UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SHEET METAL WORKERS LOCAL 32 PENSION FUND, Individually and on Behalf of All Others Similarly Situated,	)	No. 3:09-cv-02083-RNC
Plaintiff,	)	CONSOLIDATED CLASS ACTION
vs.	)	September 9, 2010
TEREX CORPORATION, et al.,	)	
Defendants.	)	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF SHEET METAL WORKERS LOCAL 32 PENSION FUND AND IRONWORKERS ST. LOUIS DISTRICT COUNCIL PENSION FUND'S MOTION FOR APPOINTMENT AS LEAD PLAINTIFFS AND FOR APPROVAL OF THEIR SELECTION OF LEAD AND LIAISON COUNSEL, AND IN RESPONSE TO THE SUPPLEMENTAL BRIEF OF THE PUBLIC RETIREMENT SYSTEMS

Institutional Investors Sheet Metal Workers Local 32 Pension Fund ("Sheet Metal Workers") and Ironworkers St. Louis District Council Pension Fund ("Ironworkers") respectfully submit this reply memorandum of law in further support of their motion for appointment as Lead Plaintiffs and for approval of their selection of Lead and Liaison Counsel, and in response to the supplemental brief ("Supp. Mem. at __") filed by the Employees Retirement System of the City of New Orleans and Irving Firemen's Relief and Retirement System Fund, the self-described "Public Retirement Systems."

I. PRELIMINARY STATEMENT

On September 13, 2010, the Court held a telephonic conference to discuss the two pending motions regarding the appointment of Lead Plaintiff. At the conclusion of the conference, the Court invited counsel for the Public Retirement Systems to submit a short memorandum identifying cases in the Second Circuit where a lead plaintiff candidate was deemed inadequate or atypical because it did not continue to purchase shares of the issuer company's stock following a partial disclosure. Despite being granted a second bite at the apple to make their argument, the Public Retirement Systems have failed to provide the Court with any binding precedent or any other type of "proof" to rebut the presumption afforded to the movant with the largest financial interest in this litigation, *i.e.*, the Sheet Metal Workers and Ironworkers. As such, Sheet Metal Workers and Ironworkers should be appointed Lead Plaintiffs and their choice of Robbins Geller Rudman & Dowd LLP ("Robbins Geller") as Lead Counsel should be approved.

II. ARGUMENT

A. Sheet Metal Workers and Ironworkers Are the Presumptive Lead Plaintiffs and the Public Retirement Systems Have Failed to Rebut That Presumption

The PSLRA is very clear. "[T]he court shall adopt a ***presumption*** that the ***most adequate plaintiff*** in any private action arising under this title 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." 15 U.S.C. §78u-4(a)(3)(B)(iii) (emphasis added). To meet the "otherwise satisfies" criterion, the movant must establish only a "***prima facie*** case of typicality and adequacy" under "traditional Rule 23 principles." *In re Cendant Corp. Litig.*, 264 F.3d 201, 263-65 (3d Cir. 2001) (internal quotations omitted) (emphasis added); *see also In re Host Am. Corp. Sec. Litig.*, 236 F.R.D. 102, 105 (D. Conn. 2006) (stating that the "Court should not undertake a comparative review of all the lead plaintiff motions. Rather, the Court should consider the motions sequentially, from greatest to smallest loss, applying the presumption that the plaintiff with the greatest loss should be the lead plaintiff, unless and until that presumption is rebutted by a showing that that plaintiff does not meet the Rule 23 criteria.") (citation omitted). The inquiry into whether institutional investors, like Sheet Metal Workers and Ironworkers, "need not be extensive" and "institutional investors and others with large losses will, more often than not, satisfy the typicality and adequacy requirements." *Cendant*, 264 F.3d at 263-65.

1. The Public Retirement Systems Have Not Identified Any Relevant Caselaw to Support Their Argument That a Lead Plaintiff Is Inadequate Because It Did Not Continue to Purchase Shares of the Issuer Company's Stock Following a Partial Disclosure

The Public Retirement Systems do not dispute that Sheet Metal Workers and Ironworkers have the largest financial interest. Instead, they attempt to rebut the presumption afforded to Sheet Metal Workers and Ironworkers by contending that they are inadequate Lead Plaintiffs because they lack standing for statements made after the Company's September 4, 2008 partial disclosure, since Sheet Metal Workers and Ironworkers sold all of their shares after the Company's September 4,

2008 partial disclosure. Their contention, however, is not supported by the law of this Circuit and the cases cited by the Public Retirement Systems do not suggest otherwise.[1]

While the Public Retirement Systems cite to a number of cases which held that a plaintiff cannot assert claims for statements made after it purchased its shares, *see* Supp. Mem. at 5, n.8, each one of those cases – which are all from outside this Circuit – is inapposite. First, and critically, none of those cases concerned a motion for lead plaintiff. Thus, they do not have any bearing on this motion, in which the "most adequate plaintiff" is only required to make a preliminary showing as to its adequacy and typicality. Sheet Metal Workers and Ironworkers readily acknowledge that if there are some claims to be asserted on behalf of the Class for which they lack standing, they will include Class representatives to assert those claims. Second, the holdings of those cases are inconsistent with the holdings of courts in this Circuit which would allow Sheet Metal Workers and Ironworkers to represent purchasers who purchased shares throughout the Class Period, even though they

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[1] The Public Retirement Systems' reliance on cases interpreting the Second Circuit's holding in *W.R. Huff Asset Management v. Deloitte & Touche LLP*, 549 F.3d 100 (2d Cir. 2008), regarding standing is also misplaced. In each instance, the courts expressed concern about the lead plaintiff's ability to establish ***any*** standing, not simply standing for a specific claim. For example, in *Baydale v. American Express Co.*, No. 09 Civ. 3016 (WHP), 2009 U.S. Dist. LEXIS 71668 (S.D.N.Y. Aug. 14, 2009), the court denied the lead plaintiff motion of a Swedish money manager who claimed to have third party standing to sue on behalf of its funds. The court there held that its "status raises complex and novel issues of law which would require extensive factual and foreign legal analysis" and "[s]uch a diversion would be a needless litigation sideshow." *Id.* at *9.

Similarly, in *In re SLM Corp. Securities Litigation*, 258 F.R.D. 112 (S.D.N.Y. 2009), and *In re Imax Securities Litigation*, No. 06 Civ. 6128 (NRB), 2009 U.S. Dist. LEXIS 58219 (S.D.N.Y. June 29, 2009), the respective courts replaced an investment advisor as lead plaintiff after motions were made by other investors following the Second Circuit's ruling in *W.R. Huff*, which held that investment advisors cannot serve in a representative capacity in securities class actions because they suffered ***no*** injury-in-fact. However, that is not the case here. Sheet Metal Workers and Ironworkers collectively purchased 19,900 shares during the Class Period and suffered losses of $713,317.61 as a result of Defendants' actions. Specifically, Sheet Metal Workers and Ironworkers collectively sold 11,605 shares after the Company's September 4, 2008 partial disclosure. Therefore, it is clear that Sheet Metal Workers and Ironworkers suffered an "injury-in-fact" and therefore can assert claims on behalf of the Class.

themselves did not purchase shares after later misstatements. *See In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 87 (S.D.N.Y. 2007); *see also City of Sterling Heights Police & Fire Ret. Sys. v. Abbey Nat'l,* 423 F. Supp. 2d 348, 359 n.4 (S.D.N.Y. 2006) (because plaintiff alleged misleading pre-purchase statements and fraud on the market, plaintiff could represent class for post-purchase statements); *Robbins v. Moore Med. Corp.*, 788 F. Supp. 179, 187 (S.D.N.Y. 1992) (finding class representatives entitled to assert Section 10(b) claims "arising from statements made both before and after the purchase date if the statements allegedly were made in furtherance of a common scheme to defraud") (citing *Nicholas v. Poughkeepsie Sav. Bank/FSB*, No. 90 Civ. 1607 (RWS), 1990 U.S. Dist. LEXIS 12677, at *14-*15 (S.D.N.Y. Sept. 27, 1990)). Thus, under the law of courts in this Circuit, Sheet Metal Workers and Ironworkers have standing to represent the entire Class.

2. Sheet Metal Workers and Ironworkers Are Not "In-and-Out" Traders

Although the Court expressly limited the supplemental submission by the Public Retirement Systems to the issue of whether a lead plaintiff candidate is inadequate or atypical because it did not continue to purchase shares of the issuer company's stock following a partial disclosure, the Public Retirement Systems nevertheless make another attempt to rebut the presumption afforded to Sheet Metal Workers and Ironworkers by misleadingly labeling Sheet Metal Workers and Ironworkers as "in-and-out" traders who cannot establish loss causation for their trades since they sold their shares before the Company's announcement in February 2009, which caused a further decline in the price of Terex stock.[2] *See* Supp. Mem. at 7-8. Aside from being beyond the scope of what the Court authorized to be filed, this argument is completely disingenuous as can be seen from the fact that the

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[2] An "in-and-out" trader is an investor who bought shares during the class period and sold ***all*** of those shares prior to ***any*** negative disclosure of the alleged fraud; as such, an "in-and-out trader" will have difficulty proving loss causation under *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

two complaints on file, *see Glassman v. Terex Corp., et al.*, Case No. 3:10-cv-00070-RNC at ¶58, and *Hays v. Terex Corp., et al.*, Case No. 3:10-cv-00182-RNC at ¶58, as well as the Public Retirement Systems' own motion papers, *see* Memorandum of Law in Support of the Public Retirement Systems' Motion for Consolidation and for Appointment of Lead Plaintiffs and Lead Counsel at pp. 2-3, all allege that the Company's September 4, 2008 announcement was a partial disclosure. Thus, there can be no real dispute that Sheet Metal Workers and Ironworkers will be able to establish loss causation for their claims.

Indeed, district courts in this Circuit consistently hold that "selling shares during the class period does ***not*** disqualify a class member from being appointed lead plaintiff." *Ellenburg v. JA Solar Holdings Co.*, 262 F.R.D. 262, 268 (S.D.N.Y. 2009) (emphasis added); *see also Montoya v. Mamma.com Inc.*, No. 05 Civ. 2313 (HB), 2005 U.S. Dist. LEXIS 10224, at *6-*7 (S.D.N.Y. May 31, 2005) (same). And, "where a putative lead plaintiff sold all its shares after a partial disclosure of misconduct by the defendant but before the final disclosure that led to the lawsuit, that putative lead plaintiff does not face the unique defense of having to show loss causation to the extent that it cannot serve as lead plaintiff." *Juliar v. SunOpta, Inc.*, No. 08 Civ. 933 (PAC), 2009 U.S. Dist. LEXIS 58118, at *7-*8 (S.D.N.Y. Jan. 30, 2009) (citation omitted) (appointing institutional investor who sold shares after partial disclosure as lead plaintiff). Here, Sheet Metal Workers and Ironworkers sold their shares ***after*** the September 4, 2008 partial disclosure and "can allege that the subject of the fraudulent statement or omissions was the cause of the actual loss suffered and, therefore, satisfy the test[] articulated by the Supreme Court in *Dura[.]*" *Montoya*, 2005 U.S. Dist. LEXIS 10224, at *7 (internal quotations omitted).[3]

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[3] Not only are "in-and-out" shareholders appropriate lead plaintiffs, but courts routinely reject defendants' attempts at the much more rigorous class certification stage to exclude "in-and-out" shareholders from the class even when – unlike here – ***no*** partial disclosures have been

3. The Presumptive Lead Plaintiff Need Not Have Standing to Assert Every Claim to Be Appointed Lead Plaintiff

During the telephone conference, counsel for the Public Retirement Systems insisted that she had caselaw to support her argument that Sheet Metal Workers and Ironworkers could not preliminarily satisfy the requirements for appointment as Lead Plaintiffs because they lacked standing to assert claims for purchases made after September 4, 2008. As the Public Retirement Systems' submission demonstrates, however, the law is not on their side on this issue. Plainly put, a lead plaintiff is not required to have standing to assert every possible claim. *See Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 82-83 (2d Cir. 2004) ("[I]t is inevitable that, in some cases, the lead plaintiff will not have standing to sue on every claim.");[4] *see also Fishbury, Ltd. v. Connetics Corp.*, No 06 Civ. 11496 (SWK), 2006 U.S. Dist. LEXIS 90696, at *12 (S.D.N.Y. Dec. 14, 2006) ("It is well settled law in this Circuit that the lead plaintiff in a securities class action need not have standing to sue on all causes of action raised in the underlying class complaint.") (citing *Hevesi*, 366 F.3d at 82); *In re Global Crossing, Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 205 (S.D.N.Y. 2003) ("In conducting the lawsuit on behalf of all class members and all those who have brought complaints that have been consolidated under their leadership, Lead Plaintiffs have a responsibility to identify and include

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identified. *See, e.g., In re Fannie Mae Secs.*, 247 F.R.D. 32, 41 (D.D.C. 2008) (denying as "premature" defendants' request at class certification stage to exclude "early sellers" who sold stock prior to the ***only*** disclosure); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 236 F.R.D. 62, 71 (D.N.H. 2006) ("it is too early in the litigation to exclude former shareholders from the class simply because their losses were caused by corrective disclosures that have not yet been specifically identified").

[4] The Public Retirement Systems attempt to distinguish *Hevesi* by arguing that "standing to prosecute separate causes of action is not at issue; rather, the issue is whether [Sheet Metal Workers and Ironworkers] have standing to assert a cause of action with respect to misstatements issued after they stopped purchasing stock in Terex and thus lack standing to prosecute." Supp. Mem. at 7, n.9. That, however, is a distinction without a difference. There is no simply requirement that a lead plaintiff have standing for all causes of action or for every allegedly false statement.

named plaintiffs who have standing to represent the various potential subclasses of plaintiff who may be determined, at the class certification stage, to have distinct interests or claims."); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 286 (S.D.N.Y. 2003) ("The PSLRA does not prohibit the addition of named plaintiffs to aid the Lead Plaintiff in representing the class."); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 384 F. Supp. 2d 838, 843 (D. Md. 2005) ("lead plaintiff need not have standing to assert every claim" but may appoint a class representative to assert certain claims) (citation omitted). This view was perhaps best expressed by the Third Circuit in *In re Cendant Corp. Litigation*, 182 F.R.D. 144, 148 (D.N.J. 1998) – "notwithstanding every plaintiff's undeniable interest in the outcome most favorable to his or her own position, every warrior in this battle cannot be a general."[5]

This conclusion is also evident from the text of the PSLRA itself in which the "most adequate plaintiff" (*i.e.*, the lead plaintiff) is the investor with the largest financial interest who also preliminarily satisfies the requirements of Fed. R. Civ. P. 23. – not the investor who has the ability to assert all possible claims. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii); *see also In re Smith Barney Transfer Agent Litig.*, No. 05 Civ. 7583 (WHP), 2006 U.S. Dist. LEXIS 19728, at *11 (S.D.N.Y. Apr. 17, 2006) ("'Any requirement that a different lead plaintiff be appointed to bring every single available claim would contravene the main purpose of having a lead plaintiff – namely, to empower one or several investors with a major stake in the litigation to exercise control over the litigation as a whole.'") (quoting *Hevesi*, 366 F.3d at 83 n.13); *Weinberg v. Atlas Air Worldwide Holdings, Inc.*,

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[5] Counsel for the Public Retirement Systems recently made an identical argument in an unrelated securities class action in the Southern District of New York, which was rejected by the court there. *See City of Roseville Emp's. Ret. Sys v. Nokia Corp., et al.*, Civil Action No. 1:10-cv-00967-GBD, slip op. at 2 (S.D.N.Y. June 9, 2010) ("*Nokia*") (attached hereto as Exhibit A) (denying the argument that the presumptive lead plaintiff is inadequate because it may need to add parties who can assert claims that the lead plaintiff cannot).

216 F.R.D. 248, 254 (S.D.N.Y. 2003) (rejecting the argument that there should be separate lead plaintiffs for different claims and stating, "[A]t this stage only one Lead Plaintiff is necessary. Designating multiple Lead Plaintiffs to represent each cause of action would fracture the litigation . . .").[6]

III. CONCLUSION

For the foregoing reasons, and those set forth in their prior submissions, Sheet Metal Workers and Ironworkers – who have already averred that they will act in the best interests of the

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[6] The Public Retirement Systems argue that the Court cannot rely on Sheet Metal Workers and Ironworkers' assertion that, if the Court finds it necessary, they will name a Class representative for later Class Period purchases in the filing of an amended complaint. *See* Supp. Mem. at 9-12. In support of their argument, the Public Retirement Systems cite to the transcript in the *Nokia* litigation. In that action, the lead plaintiff filed an amended complaint which did not include purchasers of ordinary shares of Nokia and limited the class to purchasers of Nokia American Depositary Receipts. The reason for doing so was because, after being appointed lead plaintiff and before the amended complaint was filed, the Supreme Court issued its ruling in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which held that a foreign plaintiff could not sue foreign defendants for securities fraud in connection with the purchase or sale of securities listed on a foreign exchange. A number of courts issued rulings subsequent to *Morrison* holding that *Morrison* should be interpreted to exclude the ability of U.S. investors who purchased shares abroad to assert claims under Section 10(b) of the Securities Exchange Act of 1934. *See Stackhouse v. Toyota Motor Co.*, No. CV 10-0922 DSF (AJWx), 2010 U.S. Dist. LEXIS 79837, at *2 (C.D. Cal. July 16, 2010) and *Cornwell v. Credit Suisse Group*, No. 08 Civ. 3758 (VM), 2010 U.S. Dist. LEXIS 76543, at *11 (S.D.N.Y. July 27, 2010). Thus, the lead plaintiff in *Nokia* made an informed decision, based upon the interpretations of *Morrison* that it had access to prior to the filing of its amended complaint, to limit the scope of the class to ADR purchasers (counsel for the Public Retirement Systems was well aware of this because she requested a copy of the *Nokia* amended complaint the very next day after it was filed and although she could have commenced a separate action for ordinary share purchasers at that time, she has yet to do so).

Indeed, in *Nokia*, Judge Daniels acknowledged and agreed that the Supreme Court's ruling in *Morrison* would determine who would be able to assert a claim under Section 10(b) when dealing with a foreign company that is listed on a foreign exchange. *See Nokia*, Transcript of Oral Argument, June 8, 2010, at 29-30, 40-41 (attached as Exhibit B to Supp. Mem.). While plaintiffs in other pending cases such as *Plumbers' Union Local No. 12 Pension Fund vs. Swiss Reinsurance Company, et al.*, No. 1:08-cv-01958-JGK (S.D.N.Y.) and in *In re Société Générale Securities Litigation*, No. 1:08-cv-02495-RMB (S.D.N.Y.) may have decided to pursue claims for ordinary share purchasers in those cases, that is within their discretion and irrelevant to the decision made by the lead plaintiff in *Nokia*.

entire Class, *see* Joint Declaration of Sheet Metal Workers Local 32 Pension Fund and Ironworkers St. Louis District Council Pension Fund in Support of Their Motion for Appointment as Lead Plaintiffs, filed on March 29, 2010 at ¶6 ("We are committed to vigorously representing the interests of all class members to obtain the largest practicable recovery for the class consistent with good faith, meritorious advocacy and our duties as lead plaintiffs.") – should be appointed Lead Plaintiffs and their choice of Robbins Geller as Lead Counsel should be approved.

DATED: September 9, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2010, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

DATED: September 9, 2010

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