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NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: BANK OF AMERICA CORP.
AUCTION RATE SECURITIES (ARS)
MARKETING LITIGATION,

No. MDL 09-02014 JSW

This Document Relates to:

Bondar v. Bank of America Corp.
No. C 08-2599 JSW

**ORDER GRANTING IN PART
AND DENYING WITHOUT
PREJUDICE IN PART MOTION
OF THE SITRIN GROUP TO
WITHDRAW AND SUBSTITUTE
LEAD PLAINTIFF**

INTRODUCTION

Now before the Court for consideration is the Motion of the Sitrin Group to Withdraw and Substitute Lead Plaintiff. Having considered the parties' papers, relevant legal authority, and the record in this case, the Court finds the matter suitable for disposition without oral argument and VACATES the hearing set for August 7, 2009. *See* N.D. Civ. L.R. 7-1(b). For the reasons set forth in the remainder of this Order, the Court HEREBY GRANTS IN PART AND DENIES WITHOUT PREJUDICE IN PART the motion.

BACKGROUND

On May 22, 2008, Plaintiff Richard S. Bondar filed his original complaint in this action, alleging that Defendants violated Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934 in connection with the offer and sale of auction rate securities. On August 5, 2008, this

1 Court appointed the Sitrin Group as Lead Plaintiff. (*See Bondar v. Bank of America*, 08-2599-
2 JSW, Docket No. 32.)¹

3 On January 22, 2009, the Sitrin Group filed a First Amended Complaint. (Docket No.
4 43.) Defendants moved to dismiss on the basis that the Sitrin Group lacked standing because
5 they had accepted an offer from Defendants to repurchase their auction rate securities. In
6 response, N.R. Hamm Quarry, Inc. and Ed O’Gara (“the Hamm Group”) filed a Second
7 Amended Complaint. (Docket No. 64.) The Sitrin Group now moves for leave to withdraw as
8 Lead Plaintiff in favor of the Hamm Group, whose auction rate securities have not been
9 repurchased by Defendants.²

10 **ANALYSIS**

11 The Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (“PSLRA”) sets forth
12 the requirements for the selection of lead of lead plaintiff and approval of lead counsel.
13 Although the PSLRA is silent on the issues of withdrawal and substitution, there is authority to
14 support the proposition that the Court may permit withdrawal and substitution in appropriate
15 circumstances. *See, e.g., In re Impax Laboratories, Inc. Sec. Litig.*, 2008 U.S. Dist. LEXIS
16 104485 at 24-25 (N.D. Cal. April 17, 2008); *cf. In re NYSE Specialists Sec. Litig.*, 240 F.R.D.
17 128, 133, 140 (S.D.N.Y. 2007) (granting motion to disqualify one co-lead plaintiff but denying
18 motion to substitute where remaining lead plaintiff could adequately represent the proposed
19 class); *In re Portal Software, Inc. Sec. Litig.*, 2005 U.S. Dist. LEXIS 41178 at *7-*15 (N.D.
20 Cal. Mar. 9, 2005) (permitting addition of new plaintiff without repeating PSLRA’s notice
21 process, where additional plaintiff was required to represent interests of certain putative class
22 members).

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26 ¹ Hereinafter all references to docket entries refer to the docket entries in
Bondar.

27 ² The Ben-Tal Group, which had previously moved for appointment as Lead
28 Plaintiff and then stipulated to the Sitrin Group’s appointment, does not oppose the motion to
withdraw and does not seek to be appointed Lead Plaintiff in the Sitrin Group’s stead. (*See*
Docket No. 76.)

1 At this juncture, the Sitrin Group concedes that it lacks standing to pursue claims on
2 behalf of the class. Accordingly, the Court finds good cause to permit them to withdraw as
3 Lead Plaintiff, and the motion is granted in part on that basis.

4 Defendants do not dispute that this Court has discretion to appoint a new Lead Plaintiff.
5 Rather, they contend that the Hamm Group does not qualify as a Lead Plaintiff under the
6 PSLRA’s standards and that the motion is either untimely, because the Hamm Group did not
7 move at the outset of the litigation to serve as Lead Plaintiff, or is premature, because the Court
8 has not yet permitted the Sitrin Group to withdraw.

9 The PSLRA provides that “the court shall appoint as lead plaintiff the member or
10 members of the purported class that the court determines to be the most capable of adequately
11 representing the interests of the class members.” 15 U.S.C. § 78u-4(a)(3)(B)(i). The PSLRA
12 also sets forth a rebuttable presumption that the most adequate plaintiff is a person or group of
13 persons who has filed a complaint or made a motion in response to notice published to class
14 members, in the Court’s determination has the largest financial interest in the relief sought by
15 the class, and otherwise satisfies the requirements of Federal Rule of Civil Procedure 23. *Id.* §
16 78u-4(a)(3)(B)(iii); *see also In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002) (stating that
17 the “‘most capable’ plaintiff – and hence the lead plaintiff – is the one who has the greatest
18 financial stake in the outcome of the case, so long as he meets the requirements of [Federal Rule
19 of Civil Procedure] 23”); *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 584 (N.D. Cal. 1999).

20 Here, the Hamm Group alleges that it has suffered a loss exceeding \$15 million, which
21 was larger than the losses alleged to have been suffered by the Sitrin Group. The Second
22 Amended Complaint defines the class to include only those persons who suffered damages as a
23 result of Defendants’ conduct. Thus, Defendants’ argument that the Hamm Group’s claims are
24 atypical, because they may not be subject to the same defenses as putative class members who
25 have been made whole by Defendants is unavailing. Defendants also argue that the Hamm
26 Group’s claims are atypical, because they relied on representations that were not made to the
27 class as a whole. However, the Court concludes that the record demonstrates that the Hamm
28 Group’s alleged injuries arose out of the same course of conduct and are premised upon the

United States District Court
For the Northern District of California

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