

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

NAOMI PURCHASE, on behalf of
herself and all others similarly
situated,

Civil Action No. 1:06-cv-00130-SJM

JURY TRIAL DEMANDED

Plaintiff,

v.

JEFFREY A. LUDROF, F.
WILLIAM HIRT, SUSAN HIRT
HAGEN, JONATHAN HIRT
HAGEN, J. RALPH BORNEMAN,
JR., JOHN T. BAILY, LUCIAN L.
MORRISON, PATRICIA
GARRISON-CORBIN, THOMAS
W. PALMER, JOHN R. GRAHAM,
C. SCOTT HARTZ, CLAUDE C.
LILLY, III, ROBERT C.
WILBURN, KAJ AHLMANN,
ERIE INDEMNITY COMPANY,
ERIE INSURANCE EXCHANGE,
and ERIE FAMILY LIFE
INSURANCE COMPANY,

Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NAOMI
PURCHASE'S MOTION FOR APPOINTMENT OF LEAD PLAINTIFF AND
APPROVAL OF SELECTION OF COUNSEL**

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on _____, 2006, or as soon thereafter as the matter may be heard before the Hon. Sean J. McLaughlin, in Courtroom C, located at 17 South Park Row, Erie, Pennsylvania, Plaintiff Naomi Purchase (“Purchase” or “Plaintiff”), will, and hereby does, move this Court for an order granting Purchase’s Motion for Appointment of Lead Plaintiff and Lead Counsel (the “Motion”).

This Motion is brought pursuant to §21D of the Securities Exchange Act of 1934 on the grounds that Purchase has timely filed this Motion and that she is the “most adequate plaintiff.” In addition, Purchase seeks the Court's approval of her selection of Johnson Law Firm APC as Lead Counsel pursuant to §21D(a)(3)(B)(v) and 15 U.S.C. §78u-4(a)(3)(B)(v).

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Frank J. Johnson filed herewith, the pleadings and other files herein, and such other argument as may be permitted by the Court.

STATEMENT OF RELIEF SOUGHT

Through this motion, Plaintiff seeks an order (1) appointing Naomi Purchase as Lead Plaintiff, and (2) approving her selection of Johnson Law Firm APC as Lead Counsel.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Naomi Purchase respectfully submits this memorandum in support of her motion for: (1) the appointment of Naomi Purchase as Lead Plaintiff in this action; and (2) the approval of Johnson Law Firm APC as Plaintiff's choice of Lead Counsel in this action. The financial interest of Purchase represents 60,156 shares of Erie Family Life Insurance Company stock.

The Private Securities Reform Act of 1995 ("PSLRA"), which amends the Securities Exchange Act of 1934 by adding §21D (codified at 15 U.S.C. §78u-4), establishes a procedure for the appointment of lead plaintiffs in private securities class actions filed after December 22, 1995. Section 21D provides, in relevant part, that within 60 days after publication of a notice advising class members of the pendency of a securities class action, any class member may move the Court to be appointed lead plaintiff of the purported class.¹

¹

Section 21D(a)(3) states:

(A) Early notice to class members.

(i) In general. Not later than 20 days after the date on which the Complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported class B

(I) of the pendency of the 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.

Section 21D(a)(3)(B) of the Exchange Act further provides that the Court shall consider any motion by a purported class member to be appointed lead plaintiff “not later than 90 days after the date on which a notice is published,” or as soon as practicable after the Court decides any pending motion to consolidate any actions asserting substantially the same claim or claims, and that the Court “shall 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. . . .”² 15 U.S.C. §78u-4(a)(3)(B).

Having filed the instant motion within the 60-day period prescribed by §21D, Purchase now requests that she be appointed Lead Plaintiff, and that the Court approve her selection of Johnson Law Firm APC as Lead Counsel for the purported class.

² Purchase will also file, by separate motion, a motion for class certification pursuant to Federal Rule of Civil Procedure 23. The requirements for appointment of lead plaintiff and for class certification overlap to some extent, particularly regarding the qualifications of the lead plaintiff/class representative. One distinction, however, is that the motion for appointment of lead plaintiff may not be challenged by defendants. Only another “member of the purported class” may oppose the application to be appointed lead plaintiff. Section 21D(a)(3)(B)(iii)(II); 15 U.S.C. §78u-4(a)(3)(B)(iii)(II). See *Greebel v. FTP Software*, 939 F.Supp. 57, 60 (D.Mass.1996) (the text of §21D “clearly indicates that this issue [of appointment of lead plaintiff] is one over which only potential plaintiffs may be heard”). Moreover, the court’s inquiry in ruling on a motion for lead plaintiff is limited to the requirements of Section 21D and is a separate inquiry from class certification. As the court noted in *Greebel*, “Though neither the text of the PSLRA nor its legislative history explicitly describe the relationship between motions for lead plaintiff and motions for class certification, it seems clear that Congress recognized that these motions involved distinct inquiries. Section 21D(a)(3)(B) refers throughout its text to ‘purported class members.’ Congress implicitly understood, therefore, that lead plaintiff motions would be decided prior to consideration of certification issues.” *Ibid*.

II. SUMMARY OF THE ACTION

This lawsuit arises out of an effort by Erie Indemnity Company (“Erie Indemnity”), Erie Insurance Exchange (“Erie Exchange”), and the individual defendants who are members of the Board of Directors of Erie Family Life Insurance Company (“EFL”) to use their board positions and control over EFL to “freeze out” Plaintiff and the other EFL minority shareholders at an unreasonably low price. Defendants artificially suppressed the market price of EFL and communicated a tender offer to acquire EFL’s shares for \$32.00 per share, even though EFL’s share price had been trading at and above \$32.00 for nearly two years.

The matter herein is a securities class action filed on behalf of all persons or entities who were shareholders of EFL and who sustained damages thereby. Plaintiff seeks to recover damages caused by Defendants’ Jeffrey A. Ludrof, F. William Hirt, Susan Hirt Hagen, J. Ralph Borneman, Jr., John T. Baily, Lucian L. Morrison, Patricia Garrison-Corbin, Thomas W. Palmer, John R. Graham, C. Scott Hartz, Claude C. Lilly, III, Robert C. Wilburn, Kaj Ahlmann, Erie Insurance Exchange, and Erie Family Life Insurance Company (collectively referred to herein as “Defendants”) for violations of the federal securities laws (§ 14 of the Securities Exchange Act of 1934 (the “1934 Act”)) and for violations of the fiduciary duties the individual Defendants owed to Plaintiff and the class under Pennsylvania law.

Plaintiff, Naomi Purchase, is an 87 year-old widow who owns 60,156 shares of EFL. Purchase brings this action individually and as a class action, pursuant to Rule 23

of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”), on behalf of all persons, other than Defendants, who owned the securities of EFL on or from March 21, 2004 to May 24, 2006, (the “Relevant Period”) and who are similarly situated (the “Class”), for compensatory damages and other relief.

III. PROCEDURAL BACKGROUND

This action, *Naomi Purchase v. Erie Family Life Insurance Company, et al.*, Case No. 1:06-cv-00130-SJM, was filed on June 1, 2006. Pursuant to §21D(a)(3), plaintiff Purchase caused a notice of pendency of this action (the “Notice”) to be timely published and disseminated over the Business Wire on June 20, 2006.³ The Notice advised all EFL shareholders of: 1) the pendency of this action; 2) the claims asserted in the Purchase Complaint; 3) the purported Class Period; and 4) the fact that, no later than sixty (60) days from June 20, 2006 (the date the first Notice was published), any member of the purported Class may move this Court to serve as lead plaintiff.

III. PURCHASE IS THE MOST ADEQUATE PLAINTIFF UNDER §21D OF THE EXCHANGE ACT AND SHOULD THEREFORE BE APPOINTED LEAD PLAINTIFF

Section 21D(a)(3)(B)(iii) of the Securities Exchange Act establishes a rebuttable presumption that the “most adequate plaintiff” for purposes of appointment as lead plaintiff is the person or group of persons that:

³ See Johnson Declaration, Exhibit “A”.

- (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).

Purchase meets all three of these criteria. Thus, she is the proper presumptive Lead Plaintiff for the Class Action.

A. Purchase Makes This Motion Within 60 Days Of Publication Of Notice

Plaintiff in the Erie action published her Notice on June 20, 2006. Purchase brings this motion within 60 days of such publication.

B. Purchase Has The Largest Financial Interest In The Relief Sought

Purchase holds a cumulative total of 60,156 shares of EFL securities. As no other person has sought to be appointed Lead Plaintiff, to the best of Purchase's knowledge, Purchase has the largest financial interest in the relief sought by the Class, and should therefore be appointed Lead Plaintiff in this matter. Section 21D(D)(a)(3)(B); 15 U.S.C. §78u-4(a)(3)(B); *Greebel*, supra, 939 F.Supp. at 64.

C. Purchase Otherwise Satisfies The Requirements Of Rule 23

Section 21D(a)(3)(B)(iii)(cc) of the Exchange Act further provides that the lead plaintiff or plaintiffs must "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)(cc). Rule 23(a) provides that

a party may serve as a class representative if the following four requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable (2) there are questions of law or fact common to the class (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. § 23(a).

As alleged by Plaintiff in the Purchase action, “[t]he Class of stockholders is so numerous that joinder of all members is impracticable” and that at the time of the tender offer, EFL had approximately 9,450,000 shares of common stock outstanding of which 2,350,538 common shares are subject to the tender offer.⁴ Complaint, ¶61. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Complaint, ¶62. Further, as alleged, Plaintiff and all other members of the Class sustained damages as a result of Defendants' wrongful conduct. Complaint, ¶62(i). Plaintiff's claims are typical of the claims of the members of the Class, and Plaintiff will fairly and adequately protect the interests of the members of the Class, and has retained counsel competent and experienced in class action securities litigation. Complaint, ¶¶63-64. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to

⁴ All “Complaint ¶_____” references are to the Purchase Complaint.

individually redress the wrongs done to them. Complaint, ¶67. There will be no difficulty in the management of this class action. Complaint, ¶66.

These allegations, which may be accepted as true for the purposes of this Motion,⁵ satisfy Purchase's burden of a prima facie showing, again for the purposes of this Motion, that the Rule 23 requirements of numerosity, commonality, typicality, adequacy of representation and superiority of a class action are satisfied. See also, *Greebel*, supra, 939 F.Supp. at 64.

Moreover, of the four prerequisites of class certification under Rule 23(a), only two -- adequacy of representation and typicality -- directly address the personal characteristics of the class representative/lead plaintiff, and are the only Rule 23 prerequisites, if any, the Court should focus on in appointing lead plaintiffs.⁶ The adequacy requirement is met when a plaintiff's interests are not antagonistic to the interests of the members of the proposed class, and plaintiff's attorneys are qualified, experienced and generally able to conduct the litigation.⁷ There has been no showing that

⁵ For purposes of class certification, the allegations of the complaint must be accepted as true. See e.g., *In re Ramtek Sec. Litig.*, Fed.Sec.L.Rep. (CCH) ¶95,814 (N.D.Cal. 1991) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976)). Presumably, this same rule applies to motions for lead plaintiff, which are to be determined at the pleading stage and prior to class certification.

⁶ See *In re Cell Pathways, Inc. Sec. Litig.*, 203 F.R.D. 189, 191 (E.D. Pa. 2001).

⁷ See, e.g., *Yamner v. Boich*, Fed.Sec.L.Rep. (CCH) ¶98,427 (N.D.Cal. 1994); *In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litigation*, 122 F.R.D. 251, 257 (C.D.Cal. 1988).

Purchase has any fundamental conflicts with other class members. In addition, Purchase has retained highly competent and experienced counsel in this action.

Furthermore, Purchase has already demonstrated her willingness to accept her duties as Class representative, to serve as an advocate on behalf of the Class and to prosecute this action. Purchase has stated in her certification, pursuant to Section 21D(a)(2), that she is willing to serve as representative party on behalf of the Class set forth in the Complaint, including providing testimony at deposition and trial. *See* Purchase Certification.

The typicality requirement of Rule 23(a)(3) is satisfied when the named plaintiff has: 1) suffered the same or similar injuries as the absent class members; 2) the injuries result from the same course of conduct by defendants; and, 3) the claims are based on the same legal theories.⁸

Purchase satisfies the typicality requirement, since she held EFL shares during the Relevant Period, and the Purchase Complaint asserts claims on behalf of all similarly situated Class members. Further, Purchase and each member of the Class have been similarly damaged by Defendants' violations of federal securities laws.

⁸ See, *In re Unioil Securities Litigation*, 107 F.R.D. 615, 620 (C.D.Cal. 1985).

D. The Presumption In Favor Of Purchase Has Not Been Rebutted

The presumption in favor of appointing Purchase as Lead Plaintiff may be rebutted only upon proof “by a member of the purported plaintiffs’ class” that the presumptively most adequate plaintiff --

- (aa) will not fairly and adequately protect the interests of the class; or
- (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

Section 21D(a)(3)(B)(iii)(II); 15 U.S.C. §78u-4(a)(3)(B)(iii)(II).

There has been no showing by any other purported lead plaintiff that Purchase will not adequately protect the interests of the Class or that she is subject to unique defenses that render her incapable of representing the Class. Accordingly, Purchase should be appointed Lead Plaintiff in this matter.

V. THE COURT SHOULD APPROVE PURCHASE’S CHOICE OF LEAD COUNSEL

Section 21D(a)(3)(B)(v) provides that “the most adequate plaintiff shall, subject to the approval of the Court, select and retain counsel to represent the class.” 15 U.S.C. §78u-4(a)(3)(B)(v). Purchase has selected and retained Johnson Law Firm APC to represent the Class as Lead Counsel. As reflected in the firm resume, Johnson Law Firm APC is more than capable of leading this litigation and acting in the best interest of the class.

Johnson Law Firm’s founder, Frank Johnson (“Johnson”), was formerly a partner with Sheppard Mullin Richter & Hampton, a full-service Am Law 100 law firm with

more than 400 attorneys in nine offices located throughout California, New York and the District of Columbia. While there, Johnson represented numerous corporations in complex cases, including state law class action and securities-fraud cases. *See* Johnson Affidavit.

Since leaving Sheppard Mullin to form his own firm in 2004, Johnson has successfully prosecuted several cases similar to the issues raised here. The following are just a few of cases where Johnson Law Firm is, or recently has been, lead or co-lead counsel for plaintiffs pursuing claims against directors for breaches of fiduciary duties:

- *Greenmeadows Partners LLP v. Tomkinson, et al.* (C.D. Cal. Case No. SACV 06-91 CJC) (in an action asserting claims for breach of fiduciary duty, the court was confronted with competing motions for lead counsel by five law firms. Judge Carney recognized that “movants’ counsel are exceptionally qualified and experienced” and stated that it “will appoint Johnson Law Firm as lead counsel.”).
- *In re the Titan Corp. Derivative Litig.* (San Diego, Calif. Sup. Ct. Case No. GIC 832018) (claims for breach of fiduciary duty settled after plaintiffs negotiated \$29 million in increased consideration to Titan’s shareholders in an all-cash merger acquisition).
- *In re Brocade Systems Communications, Inc. Derivative Litigation* (Santa Clara, Calif. Sup. Ct. Case No. 1:05cv041683) (pending; claims for breach of fiduciary duty).
- *In re ChoicePoint Inc. Derivative Litigation* (Fulton County, Georgia Sup. Ct. Case No. 2005-cv-103219) (pending; claims for breach of fiduciary duty).
- *Kogan v. Robinson, et al.* (S.D. Cal. Case No. 05cv1924) (settled; claims for breach of fiduciary duty).
- *In re Morgan Stanley Derivative Litig.* (S.D.N.Y. Case No. 05cv6516) (pending; claims for breach of fiduciary duty).

In addition, based on the unique experience the firm offers, Johnson Law Firm has been retained not only by shareholders but also by publicly traded corporations to pursue

former directors for breaches of fiduciary duty in a number of matters. For example, in a matter that was settled on favorable terms last year, International Real Estate (a public company with shares listed on the London Stock Exchange) retained Johnson Law Firm to pursue claims for breach of fiduciary duty against former directors of a joint venture company. *International Real Estate PLC v. Oaktree Capital Management, LLC, et al.*, Los Angeles Superior Court, Case No. BC 324973. That case involved alleged damages of approximately \$20 million. Similarly, Greenland Corporation, a public traded company located in San Diego, retained Johnson Law Firm to pursue claims for breach of fiduciary duty against several former directors. *Greenland Corp. v. Bonar, et al.*, San Diego Superior Court, Case No. GIC 842605. That matter settled last month with a payment to the corporation for the benefit of its shareholders. *See* Johnson Decl.

The appointment of Johnson Law Firm as lead counsel will unquestionably serve the best interest of the class.

VIII. CONCLUSION

For all the foregoing reasons, Plaintiff Naomi Purchase respectfully requests that this Court appoint Purchase as Lead Plaintiff and approve her choice of Johnson Law Firm APC as Lead Counsel to the Class.

DATED: August 19, 2006

/s/Frank J. Johnson

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