

1 and approval of its selection of lead counsel.¹

2 **II. BACKGROUND**

3 Movants seek to consolidate two pending class action lawsuits, brought on behalf of persons
4 who purchased or otherwise acquired publicly-traded securities of Defendant Finisar Corporation
5 between December 1, 2010 and March 8, 2011. The cases implicated in Movants motions are as
6 follows:

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Abbreviated Case Name	Case Number	Date Filed
8 <u>Derchi-Russo v. Finisar Corp., et al.</u>	5:11-CV-01252-EJD	March 15, 2011
9 <u>Wade v. Finisar Corp., et al.</u>	5:11-CV-01635-EJD	April 4, 2011

10 These related actions are brought pursuant to §§10(b) and 20(a) of the Securities Exchange
11 Act and Securities and Exchange Commission Rule 10b-5, promulgated thereunder. Plaintiffs in
12 these actions charge Finisar Corporation and certain of its officers and directors (collectively,
13 “Defendants” or “Finisar”) with violations of the Securities Exchange Act of 1934.

14 Finisar is a provider of optical subsystems and components that connect short-distance local
15 area networks, storage area networks, longer distance metropolitan area networks, fiber-to-the-home
16 networks, cable television networks and wide area networks. See Complaint, Docket Item No. 1, ¶
17 2. The Complaint² alleges that during the Class Period, Defendants issued materially false and
18 misleading statements regarding Finisar’s business and financial results. Id., ¶ 3. Plaintiffs allege
19 that, as a result of Defendants’ false statements, Finisar’s stock traded at artificially inflated prices
20 during the Class Period, reaching a high of \$43.23 per share on February 14, 2011. Id., ¶ 7. On
21 March 8, 2011, after the market closed, Finisar issued a press release announcing its third quarter
22 fiscal year 2011 results. Id., ¶ 29. Finisar reported earnings of \$18.8 million, or \$0.22 diluted
23 earnings per share, and revenue of \$263.0 million. Id. Finisar further reported its fourth-quarter
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25 ¹ This disposition is not designated for publication in the official reports.

26 ² The complaint referenced herein refers to the first-filed lawsuit against Defendants,
27 Derchi-Russo v. Finisar Corp., et al., filed on March 15, 2011. The related case raises identical
28 claims for the same groups of investors.

1 2011 revenues would be in the range of \$235 to \$250 million, lower than analysts' estimates. Id.
2 On this news, Finisar's stock fell \$15.43 per share to close at \$24.61 per share on March 9, 2011, a
3 one-day decline of nearly 39%. Complaint, ¶ 30.

4 According to the Complaint, the true facts, which were known by the Defendants but
5 concealed from the investing public during the Class Period, were as follows: (a) Finisar's recent
6 revenue surge was not due solely to organic growth from real end-market demand, but rather it was
7 partially due to an inventory build by Finisar's customers; (b) Finisar was experiencing increasing
8 pricing pressures due to intense competition in the industry and, as a result, it was forced to concede
9 to steep discounts in order to retain certain of its customers; (c) Finisar was experiencing a serious
10 slowdown in business from China, which would have a detrimental effect on Finisar's ability to
11 continue growing at unprecedented rates; and (d) Finisar failed to disclose known trends and
12 uncertainties as required by SEC regulations concerning its revenue growth rate. Complaint, ¶ 31.

13 On March 15, 2011, shareholder Martin Derchi-Russo published notice of the pendency of
14 the action to investors, which provided a deadline to seek lead plaintiff status by May 16, 2011. See
15 Decl. of Ian D. Berg in Supp. of Oklahoma Firefighters' Mot. to Consolidate, Appoint. Lead Pl. and
16 Counsel ("Berg Decl.", Docket Item No. 22, Ex. A.)

17 On May 16, 2011, each Movant filed, on their own behalf, a motion to consolidate the
18 related actions, appoint a lead plaintiff in this action, and approve selection of lead counsel for the
19 Class. See Docket Item Nos. 18, 21, 24, 26, and 28. On June 20, 2011, Hetal Patel withdrew his
20 application for appointment as lead plaintiff. Docket Item No. 38. On September 28, 2011, Daniel
21 Levy conceded that he did not suffer the largest financial loss of all of the Movants. Docket Item
22 No. 39. On September 30, 2011, the Abell Group conceded that Oklahoma Firefighters is
23 presumptively the most adequate plaintiff. Docket Item No. 41. That same day, Defendants filed a
24 response to Movants' motions, agreeing that the cases should be consolidated, but taking no position
25 on the selection of lead plaintiff or lead counsel. Docket Item No. 40.

26 Presently before the court are Movants' unopposed motions to consolidate all related actions,
27 and the competing motions of Oklahoma Firefighters, the Abell Group, Andrew Lee and Daniel

1 Levy for appointment as lead plaintiff/lead counsel.

2 **III. DISCUSSION**

3 Pursuant to the Private Securities Litigation Reform Act of 1995 (PSLRA), the court must
4 decide whether to consolidate the related actions prior to selecting a plaintiff to lead this litigation on
5 behalf of the putative class. See 15 U.S.C. §78u-4(a)(3)(B)(ii). Once the actions are consolidated,
6 “the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions” as
7 soon as practicable. Id.

8 A. Consolidation

9 Each Movant has filed a motion for consolidation of the related actions, and such motions
10 are uncontested. Federal Rule of Civil Procedure 42(a) provides:

11 When actions involving a common question of law or fact are pending before the court,
12 it may order a joint hearing or trial of any or all the matters in issue in the actions; it
13 may order all the actions consolidated; and it may make such orders concerning
14 proceedings therein as may tend to avoid unnecessary costs or delay.

15 Fed. R. Civ. P. 42(a). “The district court has broad discretion under this rule to consolidate cases
16 pending in the same district.” Investors Research Co. v. U.S. Dist. Court for Cent. Dist. of Cal., 877
17 F.2d 777, 777 (9th Cir. 1989). The court agrees that these actions present virtually identical factual
18 and legal issues and therefore should be consolidated. Accordingly, the court GRANTS the motion
19 to consolidate.

20 B. Lead plaintiff

21 Section 21D of the PSLRA provides procedures for selecting lead plaintiffs in a securities
22 class action. All proposed lead plaintiffs must submit a sworn statement setting forth certain facts
23 designed to assure the court that the plaintiff (i) has suffered more than a nominal loss, (ii) is not a
24 professional litigant, and (iii) is otherwise interested and able to serve as a class representative. 15
25 U.S.C. § 78u-4(a)(2)(A). The plaintiff in the first lawsuit to be filed must additionally publish
26 notice of the complaint in a widely circulated business publication within twenty days of filing the
27 complaint. 15 U.S.C. § 78u-4(a)(3)(A)(i). The notice must include a description of the claim and
28 notify prospective class members that they may move within 60 days of the notice to be named lead

1 plaintiff. 15 U.S.C. § 78u-4(a)(3)(A)(i)(I)-(II). Once applications for lead plaintiff status are closed,
2 the district court must determine who among the movants for lead plaintiff status is the “most
3 adequate plaintiff.” 15 U.S.C. § 78u-4(a)(3)(B) (i). The PSLRA directs courts to “appoint as lead
4 plaintiff the member or members of the purported plaintiff class that the court determines to be most
5 capable of adequately representing the interests of class members” 15 U.S.C. § 78u-4(a)(3)(B)
6 (i).

7 In the Ninth Circuit, In re Cavanaugh, 306 F.3d 726, 729-30 (9th Cir. 2002), governs lead
8 plaintiff selection and establishes a three-step process. First, as discussed above, timely and
9 complete notice of the action must be published. Id. at 729. Second, the district court considers the
10 losses suffered by potential lead plaintiffs and selects “the one who ‘has the largest financial interest
11 in the relief sought by the class’ and ‘otherwise satisfies the requirements of Rule 23 of the Federal
12 Rules of Civil Procedure.’” Id. at 730 (citing 15 U.S.C. § 78u-4(a)(3)(B) (iii)(I)). The court must
13 thus determine which plaintiff “has the most to gain from the lawsuit.” Cavanaugh, 306 F.3d at 730.
14 Finally, the court focuses on that plaintiff to ensure that the proposed lead plaintiff “satisfies the
15 requirements of [Fed. R. Civ. Pro.] 23(a), in particular those of ‘typicality’ and ‘adequacy.’” Id. A
16 plaintiff who satisfies the first two steps becomes the “presumptively most adequate plaintiff.” Id.
17 In step three, other plaintiffs have the opportunity to rebut the presumptive lead plaintiff's showing
18 of typicality and adequacy. Id. at 730 (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)).

19 Here, each Movant filed timely motions for appointment as lead plaintiff. Mr. Patel later
20 withdrew his application for appointment as lead plaintiff. Docket Item No. 38. The Abell Group
21 and Mr. Levy acknowledged that they do not have the largest financial interest in the relief sought
22 by the class, and thus are not the “most adequate plaintiff.” See Docket Item Nos. 41 and 39. It is
23 not clear whether Mr. Lee intends to pursue his motion, because he did not file a reply to the
24 Oklahoma Firefighters’ motion. In any event, the Court finds that the Oklahoma Firefighters is
25 more appropriately appointed as lead plaintiff.

1 The Oklahoma Firefighters have suffered losses in the amount of \$479,692.41,³ while
2 Andrew Lee suffered losses of approximately \$130,821.53.⁴ Moreover, the Oklahoma Firefighters
3 have made an adequate preliminary showing that they satisfy the typicality and adequacy
4 requirements of Rule 23(a): like all plaintiffs in this action, they claim that they purchased Finisar
5 securities during the class period based upon Defendants’ false and misleading statements
6 (typicality) and there appears to be no reason that their interests would conflict with those of the
7 class (adequacy). As the Oklahoma Firefighters filed proper notice of the action, have the largest
8 financial interest in the relief sought, and have made the required showing under Rule 23(a), they are
9 the “presumptively most adequate plaintiff.” Movant Andrew Lee raises no issues that overcome
10 this presumption. Accordingly, the Court GRANTS the Oklahoma Firefighters’ motion for
11 appointment as lead plaintiff.

12 C. Lead counsel

13 Once the court has designated a lead plaintiff, the lead plaintiff “shall, subject to the approval
14 of the court, select and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3) (B)(v). A
15 court generally should accept the lead plaintiff’s choice of counsel unless it appears necessary to
16 appoint different counsel to “protect the interests of the class.” Id. at § 78u-4(a)(3)(B)(iii)(II)(aa).
17 In the Ninth Circuit, Cavanaugh establishes the standard for approval of lead counsel. “[T]he
18 district court does not select class counsel at all,” and typically approves the lead plaintiff’s selection
19 of counsel. Id. at 732–34. Here, the Oklahoma Firefighters have selected the law firm of Abraham,
20 Fruchter & Twersky to represent them. The Court approves their selection and GRANTS the
21 Oklahoma Firefighters’ motion for appointment of lead counsel.

22 **IV. CONCLUSION**

23 For the foregoing reasons and for good cause shown on the current record, the court hereby
24 GRANTS the Oklahoma Firefighters’ motion for appointment as lead plaintiff and appointment of

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26 ³ See Berg Decl., Ex. C.

27 ⁴ See Decl. of Ramzi Abadou In Supp. of Andrew Lee’s Mot. to Consolidate, Appoint.
28 Lead Pl. and Counsel, Docket Item No. 27, Ex. C.

1 Abraham, Fruchter & Twersky as lead counsel (Docket Item No. 21) and DENIES Andrew Lee's
 2 motion for appointment as lead plaintiff and appointment of lead counsel. Docket Item No. 26. The
 3 motions of Daniel Levy and the Abell Group, for appointment as lead plaintiff, are DENIED as
 4 moot. Docket Item Nos. 28, and 18. The motions for consolidation, filed by Daniel Levy,
 5 Oklahoma Firefighters, Hetal Patel, Andrew Lee, and the Abell Group, are GRANTED. Docket
 6 Item Nos. 18, 21, 24, 26, and 28. These cases shall be consolidated under the lower case number,
 7 5:11-CV-01252-EJD, and case number 5:11-CV-01635-EJD shall be administratively closed.

8 IT IS HEREBY ORDERED that Defendants and the appointed lead counsel shall meet and
 9 confer in order to agree on a schedule for the next stage of the case, including the timing for the
 10 consolidated complaint and motion to dismiss.

11 IT IS FURTHER ORDERED that a Case Management Conference will be held in this matter
 12 before the Honorable Edward J. Davila on **December 9, 2011 at 10:00 a.m.** in Courtroom No. 1, 5th
 13 Floor, 280 S. First Street, San Jose, California. On or before **December 2, 2011** the parties shall file
 14 a joint case management conference statement.

15 **IT IS SO ORDERED.**

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 17 Dated: October 27, 2011

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 EDWARD J. DAVILA
 United States District Judge

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