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The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROBERT MCCLAIN, et al.,  
Plaintiffs,

v.

WSB FINANCIAL GROUP, INC., et al.,  
Defendants.

CASE NO. C07-1747RAJ  
ORDER

TURNBERRY ASSET MANAGEMENT,  
et al.,  
Plaintiffs,

v.

DAVID K. JOHNSON, et al.,  
Defendants.

CASE NO. C07-1760RAJ  
ORDER

1 RONALD E. HOUSE, et al.,  
2  
3 Plaintiffs,

4 v.

5 WSB FINANCIAL GROUP, INC., et al.,  
6  
7 Defendants.

CASE NO. C07-5618RAJ  
ORDER

8 SANDRA ELTERICH, et al.,  
9  
10 Plaintiffs,

11 v.

12 DAVID K. JOHNSON, et al.,  
13  
14 Defendants.

CASE NO. C07-5620RAJ  
ORDER

15 JEFFREY HIGHAM, et al.,  
16  
17 Plaintiffs,

18 v.

19 WSB FINANCIAL GROUP, INC., et al.,  
20  
21 Defendants.

CASE NO. C07-2067RAJ  
ORDER

22 **I. INTRODUCTION**

23 This matter comes before the court on at least fifteen motions seeking to  
24 consolidate the above-captioned actions, and seeking to appoint a lead plaintiff for the  
25 consolidated action. Most of the pending motions are duplicative. For purposes of this  
26 order, it suffices to focus on four motions in Case No. 07-1747 (Dkt. ## 12, 14, 17, 19)  
27 and one motion in Case No. 07-5620 (Dkt. # 11). Although two parties have requested  
28 oral argument, the court finds these motions appropriate for disposition based on the  
parties' briefing and supporting documents. For the reasons stated below, the court

1 CONSOLIDATES the above-captioned actions, and appoints the Police and Fire  
2 Retirement System for the City of Detroit (“Detroit P&F”) as the lead plaintiff.

## 3 **II. BACKGROUND**

4 These putative class actions allege securities fraud by WSB Financial Group,  
5 Incorporated (“WSB”), many of its officers and directors, and D.A. Davidson and  
6 Company, who orchestrated the initial public offering (“IPO”) of WSB stock in  
7 December 2006. The complaints in the above-captioned actions describe the same  
8 allegedly wrongful conduct. WSB is a bank holding company engaged in commercial  
9 lending. In connection with its 2006 IPO, WSB issued a registration statement as  
10 required by the SEC. The registration statement allegedly does not reveal that many of  
11 WSB’s lending practices did not comply with applicable state and federal laws. After the  
12 IPO, WSB shares sold for as much as \$21. In September 2007, WSB announced layoffs  
13 and the departure of several executives. Its stock price dropped. The price plummeted on  
14 October 24, 2007, when WSB announced that state and federal regulators were  
15 investigating its lending practices. On October 25, 2007, WSB shares closed at \$4.73.

16 Within a week of WSB’s disclosure, shareholders filed the first of the above-  
17 captioned actions, Case No. 07-1747, seeking relief under federal securities laws.  
18 Turnberry Asset Management (“Turnberry”) filed a second action, Case No. 07-1760.  
19 On October 31, 2007, following the Private Securities Litigation Reform Act (“PSLRA”),  
20 Turnberry’s counsel posted a notice in a national business publication announcing this  
21 action and the deadline for interested potential class members to file motions to serve as  
22 the lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(A)(i). By January 2, 2008, shareholders had  
23 filed three more actions. Each of the follow-on actions was transferred to this court as  
24 related to the first action.  
25  
26  
27  
28

1 The motions before the court seek consolidation of the above-captioned actions,  
2 and appointment of a lead plaintiff.

3 **III. DISCUSSION**

4 **A. The Court Consolidates the Above-Captioned Actions.**

5 At least three WSB shareholders seek to consolidate the five actions captioned  
6 above. No shareholder has opposed consolidation, nor has any Defendant.

7 The PSLRA envisions consolidation of multiple actions targeting the same  
8 securities law violations. 15 U.S.C. § 78u-4(a)(3)(B)(ii) (discussing consolidation of  
9 “more than one action on behalf of a class asserting substantially the same claim or  
10 claims arising under [federal securities laws]”). Fed. R. Civ. P. 42(a) permits  
11 consolidation of actions that “involve a common question of law or fact.” The court’s  
12 decision to consolidate actions under Rule 42(a) is discretionary. *Investors Research Co.*  
13 *v. U.S. Dist. Court for the Central Dist. of Cal.*, 877 F.2d 777, 777 (9th Cir. 1989).  
14

15 In this case, consolidation is appropriate. Review of the complaints in each of the  
16 above-captioned actions reveals that they target the same allegations of misconduct by the  
17 same parties. No party opposes consolidation, and the court finds that consolidating the  
18 actions is in the interests of the parties and promotes judicial economy. The court will  
19 provide instructions for further pleadings in the consolidated action at the conclusion of  
20 this order.  
21

22 **B. The Court Selects Detroit P&F as Lead Plaintiff.**

23 Five shareholders and shareholder groups initially sought to become the lead  
24 plaintiff in the above-captioned actions. The lead plaintiff selection process “is not a  
25 beauty contest,” *In re Cavanaugh*, 306 F.3d 726, 732 (9th Cir. 2002), it is a three-part  
26 pageant.  
27

28 First, the court must ensure that at least one contestant has followed the

1 PSLRA’s process for notifying potential class members of the pending actions, and  
2 offering them the opportunity to seek appointment as lead plaintiff. 15 U.S.C. § 78u-  
3 4(a)(3)(A); *Cavanaugh*, 306 F.3d at 729. Once contestants have timely identified  
4 themselves, the court must consider their petitions within 90 days of the first class  
5 member’s notice or “as soon as practicable” after a decision consolidating multiple  
6 actions. 15 U.S.C. § 78u-4(a)(3)(B)(i)-(ii).  
7

8         Second, the court must determine which of the contestants has the “largest  
9 financial interest in the relief sought by the class . . . .” 15 U.S.C. § 78u-  
10 4(a)(3)(B)(iii)(I); *Cavanaugh*, 306 F.3d at 729-30. The court must presume that the  
11 contestant with the largest financial stake is the lead plaintiff, provided the contestant also  
12 meets the requirements of Fed. R. Civ. P. 23(a). 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The  
13 contestant’s financial stake is “the *only* basis on which a court may compare plaintiffs  
14 competing to serve as the lead” plaintiff. *Cavanaugh*, 306 F.3d at 732 (emphasis in  
15 original). In the second step, the court may not consider other factors, even factors that  
16 are germane to the representation of the class and the potential class recovery. *See id.* at  
17 731-37 (reversing appointment of lead plaintiff based in large part on choice of class  
18 counsel). In determining whether the contestant with the largest financial stake meets the  
19 Rule 23(a) requirements, the court must rely solely on that contestant’s complaint and its  
20 PSLRA-mandated certification. *Cavanaugh*, 306 F.3d at 732 (“[T]here is no adversary  
21 process to test the substance of [the contestant’s] claims” in step two of the process.); 15  
22 U.S.C. § 78u-4(a)(2) (setting requirements for plaintiff certification statement).  
23  
24

25         Third, the court considers submissions from contestants other than the presumptive  
26 lead plaintiff to see if they have rebutted “the presumptive lead plaintiff’s showing that it  
27 satisfies Rule 23’s typicality and adequacy requirements.” *Cavanaugh*, 306 F.3d 730.  
28

1 Rebuttal evidence must show that presumptive lead plaintiff “will not fairly and  
2 adequately protect the interests of the class” or “is subject to unique defenses that render  
3 such plaintiff incapable of adequately representing the class.” 15 U.S.C. § 78u-  
4 4(a)(3)(B)(iii)(II)(aa)-(bb). The court cannot reject a presumptive lead plaintiff merely  
5 because it finds that “another plaintiff may be ‘more typical’ or ‘more adequate’ . . . .”  
6 *Id.* at 732 (“So long as the plaintiff with the largest losses satisfies the typicality and  
7 adequacy requirements, he is entitled to lead plaintiff status, even if . . . some other  
8 plaintiff would do a better job.”).

10 Turning to the pageant before the court, five contestants initially moved for lead  
11 plaintiff status, but two contestants bowed out, conceding that at least one of the  
12 remaining three contestants had a larger financial stake. The three remaining contestants  
13 are Detroit P&F, Turnberry, and a group of three individual WSB investors (the “Investor  
14 Group”).

16 In part one of the pageant, the court finds that the contestants met the notification  
17 requirements of the PSLRA, and that all class members were given an adequate  
18 opportunity to seek lead plaintiff status.

19 In part two of the pageant, the court finds that Detroit P&F has the largest  
20 financial stake of any contestant. The court need not delve into the details of the  
21 contestants’ methods of calculating their respective financial stakes.<sup>1</sup> Detroit P&F’s  
22 calculated stake of approximately \$470,000 dwarfs all others. The Investor Group, the  
23 closest contestant, has a calculated stake of approximately \$280,000. No other contestant  
24 has a calculated stake exceeding \$100,000. No contestant claims to have a larger  
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26 <sup>1</sup>All of the contestants calculated their financial stakes by determining their maximum  
27 possible loss under the PSLRA, which caps a plaintiff’s damages at the difference between the  
28 price the investor paid and the price of the stock after the fraud underlying the lawsuit has been  
revealed. 15 U.S.C. § 78u-4(e).

1 financial stake than Detroit P&F, nor does any contestant contend that Detroit P&F erred  
2 materially in calculating its financial stake.

3 Moreover, based solely on Detroit P&F's pleadings and certification, *Cavanaugh*,  
4 306 F.3d at 730, it meets the Fed. R. Civ. P. 23(a) requirements of typicality and  
5 adequacy. Detroit P&F purchased WSB stock either in the IPO or shortly thereafter, and  
6 continued to make purchases throughout the class period. There is no indication that its  
7 claims are atypical of claims of other class members, and no indication that it is subject to  
8 unique defenses. *See* Fed. R. Civ. P. 23(a)(3). Detroit P&F is an institutional investor  
9 with substantial experience serving as a class representative in federal securities class  
10 actions. *See* Fed. R. Civ. P. 23(a)(4) (stating that "representative parties [must] fairly and  
11 adequately protect the interests of the class"). The court finds that Detroit P&F has made  
12 a prima facie showing that it satisfies Rule 23(a).  
13

14 With Detroit P&F as the presumptive lead plaintiff, the court reaches step three of  
15 the pageant, wherein it must determine if other contestants have rebutted the presumption  
16 that Detroit P&F can lead the class. No class member presents any evidence that Detroit  
17 P&F's claims are not typical of other class members' claims. The only challenge to  
18 Detroit P&F's assumption of the lead plaintiff role is that it is a "professional plaintiff,"  
19 and therefore not an adequate class representative.  
20

21 The PSLRA places "[r]estrictions on professional plaintiffs" as follows:

22 Except as the court may otherwise permit, consistent with the purposes of  
23 this section, a person may be a lead plaintiff, or an officer, director, or  
24 fiduciary of a lead plaintiff, in no more than 5 securities class actions  
25 brought as plaintiff class actions pursuant to the Federal Rules of Civil  
Procedure during any 3-year period.

26 15 U.S.C. § 78u-4(a)(3)(B)(vi). There is no dispute that Detroit P&F has appeared as a  
27 lead plaintiff in more than five securities class actions in the last three years. Indeed, by  
28 its own admission, Detroit P&F is *currently* serving as lead plaintiff in six actions

1 pending in federal district courts across the country. Other contestants note that, if the  
2 court considers other Detroit retirement funds that share officers and directors with  
3 Detroit P&F, Detroit P&F is effectively serving as lead plaintiff in as many as eight  
4 pending securities actions.

5           The PSLRA gives a court discretion to permit a party to appear as a lead plaintiff  
6 despite its presumptive “professional plaintiff” status. The vast majority of courts have  
7 used that discretion to permit institutional investors like Detroit P&F to appear as lead  
8 plaintiff. *E.g., In re Silicon Storage Tech., Inc. Secs. Litig.*, No. C 05-0295 PJH, 2005  
9 U.S. Dist. LEXIS 45246, at \*34 (N.D. Cal. May 3, 2005) (appointing institutional  
10 investor despite five lead plaintiff appearances in three years); *In re Gemstar-TV Guide*  
11 *Int’l Secs. Litig.*, 209 F.R.D. 447, 454 (C.D. Cal. 2002) (citing cases). This exercise of  
12 discretion is consistent with the legislative history of the PSLRA, in which Congress  
13 noted that “[i]nstitutional investors seeking to serve as lead plaintiff may need to exceed  
14 [the five-lawsuit] limitation and do not represent the type of professional plaintiff this  
15 legislation seeks to restrict.” H.R. Conf. Rep. No. 104-369 at 35 (1995), *as reprinted in*  
16 *1995 U.S.C.C.A.N. 730, 734.*

17           The court declines to disqualify Detroit P&F as a professional plaintiff. The  
18 court’s review of Detroit P&F’s purchases of WSB stock shows that it has been a  
19 significant investor since WSB went public. There is no inference that Detroit P&F  
20 purchased shares for the purpose of litigation. The court is mindful of the possibility that  
21 serving as lead plaintiff in multiple securities actions could strain Detroit P&F’s ability to  
22 adequately represent class members, and acknowledges that one court has declined to  
23 choose Detroit P&F for that reason. *Thompson v. Shaw Group Inc.*, No. 04-1685, 2004  
24 U.S. Dist. LEXIS 25641, at \*22 (E.D. La. Dec. 15, 2004) (finding “risk of overstretch  
25 where Detroit P&[F] would be directing a total of eight concurrent lawsuits”). There is  
26  
27  
28



1 no evidence before the court, however, that Detroit P&F's lead plaintiff commitments in  
2 multiple actions have adversely affected class members in its other litigations. Without  
3 such evidence, the court presumes, as have other courts, that institutional investors like  
4 Detroit P&F are well-suited to serve as lead plaintiff.

5  
6 The court further finds that Detroit P&F's status as lead plaintiff in multiple  
7 actions does not rebut the presumption that it is an adequate class representative under  
8 Fed. R. Civ. P. 23(a)(4). At present, there is little evidence before the court suggesting  
9 that Detroit P&F is inadequate. For example, no one disputes that it has retained  
10 experienced class-action counsel. Instead, other contestants speculate that its  
11 commitments in other class actions will leave it "overstretched," just as the court found in  
12 *Thompson*. The court finds this speculation insufficient. One contestant has invoked 15  
13 U.S.C. § 78u-4(a)(3)(B)(iv), which permits the court to order "discovery relating to  
14 whether a member . . . of the purported plaintiff class is the most adequate plaintiff." The  
15 court can order such discovery only where the contestant "first demonstrates a reasonable  
16 basis for a finding that the presumptively most adequate plaintiff is *incapable of*  
17 *adequately representing the task.*" *Id.* (emphasis added). Again, other contestants'  
18 speculation that Detroit P&F is "overstretched" does not suffice. If Detroit P&F were  
19 incapable of representing class members, the court would expect other contestants to find  
20 evidence of incapability in the records of the many actions in which Detroit P&F is  
21 serving as lead plaintiff. Absent such a showing, the court declines to delay this action  
22 by ordering discovery into Detroit P&F's adequacy.

#### 23 24 25 **IV. CONCLUSION**

26 For the reasons stated above, the court rules as follows. The court  
27 CONSOLIDATES the five above-captioned actions. Case No. C07-1747 shall be the  
28


1 lead case, and all other actions shall be member cases. All future pleadings in the  
2 consolidated case shall be captioned substantially as follows:

3  
4 IN RE: WSB FINANCIAL GROUP  
5 SECURITIES LITIGATION

MASTER FILE NO. C07-1747RAJ

6  
7 The court GRANTS Detroit P&F's motion to be appointed lead plaintiff (Case No.  
8 07-1747, Dkt. # 19), and DENIES the other four contestants' motions to be appointed  
9 lead plaintiff (Case No. 07-1747, Dkt. ## 12, 14, 17; Case No. 07-1760, Dkt. # 11).  
10 Because granting and denying the motions listed above disposes of all relief sought in all  
11 other pending motions, the court directs the clerk to TERMINATE all other motions  
12 pending in the above-captioned actions. The court directs Detroit P&F to file a  
13 consolidated complaint no later than March 28, 2008, and directs the parties to meet and  
14 confer and to submit a proposed case management schedule no later than April 4, 2008.  
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16  
17 DATED this 10th day of March, 2008.  
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21 The Honorable Richard A. Jones  
22 United States District Judge  
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