

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IRON WORKERS LOCAL NO. 25
PENSION FUND, Individually and On Behalf
of All Others Similarly Situated,

Plaintiff,

v.

CREDIT-BASED ASSET SERVICING AND
SECURITIZATION LLC, et al.,

Defendants.

PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF MISSISSIPPI, Individually and
On Behalf of Others Similarly Situated,

Plaintiff,

v.

MERRILL LYNCH & CO. INC., et al.,

Defendants.

Civil Action No. 1:08-cv-10841-JSR
ECF Case

CLASS ACTION

**PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF MISSISSIPPI'S RESPONSE
TO IRON WORKERS LOCAL NO. 25
PENSION FUND'S SUBMISSION
REGARDING APRIL 1, 2009 HEARING**

Civil Action No. 1:09-cv-1392-JSR

The Public Employees' Retirement System of Mississippi ("MissPERS") respectfully submits this response to Iron Workers Local No. 25 Pension Fund's ("Iron Workers") Submission Regarding April 1, 2009 Hearing ("Iron Workers Submission") regarding the appointment of Lead Plaintiff pursuant to Section 27(a)(3)(B) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77z-1(a)(3)(B), as amended by the Private Securities Litigation Reform Act of 1995 (the "PSLRA").

I. INTRODUCTION

On April 1, 2009, this Court consolidated the two pending actions and held a hearing to decide the appointment of lead plaintiff. Following testimony from representatives from both Lead Plaintiff movants, the Court was "leaning towards picking the Public Employees Retirement System as the sole lead plaintiff in these consolidated actions." *See* April 1, 2009 Hearing Transcript at 35:20-25 ("Transcript"). The Court, however, afforded Iron Workers the opportunity for further briefing to address its portfolio monitoring arrangement in this case and any other issues. *Id.* at 35:25-36:13. On April 8, 2009, Iron Workers filed its further submission. As detailed herein, MissPERS continues to have the largest financial interest in the outcome of the case and otherwise remains the most adequate plaintiff to represent the class and should be appointed Lead Plaintiff.

Although portfolio monitoring arrangements for institutional investors are appropriate and do not raise conflicts of interest for such investors who obtain evaluations and retain authority to decide whether to pursue litigation and which counsel to represent them, MissPERS did not initiate this action pursuant to a portfolio monitoring arrangement. In fact, Pond, Gadow & Tyler, P.A. ("Pond Gadow"), a local Mississippi law firm that does not monitor MissPERS' portfolio and that MissPERS does not have a portfolio monitoring agreement with, noted issues with lending practices. *See* Transcript at 18:13-19:10. Following evaluation, the Attorney General's office determined that it was in MissPERS' best interests to retain counsel experienced in securities class actions to pursue class claims. George W. Neville, Special Assistant Attorney General for the State of Mississippi and legal counsel to MissPERS, identified twelve law firms

that specialize in securities class actions and directed Pond Gadow to associate with one of the firms, subject to the approval of the Attorney General. In other words, the Court need not decide whether portfolio monitoring arrangements create a conflict of interest in order to appoint MissPERS as Lead Plaintiff in this action.

As established in its prior submissions, MissPERS possesses the largest financial interest in the relief sought and is otherwise qualified to serve as Lead Plaintiff. Indeed, the Iron Workers Submission does not challenge MissPERS' adequacy or the zealouslyness with which it has and will continue to oversee its counsel and the prosecution of this action. As demonstrated at the April 1, 2009 hearing, MissPERS maintains ample resources to oversee and supervise counsel in the prosecution of this litigation and has done so. Mr. Neville's testimony confirms MissPERS' sophistication and expertise to supervise its litigation. Mr. Neville further described some of MissPERS' available resources, including four attorneys experienced in overseeing outside counsel and securities litigation, with access to further resources if required. In sum, MissPERS has the largest financial interest in this litigation, otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure, and should be appointed Lead Plaintiff.

II. MissPERS IS THE MOST ADEQUATE PLAINTIFF

In opposition to MissPERS' motion for lead plaintiff, Iron Workers speculated that MissPERS lacks the resources necessary to oversee this litigation and its counsel. Iron Workers is wrong. In fact, the Iron Workers Submission does not challenge MissPERS' adequacy to represent the Class.

MissPERS is clearly the "most adequate plaintiff" under the standards of the PSLRA given that it possesses the "largest financial interest in the relief sought by the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). This presumption "may be rebutted only upon *proof* by a member of the purported plaintiff class that the presumptively most adequate plaintiff" is inadequate to protect the interests of the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II) (emphasis added). Not only has Iron Workers failed to adduce proof of MissPERS' inadequacy, but MissPERS has itself proven that it is more than adequate to protect the interests of the Class. *See* Transcript at 24:23-25; 25:5-7;

25:20-27:6; and 28:18-21 (confirming MissPERS' sophistication, familiarity with securities litigation, and resources to oversee and direct counsel).

Pursuant to the Court's directive, Mr. Neville appeared at the April 1, 2009 hearing. Mr. Neville testified that he, along with the Attorney General of the State of Mississippi, are thoroughly familiar with the responsibilities of serving as a Lead Plaintiff under the PSLRA and, in fact, have significant experience in serving in such a capacity on behalf of fellow investors in other securities class actions. MissPERS has taken, and will continue to take, an active role in the litigation and will adequately protect the interests of the Class.

Mr. Neville further testified that MissPERS will, due to its fiduciary obligations to its beneficiaries and to the Class, vigorously prosecute this action and supervise class counsel effectively. In particular, Mr. Neville testified that he operates much like a senior partner in a law firm overseeing litigation. *See* Transcript at 25:5-7. In this respect, Mr. Neville testified that he spends a quarter to one half of his time supervising outside counsel engaged in securities litigation. *Id.* at 24:23-25. Here, Mr. Neville personally reviewed MissPERS' complaint prior to its filing. *Id.* at 28:18-21. Indeed, Mr. Neville testified to his familiarity with the factual allegations at issue in this action, as well as the collapse of the mortgage-backed securities markets in general. *Id.* at 29:2-30:7. Moreover, Mr. Neville testified that in addition to himself, MissPERS employs three other experienced attorneys who assist in supervising securities class actions and its counsel. *Id.* at 25:20-27:5. Clearly, MissPERS exercises sufficient supervision over its litigation and devotes a wealth of resources to the prosecution of securities class actions. MissPERS' participation in this action, if appointed Lead Plaintiff, will be no different.

Moreover, MissPERS has valuable experience in securities litigation and has successfully obtained substantial recoveries in other cases. For example, MissPERS has served as a lead plaintiff or a representative plaintiff in the following actions where substantial recoveries were obtained in the last twelve months:

- *In re UnitedHealth Group Inc. Shareholder Derivative Litigation*, Master File No. 06-1216 JMR/FLN (D. Minn.): Settlement valued at \$895 to \$930 million preliminarily approved in December 2008;

- *In re SCOR Holding (Switzerland) AG Litigation (Converium)*, 04-CV-7897 (SDNY): Settlement of \$115 million approved in December 2008; and
- *In re Delphi Corp. Securities Litigation*, 05-CV-02637 (SDNY): Settlements totaling \$322.35 million approved in January and April 2008.

Indeed, following the April 1, 2009 hearing, Iron Workers does not challenge MissPERS' adequacy to represent the Class. Nor can it. Prior to the hearing, Iron Workers offered mere conclusory assertions, exaggerations and speculation attempting to challenge MissPERS' ability to competently oversee the current action.¹ Mr. Neville's testimony quickly dispels any notion that MissPERS is inadequate to protect the interests of the Class. "[C]onclusory assertions of inadequacy are, however, insufficient to rebut the statutory presumption under the PSLRA without specific support in evidence of the existence of an actual or potential conflict of interest or a defense to which [the potential lead plaintiff] would be uniquely subject." *Sczesny Trust v. KPMG LLP*, 223 F.R.D. 319, 324-25 (S.D.N.Y. 2004).

Finally, as previously explained, district courts throughout the Second Circuit, including the Southern District of New York, hold that the PSLRA's bar to "professional plaintiffs" does not apply to institutional investors.² Indeed, Congress intended to encourage large institutional investors, such as MissPERS, to serve as lead plaintiffs. *See* H.R. REP. NO. 104-369, at 34 (1995) (Conf. Rep.) ("Institutional investors and other class members with large amounts at stake

¹ For example, Iron Workers exaggerates the number of MissPERS' cases, double-counting the two pending Merrill Lynch pass-through actions (which this Court consolidated on April 1, 2009) as separate cases. *See* Iron Workers Local Pension Fund's Reply Memorandum of Law in Further Support of Its Motion for Appointment as Lead Plaintiff [Docket Entry No. 29] at 2.

² *See, e.g., In re Pfizer Inc. Sec. Litig.*, 233 F.R.D. 334, 338 n.4 (S.D.N.Y. 2005) ("While the PSLRA disfavors 'professional plaintiffs' . . . [t]his provision was not intended to target institutional investors"); *Police & Fire Ret. Sys. v. SafeNet, Inc.*, 2007 U.S. Dist. LEXIS 97959, at *11 (S.D.N.Y. Feb. 21, 2007) ("it is clear that Congress did not intend to target institutional investors with this limitation."); *Kuriakose v. Fed. Home Loan Mortgage Co.*, 2008 U.S. Dist. LEXIS 95506, at *25 (S.D.N.Y. Nov. 24, 2008) ("Central States is not subject to the PSLRA's strict ban on 'professional plaintiffs' who have served as lead plaintiff in more than five class actions in the previous three-year period.").

will represent the interests of the plaintiff class more effectively than class members with small amounts at stake.”); S. REP. NO. 104-98, at 11 (1995) (“Institutions with large stakes in class actions have much the same interests as the plaintiff class generally. . . .”).

III. WHILE PORTFOLIO MONITORING SERVICES DO NOT RAISE CONFLICTS OF INTEREST, MissPERS’ PORTFOLIO MONITORING PRACTICES ARE NOT AT ISSUE HERE

As detailed in the Iron Workers Submission, portfolio monitoring services do not themselves raise conflicts of interest for institutional investors who obtain evaluations and have authority to decide whether to pursue litigation and which counsel to represent them. For example, MissPERS has twelve law firms that monitor its portfolio. MissPERS, however, retains the independent authority to decide which cases to bring and which counsel to retain. In fact, MissPERS often consults with several of its monitoring counsel for any particular case. *See* Transcript at 20:4-12.

That said, MissPERS’ portfolio monitoring practices are not at issue here because MissPERS did not initiate this action pursuant to a portfolio monitoring agreement. To the contrary, Pond Gadow, a law firm with which MissPERS does not have a portfolio monitoring agreement, noted issues with lending practices. *See* Transcript at 18:13-19:10. Following evaluation, the Attorney General’s office determined that it was in the best interests of MissPERS to retain attorneys experienced in securities class actions to pursue class claims. MissPERS provided Pond Gadow with the names of twelve law firms that specialize in securities class actions. MissPERS then directed Pond Gadow to associate with one of the firms to work with on this action, subject to the approval of the Attorney General.

IV. CONCLUSION

For the foregoing reasons, MissPERS respectfully requests the Court grant MissPERS' motion for appointment as Lead Plaintiff and approve its selection of Lead Counsel.

Dated: April 15, 2009

BERNSTEIN LITOWITZ BERGER
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/s/ David R. Stickney

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