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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

DAVID GUNDERSON, Individually and on
Behalf of All Others Similarly Situated,

Plaintiffs,

Case No. 3:18-cv-00256-LRH-CBC

ORDER

v.

KLONDEX MINES LTD., RICHARD J.
HALL, BLAIR SCHULTZ, RODNEY
COOPER, MARK DANIEL, JAMIE
HAGGARTY, PAUL ANDRE HUET,
WILLIAM MATLACK, CHARLES
OLIVER, HECLA MINING COMPANY,
and 1156291 B.C. UNLIMITED LIABILITY
COMPANY,

Defendants.

JOHN D. LAWSON,

Plaintiff,

Case No. 3:18-cv-00284-LRH-CBC

ORDER

v.

KLONDEX MINES LTD., RODNEY
COOPER, MARK DANIEL, JAMIE
HAGGARTY, RICHARD J. HALL, PAUL
ANDRE HUET, WILLIAM MATLACK,
CHARLES OLIVER, and BLAIR
SCHULTZ,

Defendants.

1 NELSON BAKER, On Behalf of Himself and
2 All Others Similarly Situated,

Case No. 3:18-cv-00288-LRH-CBC

3
4 Plaintiffs,

ORDER

5 v.

6 KLONDEX MINES LTD., RICHARD J.
7 HALL, PAUL HUET, WILLIAM
8 MATLACK, CHARLES OLIVER, BLAIR
9 SCHULTZ, RODNEY COOPER, MARK
10 DANIEL, and JAMES HAGGARTY,

11 Defendants.

12 Before the court are two motions to Consolidate, for Appointment of Lead Plaintiff, and
13 Approval of Selection of Counsel. The motions were filed by plaintiff John D. Lawson (ECF
14 No. 15),¹ and plaintiff Nelson Baker on behalf of himself and others similarly situated, (ECF
15 No. 16). The plaintiffs in Gunderson (“Gunderson plaintiffs”) have not opposed the motions and
16 have not motioned the court to act as lead plaintiff. Defendants Klondex Mines, Ltd.
17 (“Klondex”), Richard J. Hall, Blair Schultz, Rodney Cooper, Mark Daniel, James Haggarty, Paul
18 Andre Huet, William Matlack, Charles Oliver, Hecla Mining Company (“Hecla”), and 1156291
19 B.C. Unlimited Liability Company (collectively “defendants”)² have not opposed either motion.
20 Plaintiffs each responded and replied accordingly to each motion. ECF Nos. 17, 18, 19, 20. The
21 court now grants Lawson’s motion to consolidate, appoints him lead plaintiff, and approves his
22 chosen counsel as lead and liaison counsel.

23 **I. Facts and Background**

24 This is a federal securities class action filed by and on behalf of investors of Klondex
25 who allege violations of the Securities and Exchange Act of 1934 and of the U.S. Securities and
26 Exchange Commission Rules based on the then proposed merger of Klondex with Hecla and
27 1156291 B.C. Unlimited Liability Company. ECF No. 1 ¶ 1. The plaintiffs allege the Definitive

28 ¹ For clarity’s sake, this Order refers to the ECF document numbers in Lawson, Case No. 3:18-cv-00284, unless otherwise noted. Specific rulings on all three cases will be found in the conclusion.

² Hecla Mining Company and 1156291 B.C. Unlimited Liability Company are only named defendants in the Gunderson Complaint.

1 Proxy Statement filed by Klondex was materially deficient and misleading and that it did not
2 provide stockholders with the necessary information to make an informed vote on the merger. Id.
3 ¶¶ 3, 25. As a result of the proposed sale, five different federal securities class actions were
4 filed against defendants in this federal court between May and June, 2018.³

5 Baker filed a motion to enjoin the vote on the proposed merger on June 20, 2018. Baker,
6 ECF No. 5. Following oral argument, the court found that Baker had not demonstrated that he
7 would suffer irreparable harm if the preliminary injunction was not issued and declined to enjoin
8 the shareholder vote. Baker, ECF No. 26, 27.

9 Baker now moves this court to (1) consolidate this matter with the two related cases
10 before the court; (2) appoint him Lead Plaintiff; and (3) appoint his chosen counsel, Kahn Swick
11 & Foti, LLC and Monteverde & Associates PC, as co-lead counsel and Muckleroy Lunt, LLC as
12 liaison counsel. ECF No. 16.⁴ Plaintiff John D. Lawson also moves this court to consolidate
13 these three cases but moves to appoint himself lead plaintiff and his chosen counsel Levi &
14 Korsinsky, LLP (“LK”) as class counsel and Aldrich Law as liaison counsel. ECF No. 15.⁵

15 II. DISCUSSION

16 A. The court grants plaintiff Lawson’s motion to consolidate.

17 Federal Rule of Civil Procedure 42 allows a court to consolidate two or more actions that
18 involve a common question of law or fact. Fed. R. Civ. P. 42(a); see also LR 42-1. The court has
19 broad discretion under Rule 42 to determine whether to consolidate actions pending in the same
20 district. *See Inv’rs Research Co. v. U.S. Dist. Court for Cent. Dist. of California*, 877 F.2d 777,
21 777 (9th Cir. 1989). In determining if consolidation is proper, “[t]he court should weigh the time
22 and effort that consolidation would save against any inconvenience, delay, or expense it would
23 cause” as well as the specific risks of prejudice and confusion. *Narvaes v. EMC Mortg. Corp.*,
24 No. CIV 07-00621 HG-LEK, 2009 WL 1269733, at *2 (D. Haw. May 1, 2009).

25
26 ³ *Assad v. Klondex Mines Ltd. et al.*, Case No. 2:18-cv-00165 (June 13, 2018) and *Chandra v.*
27 *Klondex Mines Ltd.*, Case No. 3:18-cv-00305 (June 25, 2018) were both voluntarily dismissed
28 prior to this motion.

⁴ Gunderson, ECF No. 9; Baker, ECF No. 35.

⁵ Gunderson, ECF No. 8; Baker, ECF No. 34.

1 Under Rule 42, the court now consolidates the three aforementioned matters. “Courts
2 have recognized that class action shareholder suits are particularly well suited to consolidation
3 pursuant to Rule 42(a) because unification expedites pretrial proceedings, reduces case
4 duplication, avoids the need to contact parties and witnesses for multiple proceedings, and
5 minimizes the expenditures of time and money for all parties involved.” Miami Police Relief &
6 Penson Fund v. Fusion-io, Inc., Case No. 13-CV-05368-LHK, 2014 WL 2604991, at *3, (N.D.
7 Cal. June 10, 2014). Here, consolidation is proper because the three matters all allege the same or
8 similar shareholder class action claims against defendants for violations stemming from the same
9 proposed transaction. Additionally, as none of these cases have yet to begin discovery,
10 consolidation at this stage will reduce duplication and minimize expenditures for all parties.
11 Further, neither plaintiffs nor defendants oppose consolidation. The court therefore consolidates
12 the three matters based on the overlapping questions of law and of fact and in the interests of
13 judicial economy and efficiency under Rule 42(a).

14 **B. The court appoints plaintiff Lawson as lead plaintiff.**

15 Pursuant to the Private Securities Litigation Reform Act (“PSLRA”), the court must
16 select the lead plaintiff that is “most capable of adequately representing the interests of class
17 members.” 15 U.S.C. § 78u-4(a)(3)(B)(i). Under the statute, “most capable” is read as the
18 plaintiff “who has the greatest financial stake in the outcome of the case, so long as he meets the
19 requirements of Rule 23.” In re Cavanaugh, 306 F.3d 726, 729 (9th Cir. 2002). The PSLRA sets
20 out a three-step process that the court must follow when selecting a lead plaintiff.

21 First, the plaintiff to first file an action must post notice of the pending action “in a
22 widely circulated national business-oriented publication or wire service,” which must state that
23 “any member of the purported class may move the court to serve as lead plaintiff.” 15 U.S.C. §
24 78u-4(a)(3)(A)(i). Here, the Gunderson plaintiffs were the first to file; however, they did not post
25 notice. Rather, Baker posted the required notice in the Globe Newswire on July 23, 2018. See
26 ECF No. 15-1, 16-3. On September 21, 2018, both Lawson and Baker timely moved for
27 appointment as lead plaintiff under the PSLRA requirements and provided the necessary
28 certifications under the statute. See ECF No. 15-1, 16-4.

1 Second, the court must determine which plaintiff is presumptively most adequate. This
2 plaintiff will have (1) filed the complaint or motioned the court following notice; (2) “the largest
3 financial interest in the relief sought by the class;” and (3) otherwise satisfy Rule 23. 15 U.S.C.
4 § 78u-4(a)(3)(B)(iii)(I). To determine the largest financial interest, “the court may select
5 accounting methods that are both rational and consistently applied.” *Cavanaugh*, 306 F.3d at 730
6 n.4. Once the court identifies the plaintiff with the largest financial interest, the court “must then
7 focus its attention on that plaintiff and determine, based on the information he has provided in
8 his pleadings and declarations, whether he satisfies the requirements of Rule 23(a), in particular
9 those of ‘typicality’ and ‘adequacy.’” *Id.* at 730 (emphasis in original). “The test of typicality is
10 whether other members have the same or similar injury, whether the action is based on conduct
11 which is not unique to the named plaintiffs, and whether other class members have been injured
12 by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.
13 1992) (internal quotation marks omitted). The adequacy requirement is satisfied by showing the
14 plaintiff and his or her counsel do not “have any conflicts of interest with other class members,”
15 and are able and willing to “prosecute the action vigorously on behalf of the class.” *Staton v.*
16 *Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

17 Here, undisputed by Baker, the plaintiff with the largest financial interest is Lawson: he
18 owns 28,325 shares, Baker owns 12,014 shares, and Gunderson owns 1,905 shares of Klondex
19 stock. ECF No. 15 at 6. The court finds number of shares a rational calculation of financial
20 interest in this litigation. Baker argues that because both potential lead plaintiffs are individuals,
21 rather than large investor groups, the court should simply consider this as one of many factors.
22 However, to follow Baker’s reasoning here would be directly contradictory to Ninth Circuit
23 precedent. The Court in *Cavanaugh* specifically rejected this exact same argument: “Congress
24 enacts statutes, not purposes, and courts may not depart from the statutory text because they
25 believe some other arrangement would better serve the legislative goals.” *Cavanaugh*, 306 F.3d
26 at 731-32. Rather, the “only basis on which a court may compare plaintiffs competing to serve as
27 lead is the size of their financial stake in the controversy.” *Id.* at 732 (emphasis in the original).

28

1 Finding Lawson has the largest financial interest, the court now considers whether he
2 meets the Rule 23 requirements. Lawson fits the requirement of typicality: as a shareholder, he
3 alleges he has suffered the same injury as other absent shareholders. His alleged injury stems
4 from the same events—the proposed merger and the issuance of the allegedly materially
5 deficient and misleading proxy statement—as other class members. And he alleges the same or
6 substantially similar claims based on the same or similar legal theories as the other class
7 members. Further, Lawson is adequate. There is no evidence in the record that shows he has any
8 conflict or special defense that puts his interests at odds with those of the other plaintiffs. By
9 filing his motion with the court to be appointed as lead plaintiff by the required deadline—
10 September 21, 2018—and certifying under penalty of perjury that he is willing to serve as class
11 representative, Lawson has shown his willingness and ability to prosecute this action.

12 The final step of the analysis allows other plaintiffs the opportunity to rebut the
13 presumption that the plaintiff with the largest financial interest satisfies the requirements of
14 typicality and adequacy. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). To rebut the presumption, it must be
15 proved that the plaintiff “will not fairly and adequately protect the interests of the class; or is
16 subject to unique defenses that render such plaintiff incapable of adequately representing the
17 class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). While “[t]he district court has latitude as to what
18 information it will consider in determining typicality and adequacy,” it is not for the court to
19 determine which plaintiff is “more typical” or “more adequate.” *Cavanaugh*, 306 F.3d at 732. If
20 the plaintiff with the largest losses satisfies the Rule 23 requirements, the court must appoint him
21 lead even if the “court is convinced that some other plaintiff would do a better job.” *Id.*

22 Baker argues that he has rebutted the presumption by showing that Lawson has failed to
23 zealously prosecute the case: it was Baker who (1) filed the required notice to other plaintiffs via
24 Globe Newswire after the Gunderson plaintiffs failed to do so, (2) filed a motion for a
25 preliminary injunction, and (3) argued that motion before this court. While the court recognizes
26 that Baker has zealously advocated for the class thus far, it has not been shown that Lawson is
27 inadequate or atypical under the statute going forward. See *In re Outerwall Inc. Stockholder*
28 *Litigation*, Case No. C16-1275JLR, 2017 WL 881382, at *7 (W.D. Wash. March 6, 2017) (the

1 plaintiff attempting to rebut the presumption must prove that the presumed lead plaintiff “will
2 not be a fair and adequate lead plaintiff going forward”). The court is not persuaded that Lawson
3 will not adequately protect the interests of the class or is subject to a unique defense. Simply
4 because Baker has been more zealous in prosecuting this case to date does not prove Lawson is
5 inadequate. Accordingly, the court grants Lawson’s motion and appoints him lead plaintiff.

6 **C. The court approves plaintiff Lawson’s choice of counsel.**

7 The Court must also appoint class counsel that will “fairly and adequately represent the
8 interests of the class.” Fed. R. Civ. P. 23(g)(4). Under the PSLRA, the lead plaintiff is entitled
9 to select and retain counsel to represent the class, subject to approval of the court. 15 U.S.C.
10 § 78u-4(a)(3)(B)(v). Although the district court has discretion, the PSLRA “clearly leaves the
11 choice of class counsel in the hands of the lead plaintiff.” Cavanaugh, 306 F.3d at 734 (citing 15
12 U.S.C. § 78u-4(a)(3)(B)(v)). Further, so long as “the lead plaintiff has made a reasonable choice
13 of counsel, the district court should generally defer to that choice.” Cohen v. U.S. Dist. Court for
14 the N. Dist. of Cal., 586 F.3d 703, 712 (9th Cir. 2009).

15 Lawson seeks to appoint LK as lead counsel and Aldrich Law as liaison counsel. To
16 support the qualifications of selected counsel, Lawson produced information regarding LK’s
17 experience litigating securities fraud class actions and corporate governance and derivative
18 litigation and included both firms’ resumés. Accordingly, the court finds no reason that
19 Lawson’s choice of LK as class counsel and Aldrich Law as liaison counsel will not fairly and
20 adequately represent the interests of the class, and therefore approves both as motioned.

21 **III. CONCLUSION**

22 IT IS THEREFORE ORDERED that plaintiff Lawson’s motion to consolidate, be
23 appointed lead plaintiff, and appoint lead and liaison counsel (ECF No. 15) is **GRANTED**. The
24 court instructs the clerk of the court to consolidate this matter with Gunderson v. Klondex Mines
25 LTD. et al, case number 3:18-cv-00256-LRH-CBC, and Baker v. Klondex Mines LTD., et al.,
26 case number 3:18-cv-00288-LRH-CBC.

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1 IT IS FURTHER ORDERED that all parties shall file any actions pertaining to this class
2 action in Lawson, No: 3:18-cv-00284.

3 IT IS FURTHER ORDERED that Lawson is to properly serve notice on all defendants
4 within 60 days of this Order.

5 IT IS FURTHER ORDERED that Baker's motion to consolidate, be appointed lead
6 plaintiff, and appoint lead and liaison counsel (ECF No. 16) is **DENIED**.

7 The court's additional holdings are described below:

8 **a. Gunderson v. Klondex Mines et. al., No. 3:18-cv-00256**

9 IT IS ORDERED that plaintiff Lawson's motion to consolidate, be appointed lead
10 plaintiff, and appoint lead and liaison counsel (ECF No. 8) is **GRANTED**.

11 IT IS FURTHER ORDERED that the Baker plaintiffs' motion to consolidate, be
12 appointed lead plaintiff, and appoint lead and liaison counsel (ECF No. 9) is **DENIED**.

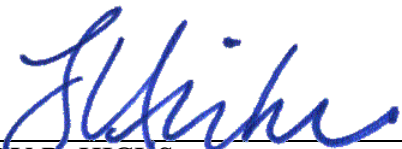
13 **b. Baker v. Klondex Mines et. al., No 3:18-cv-00288**

14 IT IS ORDERED that plaintiff Lawson's motion to consolidate, be appointed lead
15 plaintiff, and appoint lead and liaison counsel (ECF No. 34) is **GRANTED**.

16 IT IS FURTHER ORDERED that the Baker plaintiffs' motion to consolidate, be
17 appointed lead plaintiff, and appoint lead and liaison counsel (ECF No. 35) is **DENIED**.

18 IT IS SO ORDERED.

19 DATED this 18th day of December, 2018.

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21 
22 LARRY R. HICKS
23 UNITED STATES DISTRICT JUDGE
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