

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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REPEX VENTURES S.A., on behalf of itself :
and all others similarly situated, :

Plaintiff, :

vs. :

BERNARD L. MADOFF; BERNARD L. :
MADOFF INVESTMENT SECURITIES; :
BANK MEDICI S.A.; SONJA KOHN; PETER :
SCHEITHAUER; HERALD USA FUND; :
HERALD LUXEMBURG FUND; BANK :
AUSTRIA CREDITANSTALT; UNICREDIT :
S.A.; PRIMEO SELECT FUNDS; PIONEER :
ALTERNATIVE INVESTMENTS; THEMA :
INTERNATIONAL FUND PLC; ERNST & :
YOUNG LLP, and HSBC HOLDINGS PLC, :

Defendants. :
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ECF Case

Case No. 09 Civ. 0289 (RMB)

[Caption continued on the next page]

**THE FOXTON GROUP’S REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF ITS MOTION TO CONSOLIDATE,
TO BE APPOINTED LEAD PLAINTIFF, AND
FOR APPROVAL OF ITS SELECTION OF COUNSEL**

HORST LEONHARDT, on Behalf of Himself
and All Others Similarly Situated,

Plaintiff,

v.

BERNARD L. MADOFF, BANK MEDICI
S.A., SONJA KOHN, PETER
SCHEITHAUER, HERALD USA FUND,
HERALD LUXEMBURG FUND, BANK
AUSTRIA CREDITANSTALT, UNICREDIT
S.A., PRIMEO SELECT FUND, PRIMEO
EXECUTIVE FUND, PIONEER
ALTERNATIVE INVESTMENTS, THEMA
INTERNATIONAL FUND PLC, HELMUTH
E. FREY, FRIEDRICH PFEFFER, FRANCO
MUGNAI, ALBERTO BENBASSAT,
STEPHANE BENBASSAT, GENEVALOR,
BENBASSAT & CIE, DAVID T. SMITH,
GERALD J.P. BRADY, DANIEL
MORRISSEY, ERNST & YOUNG S.A.,
ERNST & YOUNG GLOBAL LIMITED,
HSBC HOLDINGS PLC, HSBC
INSTITUTIONAL TRUST SERVICES
(IRELAND) LIMITED, HSBC SECURITIES
SERVICES (IRELAND) LIMITED, HSBC
SECURITIES SERVICES, S.A.,
PRICEWATERHOUSECOOPERS,
CHARTERED ACCOUNTANTS,
PRICEWATERHOUSECOOPERS
INTERNATIONAL LIMITED and
FRIEHLING & HOROWITZ,

Defendants.

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ECF Case

Case No. 09 Civ. 2032 (RMB)

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I. INTRODUCTION

The underlying actions arose from extraordinary circumstances: the class members lost billions of dollars when defendants allegedly funneled their investments to Bernard L. Madoff, who for decades had been running the largest Ponzi scheme in history. Perhaps the most publicly-noted victim is the father of a member of lead plaintiff movant The Foxton Group, Willard Foxton. Less than three months before these motions were filed, Mr. Foxton's father – William Foxton, a retired soldier – committed suicide after learning that he lost his life savings as a result of the securities fraud alleged in the underlying actions. This tragedy devastated the Foxton family. Linkh Decl. Ex. A.

Unmoved by this devastation, the competing movants, Shmuel Cabilly and Repex Ventures S.A., argue that Mr. Foxton's certification contains speculative hearsay statements. And Cabilly and Repex urge the Court to deny the Foxton Group's motion based on the grieving family's inability to locate documents in the months following the tragedy.

Contrary to their arguments, however, the certification constitutes sufficient evidence of Mr. Foxton's financial interest in the litigation and nothing in the PSLRA precludes the Court from considering such evidence. Indeed, all lead plaintiff movants have submitted hearsay evidence in support of their motions. And this Court has broad discretion to consider hearsay evidence upon a showing that admissible evidence will be available at trial. Because discovery will produce admissible evidence to confirm the exact amount of the investment that caused Mr. Foxton's father to take his own life, the Court should reject the attempts of Cabilly and Repex to escalate a simple lead plaintiff appointment process into an evidentiary battle.

By arguing that they should be appointed as lead plaintiff despite having much smaller damages than the Foxton Group, Cabilly and Repex ignore the policy behind the Private

Securities Litigation Reform Act of 1995 (the “PSLRA”) – to ensure that “parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will . . . exercise control over the selection and actions of plaintiffs counsel.” *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 44 (S.D.N.Y. 1998) (Brieant, J.). Here, the Foxton Group’s members – Willard Foxton, Neville S. Davis, and Chia-Hung Kao – are precisely the parties Congress sought to protect, because they have suffered over \$4.2 million in damages – at least \$500,000 higher than any other movant.

Furthermore, because Messrs. Foxton, Davis, and Kao purchased all underlying funds – the Herald Funds, the Primeo Funds, and the Thema Fund (collectively, the “Medici Funds”) – they can adequately represent the divergent interests of all class members. Even if the Court does not appoint the entire Foxton Group as lead plaintiff, at a minimum it should appoint Mr. Davis as a co-lead plaintiff because, as Repex concedes, he is the only movant who can represent purchasers of the Thema Fund.

II. ARGUMENT

A. Mr. Foxton’s Certification Can Withstand Any Evidentiary Attacks Because the Certification Provides an Adequate Basis for His Father’s Damages

(1) The PSLRA Does Not Require Mr. Foxton to Provide a Certification

Misstating the law, Cabilly argues that “the PSLRA requires each movant seeking the position of lead plaintiff to provide a ‘sworn certification’” setting forth the movant’s transactions in the securities implicated in the litigation. Cabilly Opp. Br. at 7 (quoting 15 U.S.C. § 78u-4(a)(2)(A)). Contrary to Cabilly’s argument, the statutory language states that the requirement of a “sworn certification” applies only to *plaintiffs*, and not to movants seeking lead plaintiff appointment. 15 U.S.C. § 78u-4(a)(2)(A). Thus, some courts have refused to extend this requirement to movants. *See, e.g., Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146,

1155 (N.D. Cal. 1999) (Whyte, J.) (finding that Congress intended to “limit[] the certification requirement to those who file complaints”). This District has recognized that the question is “unsettled.” *Vladimir v. Bioenvision, Inc.*, No. 07 Civ. 6416 (SHS), 2007 U.S. Dist. LEXIS 93470, at *34 (S.D.N.Y. Dec. 26, 2007) (Peck, Mag. J.). The Court need not resolve this unsettled question, however, because Mr. Foxton has submitted a certification dated May 2, 2009. Linkh Decl. Ex. A.

(2) Mr. Foxton’s Certification Sufficiently Demonstrates That His Father Suffered Between \$2,880,000 and \$3,120,000 in Damages

In his certification, Mr. Foxton stated, under penalty of perjury, that his father invested approximately 1.6 million British Pounds in the Herald Funds between late 2004 and early 2005. Linkh Decl. Ex. A. And during that period, the exchange rate ranged between \$1.80 and \$1.95 for a British Pound. *Id.* Accordingly, Mr. Foxton estimated that his father lost between \$2,880,000 and \$3,120,000 as a result of the fraud alleged in the underlying actions. *Id.*

Without any authority on point, Cabilly and Repex contend that Mr. Foxton’s certification contains hearsay statements and should therefore be disregarded. This contention lacks merit for two reasons. First, the PSLRA does not prescribe the form of evidence lead plaintiff movants may proffer to demonstrate their financial interest in the litigation.¹ Second, in ruling on motions for lead plaintiff appointment, courts have broad discretion to fashion the evidentiary standard and have routinely considered hearsay evidence. Considering hearsay evidence is also appropriate where, as here, with adequate discovery admissible evidence will be available to support Mr. Foxton’s statements.

¹ Significantly, neither Cabilly nor Repex have submitted any evidence other than their own hearsay declarations in support of their motions for lead plaintiff appointment. Nor have they submitted account statements or any type of admissible evidence to support their alleged losses.

(a) The PSLRA Does Not Prescribe the Form of Evidence to Demonstrate Financial Interest

The PSLRA requires the appointment of the “most adequate” plaintiff as the lead plaintiff in securities class actions. 15 U.S.C. § 78u-4(a)(3)(B)(ii). The “most adequate” plaintiff is presumed to be the one who “has the largest financial interest” in the litigation. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). The PSLRA does not specify the type of evidence that is required to demonstrate financial interest, nor “provide a method for determining which [movant] has the largest financial interest.” *Vladimir*, 2007 U.S. Dist. LEXIS 93470, at *14. Thus, courts have broad discretion when deciding which movant has the largest financial interest. *See id.* at *15 & n.9 (applying a judicially-developed four-factor test).

(b) Mr. Foxton’s Certification Is Proper Because the Circumstances Necessitate Submission of Hearsay Statements and Because Discovery Will Reveal Admissible Evidence

Declarations are hearsay evidence because they contain out-of-court statements offered to prove the truth of the matter asserted. *See* FED. R. EVID. 801(c). In ruling on PSLRA lead plaintiff motions, however, courts rely almost exclusively on movants’ declarations specifying their damages. *E.g., In re Orion Sec. Litig.*, No. 08 Civ. 55368, 2008 U.S. Dist. LEXIS 55368, at **15-16 (S.D.N.Y. July 8, 2008) (Sullivan, J.) (considering declarations). Reliance on hearsay declarations is appropriate because the PSLRA obligates courts to find the movant with the “largest financial interest,” not to hunt for the best evidence of financial interest.²

Courts have taken a similar approach in an analogous situation. Under Article 16(b) of the Fair Labor Standards Act of 1938 (the “FLSA”), courts have discretion to conditionally certify a class at the pleadings stage, upon a showing that “similarly situated” class members

² Were hearsay declarations inadmissible, then presumably district courts would need to conduct lengthy evidentiary hearings with live witnesses to decide every lead plaintiff motion.

exist. *Fasanelli v. Heartland Brewery, Inc.*, 516 F. Supp. 2d 317, 321 (S.D.N.Y. 2007) (Batts, J.). But the FLSA does not define the term “similarly situated.” *Id.* Accordingly, courts have adopted a test requiring movants to submit affidavits and make a “modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.” *Id.* (citing cases). Following this approach, the *Fasanelli* court overruled evidentiary objections based on hearsay and speculation because, at the pre-discovery stage, declarations “necessarily contain unproven allegations.” *Id.* at 322.

The same reasoning applies here. District courts almost always rely upon hearsay declarations to decide lead plaintiff motions. Moreover, it is undisputed that Mr. Foxton’s father is unavailable to testify. To ascertain the exact amount his father invested in the Herald Funds, Mr. Foxton searched, without success, for his father’s documents between February and May 2009. Linkh Decl. Ex. A. Thus, Mr. Foxton had no choice but to submit to the Court a reliable estimate of his father’s damages based on his communications with his father and other family members. *See id.* Discovery will no doubt reveal additional evidence showing the exact amount of Mr. Foxton’s father’s damages. Because the truth of Mr. Foxton’s statements will be established by additional admissible evidence obtained from discovery, the Court may properly consider his certification, even if it contains hearsay statements.³ *Fasanelli*, 516 F. Supp. 2d at 322 (considering hearsay evidence in granting conditional class certification); *see also Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 924 (2d Cir. 1985) (holding that consideration of hearsay statements is permissible only upon “a showing that admissible evidence will be available at trial”).

³ The Court can overrule the objections to Mr. Foxton’s certification on this ground and therefore need not determine whether any hearsay exceptions apply to his statements. The Foxton Group does not analyze the hearsay exceptions here, but is prepared to submit further briefing on hearsay exceptions, should the Court so require.

(3) Mr. Foxton' Electronic Signature Is Valid

Relying on the faulty premise that the PSLRA requires Mr. Foxton to “personally sign[]” his certification, Cabilly argues that Mr. Foxton’s electronic signature to his certification is invalid. But Cabilly fails to cite any authority for the proposition that the PSLRA prohibits electronic signatures on certifications. Indeed, another court in this District has rejected that proposition. *Bhojwani v. Pistiolis*, Nos. 06 Civ. 13761 (CM) *et al.*, 2007 U.S. Dist. LEXIS 52139, at *27 (S.D.N.Y. June 26, 2007) (Fox, Mag. J.).

In any event, Mr. Foxton did in fact personally sign a certification on May 2, 2009. But his travels prevented him from delivering the personally-signed certification to counsel in time to meet the May 4, 2009 deadline. Chang Decl. ¶ 2. Thus, he authorized the filing of an electronically-signed copy. *Id.* He now submits a copy of his personally-signed certification together with this memorandum of law. Chang Decl. Ex. A. Accordingly, Cabilly’s argument not only lacks a legal basis, but is also moot.

(4) Mr. Foxton’s Use of Exchange Rates Is Proper

Cabilly speculates that Mr. Foxton used a “hypothetical exchange rate of \$1.80 to \$1.95 per British [P]ound” to calculate his father’s damages. Cabilly Opp. Br. at 9. But there is nothing “hypothetical” about these exchange rates. Contrary to Cabilly’s speculation, the exchange rates Mr. Foxton used are the historical exchange rates. Mr. Foxton stated that his father invested approximately 1.6 million British Pounds in the Herald Funds between late 2004 and early 2005. Between November 1, 2004 and March 1, 2005, the average exchange rates were between \$1.80 and \$1.95 per British Pound – an exact match to the range Mr. Foxton used. *See* Chang Decl. Ex. B (chart reflecting actual daily average exchange rates between November 1, 2004 and March 1, 2005). Accordingly, the Court should reject Cabilly’s argument.

(5) News Articles From February 2009 Cannot Form a Basis to Impeach Mr. Foxton's Sworn Certification

In a last-ditch effort to muddy Mr. Foxton's credibility, Cabilly and Repex submit news articles published between February 12 and 15, 2009. *Repex*, Dkt. Nos. 46, 48. These articles report that in the wake of his father's death, Mr. Foxton was unsure about the amount of his father's investment in the Herald Funds. For example, in an article published on February 12, 2009, the second day after the tragic suicide, Mr. Foxton reportedly stated that his "guess" would have been that his father lost "six-or-seven figure sums[,] but it would be foolish to assume an accurate amount." *Repex*, Dkt. No. 46 Ex. A. According to Cabilly and Repex, these statements are inconsistent with Mr. Foxton's statement in his May 2, 2009 certification that his father invested approximately 1.6 million British Pounds in the Herald Funds. Thus, Cabilly and Repex argue that Mr. Foxton's certification is unreliable.

Cabilly's and Repex's argument fails for three reasons. First, the February 2009 news articles do not conflict with the statement in Mr. Foxton's May 2, 2009 certification. As the articles indicate, he estimated his father lost a six or seven figure sum, which is fully consistent with the estimated loss contained in Mr. Foxton's certification. *See Repex*, Dkt. No. 46 Exs. A-D. Second, the articles identify investments in the Herald Funds, corroborating the statements in his certification. *See id.* Third, the statements attributed to him in the news articles from February 2009 (made at a time of shock and grief) have not been verified or authenticated and are therefore inadmissible. *See Staehr v. Hartford Fin. Servs. Group*, 547 F.3d 406, 425 (2d Cir. 2008) (noting with approval that the district court did not consider press coverage for the truth of the matter asserted). Mr. Foxton's May 2, 2009 certification has been submitted under penalty of perjury, and was submitted three months after the dates of the alleged news articles. Thus, Mr. Foxton's unsworn statements to the press cannot form a basis to impeach his certification.

Furthermore, to the extent that Cabilly argues that these meritless evidentiary issues render the Foxton Group an inadequate class representative, this argument is misplaced because nothing in the record indicates that Messrs. Foxton, Davis, and Kao lost their investments in a different manner than any class members. The Foxton Group's opening and opposition briefs have firmly established that the group members meet the typicality and adequacy requirements under Federal Rule of Civil Procedure 23. Cabilly's and Repex's evidentiary challenges cannot change this conclusion and should be rejected because, as discussed above, they lack any factual and legal basis.

B. Mr. Foxton Has the Authority to Pursue Claims on Behalf of His Father's Estate

Before signing the May 2, 2009 certification, Mr. Foxton obtained authorization from his mother-in-law, the personal representative of his father's estate, to pursue the claims on the estate's behalf in this litigation. In his certification, Mr. Foxton states that his "father's estate has authorized [him] to pursue a claim on behalf of [the estate] in this case." Linkh Decl. Ex. A.

But Mr. Foxton's reference to "estate" alarmed Repex. Repex argues that because, under English law, the personal representative of the estate, not the estate itself, possesses the estate's claims, Mr. Foxton lacks authority to sue on behalf of his father's estate. Even assuming English law applies, however, Repex's argument fails because Mr. Foxton in fact has authorization from his mother-in-law, the personal representative of his father's estate.⁴

⁴ Mr. Foxton is prepared to submit further declarations and briefing on this issue, should the Court so require.

C. The Foxtan Group's Motion Is Timely

Cabilly argues that the Foxtan Group's motion is untimely. This argument lacks a legal and factual basis. As a matter of fact, the Foxtan Group filed its lead plaintiff motion on May 4, 2009, relying in good faith upon the March 5, 2009 class notice, as well as the letter endorsed by this Court in *Repex* stating that the May 4, 2009 deadline for lead plaintiff motions "should not [be] disturbed." *Repex*, Dkt. No. 18 at 1. Moreover, the Foxtan Group has no role in creating the confusion of deadlines. In terms of law, Cabilly fails to cite any authority for the proposition that a lead plaintiff motion is time-barred even though the class member filed the motion in compliance with a valid class notice and a court-endorsed deadline. Accordingly, the Court should reject Cabilly's argument.

D. The Foxtan Group Is the Only Movant Who Can Represent the Divergent Interests of All Class Members

As *Repex* concedes, an appropriate lead plaintiff must be able to claim damages attributable to each Medici Fund. Cabilly and *Repex* claim damages attributable only to either the Heralds Funds or the Primeo Funds and thus have no standing to pursue claims against numerous defendants whom were implicated solely based on their alleged involvement with the Thema Fund. See *Ontario Pub. Serv. Employees Union Pension Trust Fund v. Nortel Networks Corp.*, 369 F.3d 27, 34 (2d Cir. 2004) ("Stockholders do not have standing to sue under Section 10(b) and Rule 10b-5 when the company whose stock they purchased is negatively impacted by the material misstatement of another company, whose stock they do not purchase.").

Whether or not the Court engages in a standing analysis under *Nortel*, the inability of Cabilly and *Repex* to represent all class members is fatal to their motions because many courts have "look[ed] into Rule 23(a)(3)'s *typicality requirement* in determining whether plaintiffs can bring claims for harms committed to funds in which they did not invest." *Hoffman v. UBS-AG*,

591 F. Supp. 2d 522, 532 (S.D.N.Y. 2008) (Sand, J.) (emphasis added). The typicality requirement, of course, must be examined at the lead plaintiff stage. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc) (requiring that the presumption of lead plaintiff be given only to those who satisfy Federal Rule of Civil Procedure 23). Here, Cabilly and Repex are not typical or adequate lead plaintiffs because they have no standing to pursue claims on behalf of the purchasers of funds in which Cabilly and Repex did not invest. *Hoffman*, 591 F. Supp. 2d at 532.

Arguing the contrary, Cabilly relies on a line of cases in which courts “appoint[ed] purchasers of one type of securities to represent purchasers of other types of securities of *the same issuer* where the interest of those purchasers are aligned.” See *Davidson v. E*Trade Fin. Corp.*, Nos. 07 Civ. 10400 *et al.*, 2008 U.S. Dist. LEXIS 61265, at *17 (S.D.N.Y. July 17, 2008) (Sweet, J.). Cabilly’s reliance on these case is misplaced because the Medici Funds were managed and sold by different defendants and because the class members’ interests are divergent. Accordingly, the Foxton Group is the only movant claiming damages attributable to all Medici Funds and is thus the most adequate lead plaintiff.

III. CONCLUSION

Cabilly’s and Repex’s meritless attacks on Mr. Foxton’s credibility and the Foxton Group’s motion amount to nothing but red herring. The Court should appoint the Foxton Group Lead Plaintiff in this litigation because the group claims the largest damages and is the only movant who can adequately represent all class members.

In the alternative, should the Court decline to appoint the Foxton Group as Lead Plaintiff, each member of the Foxton Group requests appointment individually as Lead Plaintiff or Co-Lead Plaintiff.

Dated: June 1, 2009

Respectfully submitted,

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DECLARATION OF SERVICE

I am an attorney admitted to practice in this district. I hereby certify, under penalty of perjury, that on this 1st day of June, 2009, I caused a true and correct copy of the foregoing document to be served on the persons listed below: 1) through this court's ECF system, 2) by e-mail, and/or 3) by mail, postage prepaid:

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CHARTERED ACCOUNTANTS
One Spencer Dock
North Wall Quay
Dublin 1
Ireland

PRICEWATERHOUSECOOPERS
INTERNATIONAL LIMITED
1 Embankment Place
London
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PIONEER ALTERNATIVE
INVESTMENTS
1 George's Quay Plaza
George's Quay
Dublin 2
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MANAGEMENT, LTD
c/o HWR Services
P.O. Box 71
Road Town
Tortola
B.V.I.

BA WORLDWIDE MANAGEMENT
LTD
c/o HWR Services
P.O. Box 71
Road Town
Tortola
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HERALD C. NOGRASEK
c/o HWR Services
P.O. Box 71
Road Town
Tortola
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HANNES SALETA
c/o HWR Services
P.O. Box 71
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NICOLA A. CORSETTI
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BANK OF BERMUDA (CAYMAN)
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S/
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