

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Robert E. Blackburn**

Civil Action No. 09-cv-00658-REB-CBS

D. EDWARD WALTER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

LEVEL 3 COMMUNICATIONS, INC., et al.,

Defendants.

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Civil Action No. 09-cv-00952-PAB

DEMITRA DAGRES, individually and on behalf of all others similarly situated,

Plaintiff,

v.

LEVEL 3 COMMUNICATIONS, INC., et al.,

Defendants.

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Civil Action No. 09-cv-01050-MSK-KLM

PETER FRAGALE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

LEVEL 3 COMMUNICATIONS INC., individually and on behalf of all others similarly situated,

Defendants.

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**ORDER RE: MOTION TO CONSOLIDATE AND TO APPOINT LEAD PLAINTIFF AND  
COUNSEL**

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**Blackburn, J.**

The matters before me are (1) **Motion for Entry of [Proposed] Pretrial Order No. 1. Consolidating the ERISA Actions and Appointing Interim Co-Lead Counsel and Interim Co-Liason Counsel** [#22]<sup>1</sup> filed May 28, 2009; (2) **Plaintiff Demitra Dagues' Motion and Memorandum of Law in Support Thereof To Consolidate ERISA Actions: Appoint Interim Lead and Liaison Counsel; and for Entry of Pretrial Order No. 1.** [#40] filed September 21, 2009; and (3) **Motion and Memorandum of Law in Support Thereof To Consolidate ERISA Actions; Appoint Interim Lead and Liason Class Counsel; and for Entry of Pretrial order No. 1.** [#48] filed October 13, 2009. I deny the motions docketed as [#22 & #40], and I grant the motion docketed as [#48].

## I. JURISDICTION

I have jurisdiction over this consolidated putative class action pursuant to 28 U.S.C. § 1331 (federal question) and 29 U.S.C. § 1132(e)(1) (ERISA).

## II. CONSOLIDATION

The motions to consolidate concern three cases filed in this court which are putative class actions asserting claims under the Employee Retirement Income and Security Act (ERISA). 29 U.S.C. §§ 1001 - 1461. The putative class actions addressed in these motions are (1) ***Walter v. Level 3 Communications, Inc.***, et al., 09-cv-00658-REB-CBS, filed March 24, 2009; (2) ***Dagues v. Level 3 Communications, Inc.***, et al., 09-cv-00952-PAB, filed May 24, 2009; and (3) ***Fragale v. Level 3 Communications, Inc.***, et al., 09-cv-01050-MSK-KLM, filed May 5, 2009.

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<sup>1</sup> “[#22]” is an example of the convention I use to identify the docket number assigned to a specific paper by the court’s case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

Under FED.R.CIV.P. 42(a), the court may consolidate cases involving common questions of law or fact. Common questions of law and fact are predominant among the three cases listed above. Therefore, I grant the motion to consolidate [#48] to the extent it seeks consolidation of the three cases listed above. To the extent additional cases may be filed, which arguably should be consolidated with this case, I will consider consolidation of such cases on a case by case basis.<sup>2</sup>

### **III. INTERIM LEAD COUNSEL**

No plaintiff class has been certified in this case. Under FED. R. CIV. P. 23(g)(3), I “may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.” Rule 23(g)(1)(A) enumerates four factors that I must consider when appointing counsel for a certified class.

- (i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- (iii) counsel's knowledge of the applicable law; and
- (iv) the resources that counsel will commit to representing the class.

These factors are relevant also to the appointment of interim counsel.

Initially, plaintiff Dagres and plaintiffs Walter and Fragale presented competing motions for appointment of interim lead and liaison class counsel. [#22 & #40]. In a later motion [#48], these three plaintiffs joined together in a request for the appointment

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<sup>2</sup> In their response [#33] to the motions to consolidate, the defendants ask also that these consolidated ERISA cases be reassigned the United States District Judge Philip A. Brimmer under D.C.COLO.LCivR 40.1A. I note that Local Rule 40.1A. does not provide directly for a remedy of reassignment that may be asserted by a party to a case. In addition, to the extent this request is intended to be a motion addressed to the court, inclusion of such a motion in a response to another motion is improper. D.C.COLO.LCivR 7.1C.

of interim lead and liaison class counsel. Based on the information included with the motions docketed as [#22, #40, and #48], I conclude that the proposed interim lead class counsel and interim liaison class counsel proposed in the motion [#48] filed by Dagres, Walter, and Fragale each satisfy the factors outlined above. Thus, I intend to appoint Joseph H. Meltzer and Edward W. Ciolko of Barroway Topaz Kessler Meltzer & Check, LLP as interim lead class counsel - committee chair. Also, I intend to appoint Robert I. Harwood of Harwood Feffer LLP and Edwin Mills of Stull, Stull and Brody as interim lead class counsel committee members. Finally, I intend to I appoint Kevin Allen of Allen & Vellone, P.C. as interim liaison class counsel.

#### **IV. ORDERS**

**THEREFORE, IT IS ORDERED** as follows:

1. That the **Motion and Memorandum of Law in Support Thereof To Consolidate ERISA Actions; Appoint Interim Lead and Liaison Class Counsel; and for Entry of Pretrial order No. 1.** [#48] filed October 13, 2009, is granted on the terms stated in this order;

2. That under FED.R.CIV.P. 42(a)(2) and D.C.COLO.LCivR 42.1, Civil Action No. 09-cv-00952-PAB and Civil Action No. 09-cv-01050-MSK-KLM are **CONSOLIDATED** with Civil Action No. 09-cv-00658-REB-CBS for all purposes;

3. That under D.C.COLO.LCivR 42.1, Civil Action No. 09-cv-00952-PAB and Civil Action No. 09-cv-01050-MSK-KLM **ARE REASSIGNED** to the Honorable Craig B. Shaffer, United States Magistrate Judge for the United States District Court for the District of Colorado;

4. That these consolidated actions **SHALL** be captioned as follows:

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Civil Action No. 09-cv-00658-REB-CBS  
(Consolidated with Civil Action Nos. 09-cv-00952-REB-CBS and 09-cv-01050-REB-CBS)

D. EDWARD WALTER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

LEVEL 3 COMMUNICATIONS, INC., et al.,

Defendants.

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5. That Joseph H. Meltzer and Edward W. Ciolko of Barroway Topaz Kessler Meltzer & Check, LLP are **APPROVED AND APPOINTED** as interim lead class counsel - committee chair;

6. That Robert I. Harwood of Harwood Feffer LLP and Edwin Mills of Stull, Stull and Brody is **APPROVED AND APPOINTED** as interim lead class counsel - committee members;


7. That Kevin Allen of Allen & Vellone, P.C. is **APPROVED AND APPOINTED** as interim liaison class counsel;

8. That the **Motion for Entry of [Proposed] Pretrial Order No. 1. Consolidating the ERISA Actions and Appointing Interim Co-Lead Counsel and Interim Co-Liason Counsel** [#22] filed May 28, 2009, is **DENIED** as moot; and

9. That **Plaintiff Demitra Dagres' Motion and Memorandum of Law in Support Thereof To Consolidate ERISA Actions: Appoint Interim Lead and Liason Counsel; and for Entry of Pretrial Order No. 1.** [#40] filed September 21, 2009, is **DENIED** as moot.

Dated March 18, 2010, at Denver, Colorado.

**BY THE COURT:**

  
Robert E. Blackburn  
United States District Judge