

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BILL RAINS, Individually and on Behalf of	§	
All Others Similarly Situated,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO. 3:09-CV-2133-B
v.	§	
	§	
ZALE CORPORATION, et al.,	§	
	§	
Defendants.	§	
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BRIAN A. LAWYER, Individually and on	§	
Behalf of All Others Similarly Situated,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. 3:09-CV-2218-B
	§	
v.	§	
	§	
ZALE CORPORATION, et al.,	§	
	§	
Defendants.	§	
	§	
	§	
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**ORDER CONSOLIDATING ACTIONS, APPOINTING LEAD PLAINTIFF AND
APPROVING SELECTION OF COUNSEL**

Before the Court is the motion of Pipefitters Local No. 636 Defined Benefit Plan (“Pipefitters Plan”) to consolidate the above captioned class actions, for appointment as lead plaintiff, and for approval of their selection of counsel. (doc. 10). For the reasons stated below, the Court **GRANTS** the motion (doc. 10).

A. Background

The first filed class action, *Rains v. Zale Corp.*, No. 3:09-cv-2133, was filed in the Northern

District of Texas on November 9, 2009. The second class action, *Lawyer v. Zale Corp.*, No. 3:09-cv-2218 was filed in the Northern District of Texas on November 19, 2009. On March 1, 2010, case No 3:09-cv-2133 was transferred to the this Court's docket "for consideration with related cases," and both actions are currently before the Court. (doc. 7). Both actions assert claims against Zale Corporation and certain of its officers and/or directors for violation of the Securities Exchange Act of 1934 (the "1934 Act"). Each action is brought on behalf of all persons who purchased or otherwise acquired the publicly trade securities of Zale Corporation ("Zale") between November 16, 2006 and October 29, 2009 (the "Class Period").

Notice of this class action was published on November 9, 2009 and the Pipefitters Plan filed its motion for appointment as lead plaintiff on March 5, 2010.¹ (doc. 10). No competing motions for appointment have been filed in either case.

B. Consolidation

The PSLRA directs the Court to resolve the issue of consolidation before addressing the appointment of lead plaintiff. 15. U.S.C. §78u-4(a)(3)(B)(ii). Consolidation of cases is appropriate "when the cases involve common questions of law and fact and . . . it would avoid unnecessary costs or delay." *St. Bernard Gen. Hosp., Inc. v. Hosp. Serv. Ass'n of New Orleans*, 712 F.2d 978, 989 (5th Cir. 1983); Fed. R. Civ. P. 42.

Here, the two actions before the Court both assert claims on behalf of purchasers of publicly traded Zale securities during an identically defined Class Period. (Rains Complaint, p. 1; Lawyer

¹ The motion was initially filed on January 8, 2010, the date on which the Pipefitters executed the certification required by the Private Securities Litigation Reform Act ("PSLRA"). The motion was subsequently unfiled for failure to include a certificate of conference or inability to confer, and was refiled on March 5, 2010. (docs. 6, 9, 10).

Complaint, p. 1). Each complaint alleges that Zale, acting through the same named Defendant officers and directors, made material omissions or misrepresentations related to “advertising costs, intercompany accounts receivable, depository bank accounts, federal income taxes, and personal income taxes” and that those omissions or misrepresentations caused Zale shares to trade at artificially inflated prices during the Class Period. (Rains Complaint, p. 2; Lawyer Complaint, p. 28). Both complaints point to the same releases, statements and reports as the factual basis for their claims and allege the same causes of action.

The Court finds that the two complaints involve the same factual and legal issues and that consolidation is appropriate. “In securities actions where the complaints are based on the same ‘public statements and reports’ consolidation is appropriate if there are common questions of law and fact and the defendants will not be prejudiced.” *Vincelli v. Nat’l Home Health Care Corp.*, 112 F.Supp.2d 1309, 1313 (M.D. Fla. 2000) (quoting *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F.Supp. 1196, 1211, (S.D.N.Y. 1992)). *See, also, In re Universal Access.*, 209 F.R.D. 379, 382 (E.D. Tex. 2002) (consolidating actions brought by purchasers of securities during the same relevant time period). No objections to consolidation have been filed and the Court sees no potential for prejudice, as neither case has progressed beyond the filing of a complaint. Accordingly, the Court **GRANTS** the motion to consolidate for all purposes. From this date, all papers should be filed only in Civil Action No. 3:09-cv-2133-B. *See* LR 42.1.

C. Appointment of Lead Plaintiff

The PSLRA sets forth the procedure governing the appointment of lead plaintiffs in securities class actions. 15 U.S.C. § 78u-4(a)(3). The Act directs the Court to “consider any motion made by a purported class member” and 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.” *Id.* at § 78u-4(a)(3)(B). The Court is to adopt a rebuttable 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 a notice under subparagraph (A)(I); (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.” *Id.* at § 78u-4(a)(3)(B)(iii).

The first criteria requires timely notice of the class action and motion for appointment. Within 20 days of filing the complaint, the plaintiff “shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class (I) of the pendency of the class action, the claims asserted therein, and the purported class period; and (II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.” *Id.* at § 78u-4(a)(3)(A)(i). If multiple class actions are filed asserting substantially the same claims, only the plaintiff in the first-filed action need publish notice. *Id.* at § 78u-4(a)(3)(A)(ii). Any potential class member, not only those named as plaintiffs in a complaint, can move to be appointed lead plaintiff. *Id.* at § 78u-4(a)(3)(B)(1).

Notice was timely published in the Business Wire on November 9, 2009, the same date the first action was filed. (doc. 10, p. 4).² The notice contained the required information, including a description of the claims asserted, the dates of the Class Period, and the right of any potential class

² The Pipefitters Plan’s motion (doc. 10) references the appendix filed in support of its previously filed motion (doc. 6). The appendix includes both the required notice (Exhibit A) and the Pipefitters Plan’s certification (Exhibit B). The Court finds that the appendix is properly referenced and timely filed though it was not refiled with the renewed motion (doc. 10).

member to move for appointment as lead plaintiff. (Ex. A). Further, “the Business Wire has consistently been recognized as a suitable vehicle for meeting the PSLRA’s statutory requirement that notice be published ‘in a widely circulated national business-oriented publication or wire service’” *In re Universal Access*, 209 F.R.D. at 383. No challenge to the adequacy of the November 9 notice has been raised. As a result, the Court finds that the initial notice requirement has been satisfied.

The Pipefitters Plan filed the only motion for appointment as lead plaintiff. Their motion was filed on January 8, 2010, within 60 days of the November 9, 2009 notice. No other motions were filed and no opposition to the Pipefitters’ motion has been received. (doc. 8). While the motion was later unfiled on March 5, 2010 for failure to include a certificate of conference, the deficiency did not affect the timeliness of the Pipefitters Plan’s compliance with the statutory certification and filing requirements. *See Culwell v. City of Forth Worth*, 468 F.3d 868, 870 (5th Cir. 2006) (finding that where a motion was unfiled for noncompliance with local rule, it was error to strike corrected motion as untimely). This result is consistent with the purpose of the provisions at issue: “[t]he obvious intent of these provisions is to ensure that the lead plaintiff is appointed at the earliest possible time, and to expedite the lead plaintiff selection process.” *In re Telxon Corp. Sec. Litig.*, 67 F.Supp.2d 803, 818-19 (N.D. Ohio, 1999). The Pipefitters Plan took the required action within the deadline, and no other person or group of persons has sought appointment or objected to the Pipefitters Plan’s appointment.

The PSLRA directs that the Court consider, in evaluating competing motions for appointment as lead plaintiff, which potential lead plaintiff “has the largest financial interest in the relief sought by the class.” 15 U.S.C. 78u-4(a)(3)(B)(iii). The object of the of the “most adequate

plaintiff” provision of the PSLRA, and the associated presumption is to “ensure that institutional plaintiffs with expertise in the securities market and real financial interests in the integrity of the market would control the litigation, not lawyers.” *Vincelli*, 112 F.Supp.2d at 1314 (citing *In re Donnkenny Inc. Sec. Litig.*, 171 F.R.D. 156, 157 (S.D.N.Y. 1997)). Here, the Pipefitters Plan contends it “lost more than \$46,000 due to defendants’ misconduct.” (doc. 10, p. 4; App. Ex. B, C).

Because the Pipefitters Plan has asserted substantial loss and no other group has sought appointment or objected, the Pipefitters Plan satisfies the “largest financial interest” requirement.

Additionally, the PSLRA requires that a potential lead plaintiff “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). The Rule 23 inquiry is not rigorous here; at this stage of the proceedings, a lead plaintiff applicant “need only make a preliminary showing that it satisfies these requirements.” *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex. 1997). “A wide-ranging analysis under Rule 23 is not appropriate and should be left for consideration of a motion for class certification.” *Id.* (quoting *Fischler v. AmSouth Bancorpoation*, No. 97-1567-Civ-T-17A, 1997 WL 118429 at *2 (M.D. Fla. Feb 6, 1997)).

The Pipefitters Plan has made the required preliminary showing of typicality and adequacy. “If successful in proving its injury and losses resulting from” Defendants’ actions, the Pipefitters Plan “will necessarily prove the conduct which underlies the claims of all purported plaintiffs.” *Gluck*, 976 F. Supp. at 546. As a result, the Pipefitters Plan’s claims are typical of those of the purported class. *Id.* Further, the Pipefitters Plan has shown that it is well suited to adequately represent the plaintiff class. It has “a significant financial interest in the litigation” and “as an institutional investor, it is

accustomed to acting in the role of a fiduciary, and its experience with investing and financial matters will only benefit the class.” *Id.*

Because the Pipefitters Plan has satisfied the requirements set forth by the PSLRA, the Court adopts the presumption that it is the most adequate plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). No eligible potential class member has attempted to rebut the presumption by presenting proof that the Pipefitters Plan either “(I) will not fairly and adequately protect the interests of the class or (ii) is subject to unique defenses that render the plaintiff incapable of adequately representing the class.” *Id.* at § 78u-4(a)(3)(B)(iii)(II). Accordingly, the Court appoints the Pipefitters Plan as lead plaintiff.

D. Appointment of Lead Counsel

The PSLRA provides that the lead plaintiff shall select lead counsel to represent the class, subject to the Court’s approval. *Id.* at § 78u-4(a)(3)(B)(v). The Pipefitters Plan seeks the approval of its selection of Coughlin Stoia Geller Rudman & Robbins LLP – now known as Robbins Geller Rudman & Dowd LLP (doc. 11) – as lead counsel and Kendall Law Group, LLP as liaison counsel for the class. (doc. 10, p. 1).

“Giving the lead plaintiff primary control for the selection of counsel was a critical part of Congress’s effort to transfer control of securities class actions from lawyers to investors.” *Gluck*, 976 F. Supp. at 550. The Court can discern no reason to upset the Pipefitters Plan’s choice here. Pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v), the law firm of Robbins Geller Rudman & Dowd LLP is approved as lead counsel and the Kendall Law Group, LLP is approved as liaison counsel for the class.

CONCLUSION

The Court **GRANTS** the Pipefitters Plan's motion (doc. 10) and **ORDERS** as follows:

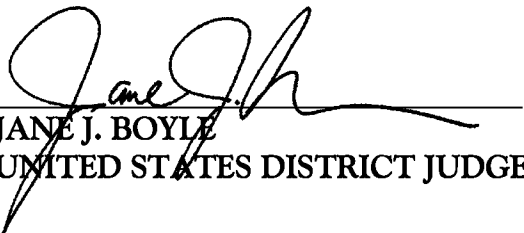
1. Civil Action No. 3:09-cv-2133-B and Civil Action No. 3:09-cv-2218-B are hereby consolidated as *In re Zale Corporation Securities Litigation*, and all papers shall be filed only in Civil Action No. 3:09-cv-2133-B;

2. The Court appoints the Pipefitters Local No. 636 Defined Benefit Plan ("Pipefitters Plan") as lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(3)(B); and

3. The Pipefitters Plan's selection of the law firm of Robbins Geller Rudman & Dowd LLP as lead counsel and its selection of the Kendall Law Group, LLP as liaison counsel are approved, pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v).

SO ORDERED

Signed: June 10, 2010


JANE J. BOYLE
UNITED STATES DISTRICT JUDGE