 2006 WL 399456 at *1 (S.D.N.Y. 2006), nor cases on appeal, *see YP Corp., Inc. v. Sitrick and Co., Inc.*, 2005 WL 3334326 at *7 (D. Ariz. 2005), nor improperly removed actions, *see Heck v. Bd. of Trustees, Kenyon College*, 12 F. Supp. 2d 728, 747 (S. D. Ohio 1998), are properly consolidated under Rule 42(a). If consolidation is inappropriate in the circumstances confronted in the cases above, it must necessarily be inappropriate as well in the case

of purely hypothetical future actions. Accordingly, the court will deny plaintiffs' motion to consolidate actions. The denial is without prejudice for the court to revisit the issue of consolidation if, in fact, an action involving a common question of law or fact is subsequently filed.

2. *Lead Plaintiff and Counsel*

The Private Securities Litigation Reform Act requires the plaintiff in a putative class action brought under the Securities Act to publish a notice generally advising members of the purported class of the pendency of the action, the claims asserted therein, and that any member of the proposed class may move the court to serve as lead plaintiff. 15 U.S.C. § 77z-1(a)(3)(A). The court must then consider any motion for appointment as lead plaintiff. 15 U.S.C. § 77z-1(a)(3)(B)(i). Plaintiffs' motion is, in part, a motion for appointment as lead plaintiff. Defendants respond that although they do not necessarily oppose the appointment of plaintiffs as a collective lead plaintiff, the notice published by plaintiff was defective in several respects, and the court should therefore require plaintiffs to republish notice before entertaining motions for the appointment of lead plaintiff.

At the outset, the court rejects plaintiffs' suggestion that defendants do not have standing to challenge the published notice as defective. The majority of courts to have considered the issue have concluded that, although defendants may not have a right to be heard on the substantive adequacy of a particular would-be lead plaintiff, a court may consider defendants' arguments as to the adequacy of published notice. *See, e.g., California Public Employees' Retirement System v. Chubb Corp.*, 127 F. Supp. 2d 572, 575 n.2 (D.N.J. 2001); *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 580 (N. D. Cal. 1999); *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 61 (D. Mass. 1996). Thus the court proceeds to consider defendants' arguments regarding the adequacy of the published notice.

First, defendants point out that the notice misstated the time in which potential class members were required to move the court for appointment as lead plaintiff. The notice, published on a national wire service on February 1, 2008, provided in part “[i]f you . . . wish to serve as lead plaintiff, you must move the Court no later than 60 days from January 23, 2008 to appoint you as lead plaintiff.” January 23, 2008 is the date the complaint in this case was filed. However, the notice should have indicated that potential class members were permitted to move the court for appointment as lead plaintiff “not later than 60 days after *the date on which the notice was published*” – February 1, rather than January 23. *See* 15 U.S.C. § 77z-1(a)(3)(A)(i)(II) (emphasis added).

In the court’s view, this relatively minor flaw in the published notice does not justify requiring plaintiffs to republish notice and begin the 60-day period anew. In the case relied on by defendants, *King v. Livent, Inc.*, 36 F. Supp. 2d 187 (S.D.N.Y. 1999), the court denied a motion for appointment as lead plaintiff where the plaintiff had published notice nearly two months *before* filing the complaint. Because the complaint was filed just as the two-month window for filing lead-plaintiff motions came to a close, other potential lead plaintiffs had no opportunity “to review the complaints and the qualification of the putative lead plaintiff.” *Id.* at 190. By contrast, in this case potential lead plaintiffs had ample time to review the complaint and the qualifications of the Mastrella Group as lead plaintiff. Although the notice should have indicated that the 60-day period ran from February 1 rather than January 23, this *de minimis* deviation from the statutory requirements is not enough, standing alone, to require republication of notice. *See In re USEC Securities Litigation*, 168 F. Supp. 2d 560, 567 (D. Md. 2001) (finding notice compliant with PSLRA requirements notwithstanding slight mistake in notice’s calculation of lead-plaintiff deadline).

Second, defendants argue that the notice is substantively inadequate. The court agrees. A district court is required to carefully scrutinize the published notice to ensure that it comports with the objective of the PSLRA – that is, encouraging the most adequate plaintiff to come forward and take control of the litigation. *See Chubb Corp.*, 127 F. Supp. 2d at 577 (D.N.J. 2001). Courts have held that published notice does not advance this interest unless it indicates not only that an action is pending, but where it is pending, and its full name and style. *See Holley v. Kitty Hawk, Inc.*, 200 F.R.D. 275, 279 (N. D. Tex. 2001); *Burke v. Ruttenberg*, 102 F. Supp. 2d 1280, 1316 (N. D. Ala. 2000). The notice in this case indicated only that a securities class action lawsuit had been filed against defendants on behalf of purchasers of condominium units, and not the style of the case or the court in which it was filed.

A more serious flaw is the notice’s encouragement of potential class members to contact the law firm now seeking appointment as lead counsel. The notice provided: “If you wish to discuss this action or your rights, please contact Beasley Hauser . . . for a more thorough explanation of the lead plaintiff selection process and the litigation.” The court in *Holley* disapproved of a notice containing a nearly identical statement. 200 F.R.D. at 278. The notice goes on to describe Beasley Hauser’s “considerable experience in complex commercial litigation,” and the “lead roles in major cases” played by Berger & Montague, another law firm then representing plaintiffs, “in major cases over the past 30 years that have resulted in recoveries of billions of dollars to investors.” The general impression left by the notice is that class members interested in participating as lead plaintiff – or even simply interested in learning should contact plaintiffs’ counsel. Instead of straightforwardly apprising class members of their right to move for appointment as lead plaintiff, as contemplated by the PSLRA,

the notice serves primarily to “funnel[] potential lead plaintiffs through the law firm.” *Holley*, 200 F.R.D. at 278; *see also In re Network Associates, Inc. Securities Litig.*, 76 F. Supp. 2d 1017, 1032 (N. D. Cal. 1999) (criticizing “puff pieces steering investors toward registering with counsel and steering them away from independently seeking the role of lead plaintiff, as the PSLRA intended”).

Plaintiffs also failed to comply with the requirements of the PSLRA by filing the required statutory certifications with the instant motion for appointment as lead plaintiff, rather than with the complaint. *See* 15 U.S.C. § 77z-1(a)(2)(A). Plaintiffs respond that because the purpose of the certifications is to allow the court to evaluate competing lead-plaintiff candidates, the inclusion of the certifications with a lead-plaintiff motion substantially complies with the PSLRA. Pls.’ Reply at 5. But that is not the only purpose of the certifications. The information required in the certifications is not only helpful to the court in determining motions for appointment as lead plaintiff, but also for class members considering whether to move the court for appointment as lead plaintiff. Here, potential lead plaintiffs had no opportunity to review the certifications because they were not filed with the court until the 60-day lead-plaintiff window had closed (at least as that period was calculated by the notice).

Plaintiffs point to *Chill v. Green Tree Financial Corp.*, 181 F.R.D. 398, 410 (D. Minn. 1998), and that court’s statement that “[i]f there is any benefit in appending a certification to the Complaint, it is only realized when the Court reviews the certification in the context of a Lead Plaintiff Motion.” But the statement is wrenched out of its context. The court in *Chill* decided that the PSLRA required certifications to be filed with lead-plaintiff motions *as well as* with the complaint; not with lead-plaintiff motions *instead of* with the complaint. The court in fact proceeded on the assumption that certifications were required with the complaint. *See id.*; *see also Blaich v. Employee Solutions, Inc.*,

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1997 WL 842417 (D. Ariz. 1997). No certifications were filed with the complaint here, and thus the requirements of the PSLRA have not been satisfied.

The court thus concludes that it cannot, consistent with the PSLRA, proceed to consider the merits of the Mastrella Group as lead plaintiff or Beasley Hauser as lead counsel. The court will therefore deny plaintiffs' motion for appointment of lead plaintiff and lead counsel; direct plaintiffs to republish notice; and entertain any motions for lead plaintiff filed within the renewed 60-day period. This order expresses no view as to the suitability of Mastrella Group as lead counsel or Beasley Hauser as lead counsel.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Plaintiffs' motion for consolidation of related cases, appointment of lead plaintiff, and approval of choice of counsel [DE # 8] is **DENIED** in all respects.
2. Plaintiffs are directed to republish notice, consistent with this order and the requirements of the PSLRA, within **TWENTY (20) DAYS**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida, this 28th day of May, 2008.


Daniel T. K. Hurley
U. S. District Judge

Copies provided to counsel of record