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

In re NVIDIA Corporation Securities
Litigation

NO. C 08-04260 JW

**ORDER APPOINTING LEAD
PLAINTIFFS, CO-LEAD COUNSEL**

I. INTRODUCTION

This is a consolidated putative securities fraud class action brought on behalf of investors who acquired NVIDIA Corporation (“NVIDIA”) securities between November 8, 2007 and July 2, 2008 (the “Class Period”) against NVIDIA and certain of NVIDIA’s senior officers and directors (collectively, “Defendants”).¹ This action is brought under Sections 10(b) and 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934 (“Exchange Act”).

Presently before the Court are motions by seven purported class members seeking appointment of themselves as lead plaintiff and approval of their respective choices of lead counsel.²

¹ The consolidated actions are Miller v. NVIDIA Corp., No. C 08-4260 JW (filed September 9, 2008); Jermyn v. NVIDIA, No. C 08-4344 PVT (filed September 16, 2008) and Politz v. NVIDIA, No. C 08-4432 SI (filed September 23, 2008).

² (Motion by Harmik Kazanchian for Appointment of Lead Plaintiff and Approving Selection of Lead Counsel, Docket Item No. 15; Motion to Appoint IBEW Local 640/Arizona Chapter NECA Pension Trust Fund as Lead Plaintiff and to Approve Lead Counsel, Docket Item No. 20; Motion for Appointment of Douglas Depies, Jerrold Engber, Geoffrey James, Chester Chow and Kumaraswamy Krishnamurthy Lead Plaintiffs and Approval of Co-Lead Counsel, hereafter, “Depies Group Motion,” Docket Item No. 23; Motion of George Franks, Glen Campbell, Andriani Lazo, Glen Morris and Bonnie Avery for Appointment as Lead Plaintiff and Approval of Lead

1 The Court found it appropriate to take the matter under submission without oral argument. See Civ.
 2 L.R. 7-1(b). Based on the papers submitted to date, the Court appoints Roberto Cohen and New
 3 Jersey Carpenters Pension and Annuity Funds as Lead Plaintiffs and appoints Milberg LLP and
 4 Girard Gibbs LLP as Co-Lead Counsel.

II. BACKGROUND

6 On September 8, 2008, Lisa Miller filed the first putative securities fraud class action against
 7 NVIDIA for violations of the federal securities laws concerning alleged misrepresentations made by
 8 NVIDIA and certain officers between November 8, 2007 and July 2, 2008. (Class Action Complaint
 9 for Violations of the Federal Securities Laws, hereafter, “Complaint, Docket Item No. 1.) On
 10 October 8, 2008, the Court consolidated Miller’s first-filed action with two additional actions
 11 concerning the same conduct and Class Period. (Docket Item No. 13.) In its Order consolidating
 12 the three actions, the Court set a deadline of November 10, 2008 to file motions for appointment of
 13 Lead Plaintiff(s) and Lead Counsel. (Id.)

14 Seven purported class members or groups of class members filed motions to be appointed
 15 Lead Plaintiff and for approval of their selection of Lead Counsel:

Movant Seeking Appointment as Lead Plaintiff(s)	Selected Counsel
Harmik Kazanchian	Stull, Stull & Brody and Kantrowitz, Goldhamer & Graifman, P.C.
IBEW Local 640/Arizona Chapter NECA Pension Trust Fund (“IBEW ”)	Hagens Berman Sobol Shapiro LLP
Douglas Depies, Jerrold Engber, Geoffrey James, Chester Chow and Kumaraswamy Krishnamurthy (“Depies Group ”)	Girard Gibbs LLP and Shalov Stone Bonner & Rocco LLP

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 23 Counsel, Docket Item No. 26; Motion of Roberto Cohen to Consolidate Future Related Actions; To
 24 Be Appointed Lead Plaintiff and To Approve Lead Counsel, hereafter, “Cohen Motion, Docket
 25 Item No. 27; New Jersey Carpenters Pension and Annuity Funds Motion for Appointment as Lead
 26 Plaintiff and Approval of Lead Counsel, hereafter, “New Jersey Carpenters Motion, Docket Item
 27 No. 33; City of Pontiac General Employees’ Retirement System’s Motion for Appointment as Lead
 Plaintiff and Approval of Lead Counsel, hereafter, Docket Item No. 40.) The City of Pontiac
 Plaintiff has also filed an Administrative Motion for Relief Pursuant to Local Rule 7-11 to File
 Response to Docket #79. (See Docket Item No. 89.) In light of this Order, the Court DENIES the
 City of Pontiac’s Motion as moot.

George Franks, Glen Campbell, Andriani Lazo, Glen Morris and Bonnie Avery (“Franks Group”)	Dreier Stein Kahan Browne Woods George LLP and Dreier LLP
Roberto Cohen (“Cohen”)	Kahn Gauthier Swick, LLC
New Jersey Carpenters Pension and Annuity Funds (“New Jersey Carpenters”) ³	Milberg LLP
City of Pontiac General Employees’ Retirement System	Coughlin Stoia Geller Rudman & Robbins LLP

On December 8, 2008, the Franks Group withdrew its motion. (Docket Item No. 70.)

III. STANDARDS

The Private Securities Litigation Reform Act (the “PSLRA”) requires the court to appoint as lead plaintiff “the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members. 15 U.S.C. § 78u-4(a)(3)(B)(I). The act creates a rebuttable presumption that the most adequate plaintiff is the person or group of persons that (i) either filed the complaint or made a motion in response to the published notice; (ii) in the determination of the court, has the largest financial interest in the relief sought; and (iii) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii). Thus, under the PSLRA, the “most capable plaintiff is “the one who has the greatest financial stake in the outcome of the case, so long as he meets the requirement of Rule 23. In re Cavanaugh, 306 F.3d 726, 729 (9th Cir. 2002).

To determine who meets these criteria, the Ninth Circuit has articulated a three-step test. First, a court must determine that the first plaintiff to file an action issued a notice publicizing the pendency of the action, the claims made and the putative class period “in a widely circulated national business-oriented publication or wire service. In re Cavanaugh, 306 F.3d at 729 (citing 15 U.S.C. § 78u-4(a)(3)(A)). Second, a court “must compare the financial stakes of the various plaintiffs and determine which one has the most to gain from the lawsuit. Id. at 730. At the same

³ New Jersey Carpenters Pension Fund and Annuity Fund are related funds under joint management. (Declaration of Sabrina S. Kim in Support of the Motion of the New Jersey Carpenters Pension and Annuity Funds for Appointment as Lead Plaintiff, Ex. A, hereafter, “Kim Decl., Docket Item No. 34.)

1 time, the court must also determine whether the plaintiff with the most to gain satisfies the
2 requirements of Rule 23(a). Id. The movant that has the largest stake and satisfies Rule 23(a) is the
3 presumptive lead plaintiff. Id. Third, the court must consider the competing plaintiffs’ attempts to
4 rebut the presumptive plaintiff’s showing that it satisfies the requirements of Rule 23(a). Id.

5 **IV. DISCUSSION**

6 **A. Appointing Lead Plaintiffs**

7 **1. Notice**

8 First, the Court must determine whether the notice requirement of 15 U.S.C. § 78u-
9 4(a)(3)(A) has been satisfied. Lisa Miller, the plaintiff who filed the first of the consolidated
10 actions, fulfilled the statutory notice requirement by publishing a notice in *Market Wire* on
11 September 9, 2008. (See Docket Item No. 7.)

12 **2. Presumptive Lead Plaintiffs**

13 Second, the Court must determine which of the movants has the largest stake in the litigation.
14 Determining which movant has the largest stake depends on the method for calculating their
15 respective financial interests.

16 Under the “net shares” method, a court can estimate the potential recovery of a plaintiff by
17 calculating the total number of shares purchased during the Class Period and subtracting the total
18 number of shares sold during the Class Period. See In re Network Assoc., Inc., Sec. Litig., 76 F.
19 Supp. 2d 1017, 1027 (N.D. Cal. 1999). The net shares method of calculating a plaintiff’s financial
20 interest is based on the likelihood that the “fraud premium” (*i.e.*, the amount that public
21 misrepresentations falsely inflated the stock price) was uniform throughout the Class Period. See id.
22 A court may also look to the “first-in, first-out” (“FIFO”) method, which measures loss by treating
23 the first share purchased as the first share sold. See Query v. Maxim Integrated Prod., Inc., 558 F.
24 Supp. 2d 969, 974 (N.D. Cal. 2008). In determining which movant has the largest financial stake, a
25 district court “may select accounting methods that are both rational and consistently applied. In re
26 Cavanaugh, 306 F.3d at 730.

1 In this case, under the net shares calculation, the Depies Group has the largest financial stake
2 in the litigation because they purchased 20,968 NVIDIA net shares during the Class Period.⁴ New
3 Jersey Carpenters has a nearly identical stake with 20,900 net shares during the Class Period.⁵
4 Under the FIFO method, Cohen has the largest financial stake in that he suffered a total loss of
5 approximately \$324,811.⁶ Thus, the Court considers whether Cohen, the Depies Group, and New
6 Jersey Carpenters⁷ meet the requirements of Rule 23(a).

7 The court must look to the declarations provided by the movants and determine whether they
8 satisfy Rule 23(a). At this stage, the focus is primarily on the typicality and adequacy of
9 representation requirements and only a preliminary showing is necessary. See In re Cavanaugh, 306
10 F.3d at 730; In re Ditech Communs. Corp. Sec. Litig., 2005 U.S. Dist. LEXIS 40963, *3 (N.D. Cal.
11 Dec. 19, 2005).

12 With respect to typicality, the court looks to whether “other members have the same or
13 similar injury, whether the action is based on conduct which is not unique to the named plaintiffs,
14 and whether other class members have been injured by the same course of conduct. Hanon v.
15 Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). Here, Cohen, the Depies Group and New
16 Jersey Carpenters provide certifications showing that each of them purchased NVIDIA stock during
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18 ⁴ (Declaration of Jonathan K. Levine in Support of the Depies Group’s Opposition to
19 Competing Lead Plaintiff Motions, Ex. 1, Docket Item No. 58.)

20 ⁵ (The New Jersey Carpenters Pension and Annuity Funds’ Memorandum in Opposition to
21 the Competing Lead Plaintiff Motions at 7, Docket Item No. 59.)

22 ⁶ (Supplemental Declaration of Kim E. Miller in Further Support of the Motion of Roberto
23 Cohen to be Appointed Lead Plaintiff, Ex. A, Docket Item No. 64.)

24 ⁷ Several movants contend that New Jersey Carpenters does not qualify as a lead plaintiff
25 because it is a “professional plaintiff” under 15 U.S.C. 78u-4(a)(3)(B)(vi), which presumptively bars
26 a person from being a lead plaintiff in more than five cases within three years. (See, e.g., The
27 Depies Group Memorandum of Points and Authorities in Opposition to Competing Lead Plaintiff
Motions at 4, Docket Item No. 57.) However, within the last three years, New Jersey Carpenters
Pension Fund has been certified as a lead plaintiff in only two other actions, and the New Jersey
Carpenters Annuity Fund has been certified as a lead plaintiff in only one. (New Jersey Carpenters
Pension and Annuity Funds’ Reply to the Lead Plaintiff Opposition Briefs and in Further Support of
its Motion for Appointment as Lead Plaintiff at 7, Docket Item No. 75.)

1 the Class Period.⁸ Thus, like the rest of the putative class, the Depies Group, Cohen and New Jersey
2 Carpenters purport to have suffered losses as a result of Defendants’ alleged misrepresentations and
3 the subsequent drop in NVIDIA’s stock price after those misrepresentations were revealed to the
4 public.

5 As to whether a prospective lead plaintiff will adequately represent the class, the court
6 considers two questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest
7 with other class members and (2) will the named plaintiffs and their counsel prosecute the action
8 vigorously on behalf of the class? Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998).
9 Based on the submissions by Cohen, the Depies Group, and New Jersey Carpenters, it appears that
10 there are no conflicts of interest and each potential lead plaintiff intends to vigorously pursue the
11 alleged claims. (See Miller Decl., Ex. A; Levine Decl., Ex. D; Kim Decl., Ex. A.)

12 In addition to the two Hanlon factors, the court also consider whether groups of investors had
13 a relationship prior to the litigation. In re Critical Path, Inc. Sec. Litig., 156 F. Supp. 2d 1102, 1111
14 (N.D. Cal. 2001). A group without a preexisting relationship or decisionmaking apparatus is likely
15 to run afoul of the PSLRA’s objective of placing control of the litigation with the parties instead of
16 the lawyers. Id.; In re Network Associates, 76 F. Supp. 2d at 1022. Indeed, allowing discrete
17 individual investors to be aggregated to overcome the largest financial stake requirement would
18 vitiate the PSLRA’s “preference that sophisticated institutional investors direct the course of
19 securities cases. Takeda v. Turbodyne Tech., Inc., 67 F. Supp. 2d 1129, 1135 (C.D. Cal. 1999); see
20 also In re Network Associates, 76 F. Supp. 2d at 1023.

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25 ⁸ (Declaration of Kim E. Miller in Support of the Motion of Roberto Cohen to Consolidate
26 Future Related Actions, Ex. A, hereafter, “Miller Decl., Docket Item No. 31; Declaration of
27 Jonathan K. Levine in Support of Motion of Douglas Depies, Jerrold Engber, Geoffrey James,
Chester Chow and Kumaraswamy Krishnamurthy for Appointment as Lead Plaintiff, Ex. B,
hereafter, “Levine Decl., Docket Item No. 24; Kim Decl., Ex. A.)

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1 In this case, the Depies Group is made up of individual investors who, after this action was
2 filed, met with their counsel and agreed to collectively prosecute the class action.⁹ There is no
3 indication that the Depies Group has any formal structure or decisionmaking apparatus, and its
4 members have not provided any evidence of a preexisting relationship. Thus, the Court finds that
5 New Jersey Carpenters, which has essentially an identical financial interest under the net shares
6 calculation, would be a more adequate class representative pursuant to the goals of the PSLRA.

7 Accordingly, the Court finds that Cohen and New Jersey Carpenters are presumptively the
8 most adequate lead plaintiffs.

9 **3. Attempts to Rebut the Presumptive Plaintiffs’ Satisfaction of Rule 23(a)**

10 Third, the Court must address the competing movants’ attempts to establish that the
11 presumptive lead plaintiffs do not satisfy the requirements of Rule 23(a).

12 Here, IBEW contends that Cohen is atypical of the class because he is a “day trader (also
13 referred to as an “in-and-out trader) who trades frequently and may be subject to unique reliance
14 defenses.¹⁰ However, such investors are not precluded from being class representatives. See In re
15 Silicon Storage Tech., Inc., 2005 U.S. Dist. LEXIS 45246, *25 (N.D. Cal. May 3, 2005).
16 Additionally, the Court will not speculate at this stage as to whether higher trading volumes will
17 subject certain individual investors to unique defenses in this case. Thus, the Court finds that the
18 presumption in favor of certifying Cohen and New Jersey Carpenters as lead plaintiffs has not been
19 rebutted.

20 Accordingly, the Court GRANTS Cohen and New Jersey Carpenter’s Motions for
21 Appointment as Lead Plaintiffs.

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24 ⁹ (Depies Group’s Reply Memorandum of Points and Authorities in Further Support of
25 Motions for Appointment as Lead Plaintiffs and Approval of Selection of Lead Counsel at 3, Docket
Item No. 73; Levine Decl., Ex. D.)

26 ¹⁰ (Memorandum of Law in Further Support of the IBEW Local 640/Arizona Chapter NECA
27 Pension funds Motion for Appointment as Lead Plaintiff and Approval of Lead Counsel and in
Opposition to all Competing Motions at 9-10, Docket Item No. 48.)

1 **B. Appointing Class Counsel**

2 Under the PSLRA, the lead plaintiffs, “subject to the approval of the court, select and retain
3 counsel to represent the class. 15 U.S.C. § 78u-4(a)(3)(B)(v). Each movant seeks to have their
4 own counsel appointed as lead counsel. Upon review of each firms’ resume, the Court finds that,
5 given each firms’ experience with similar actions, the most qualified counsel for this case are
6 Milberg LLP and Girard Gibbs LLP.

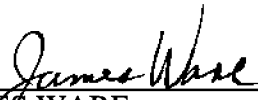
7 Accordingly, the Court appoints Milberg LLP and Girard Gibbs as Co-Lead Counsel.

8 **V. CONCLUSION**

9 The Court ORDERS as follows:

- 10 (1) Roberto Cohen and New Jersey Carpenters Pension and Annuity Funds are appointed
11 Lead Plaintiffs;
12 (2) Milberg LLP is and Gibbs LLP are appointed Co-Lead Counsel.

13
14 Dated: December 23, 2008



JAMES WARE
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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Dated: December 23, 2008

Richard W. Wiekling, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy