IN THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE

POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT and GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, on behalf of themselves and all other similarly situated shareholders of Yahoo! Inc., Plaintiffs, v. YAHOO! INC., JERRY YANG, ROY BOSTOCK, RON BURKLE, ERIC HIPPEAU, VYOMESH JOSHI, ARTHUR KERN, ROBERT KOTICK, EDWARD KOZEL, MAGGIE WILDEROTTER, AND GARY WILSON, Defendants.	Civil Action No. 3561
RONALD J. DICKE, on behalf of himself and all others similarly situated, Plaintiff, v. YAHOO! INC., JERRY YANG, RONALD BURKLE, ROBERT KOTICK, GARY WILSON, MAGGIE WILDEROTTER, ROY BOSTOCK, ERIC HIPPEAU, ARTHUR KERN, EDWARD KOZEL, AND VYOMESH JOSHI, Defendants.	Civil Action No. 3539
PLUMBERS AND PIPEFITTERS LOCAL UNION NO. 630 PENSION-ANNUITY TRUST FUND, On Behalf of Itself and All Others Similarly Situated and Derivatively on Behalf of YAHOO! INC., Plaintiff, v. JERRY YANG, ROY J. BOSTOCK, RONALD W. BURKLE, ERIC HIPPEAU, VYOMESH JOSHI, ARTHUR H. KERN, ROBERT A. KOTICK, EDWARD R. KOZEL, GARY L.	Civil Action No. 3578

WILSON and MAGGIE WILDEROTTER, Defendants, -and- YAHOO! INC., a Delaware corporation, Nominal Defendant.	
VERNON A. MERCIER Plaintiff, v. YAHOO! INC., a Delaware corporation, JERRY YANG, ROY J. BOSTOCK, RONALD W. BURKLE, ERIC HIPPEAU, VYOMESH JOSHI, ARTHUR H. KERN, ROBERT A. KOTICK, EDWARD R. KOZEL, GARY L. WILSON and MAGGIE WILDEROTTER, Defendants.	Civil Action No. 3579

MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE DETROIT FUNDS' MOTION FOR CONSOLIDATION, APPOINTMENT OF LEAD COUNSEL AND IN OPPOSITION TO THE PLUMBERS AND PIPEFITTERS COMPETING MOTION

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PRELIMINARY STATEMENT

The Detroit Funds and its counsel took the initiative to present to the Court a thorough complaint, a motion for expedited proceedings, and a supporting brief. We then secured defendants' agreement to expedited discovery. These efforts, and all other relevant factors, including the nearly 340,000-share stake in Yahoo held by the Detroit Funds, support a consolidated leadership structure led by the Detroit Funds' chosen counsel. Individual plaintiff Ronald Dicke, represented by the firms Chimicles & Tikellis LLP and Cohen, Milstein, Hausfeld & Toll, P.L.L.C., have submitted a Response supporting the Detroit Funds' leadership proposal.

The competing motions for the appointment of lead counsel filed by Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund ("P&P") in C.A. No. 3578 ("the "P&P Motion") and by Vernon A. Mercier ("Mercier") in C.A. No. 3579 (the "Mercier Motion") should be denied. P&P propose the Coughlin Stoia firm as Lead Counsel, even though Coughlin Stoia is currently lead counsel in a securities class action pending ***against*** Yahoo in the Central District of California. Lead Counsel in this action should be solely motivated to protecting the interests of Yahoo stockholders, unaffected by the pursuit of separate damage claims against Yahoo itself on behalf of "purchasers" and "sellers" who may not be current stockholders.

P&P challenges the Detroit Funds on the supposition that the Detroit Funds hold Microsoft shares. This Court has never before held (and we are unaware of any defendant even arguing) that a proposed representative plaintiff is subject to disqualification due to an equity interest in a potential acquiror. Adopting the rule sought by P&P would basically exclude every multi-billion dollar investment fund from participating in litigation arising from any public company transaction involving or

affecting another public company. There is no basis for enacting a rule that would essentially foreclose large institutions such as the Detroit Funds from serving as lead plaintiff in Delaware cases involving two or more public companies.

Finally, Mercier seeks to ensure that his counsel be appointed co-lead counsel with other counsel, asserting that the Detroit Funds did not provide them an opportunity to participate in this case. As demonstrated by the support of Mr. Dicke and his counsel and the accompanying Declaration of Mark Lebovitch ("Lebovitch Decl.") at ¶¶4-7, Mr. Mercier is factually wrong.

RELEVANT PROCEDURAL FACTS

Microsoft's announced interest in acquiring Yahoo, and Yahoo's rebuff of that interest has spawned multiple class action and derivative lawsuits in California and Delaware courts. The actions assert claims both against and on behalf of Yahoo, and against Yahoo's directors and officers. In addition, Yahoo and certain current or former officers are defendants in a federal securities class action arising from the company's failure to execute on its business plan.

A. The Federal Securities Fraud Action

On May 11, 2007, an individual shareholder represented by Coughlin Stoia filed a complaint in the district court for the Central District of California against Yahoo and certain of its senior officers alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§78j(b) and 78t(a), and Rule 10b-5 (the "Federal Securities Action"). On August 20, 2007, the district court granted the motion filed by Coughlin Stoia to consolidate the related actions, to appoint a different plaintiff, this time an institutional investor, as lead plaintiff, and to appoint Coughlin Stoia as Lead Counsel.

On December 21, 2007, Coughlin Stoia filed a 209-page Consolidated Amended Complaint (the "Federal Securities Complaint"), alleging that positive statements regarding Yahoo's attempts to improve its search engine business, through "Project Panama" and other strategic initiatives, coupled with allegedly false financial reports, artificially inflated Yahoo's stock. *In re Yahoo! Inc.*, Master File No. CV-07-03125-CAS(FMOx) (C.D. Cal.) (Relevant excerpts are attached as Declaration of Mark Lebovitch ("Lebovitch Decl.") Ex. A.)

The Federal Securities Complaint seeks damages for a class of purchasers of Yahoo shares between April 8, 2004 and July 18, 2006 (the "Securities Class"). (*See* Federal Securities Complaint ¶1.) The Federal Securities Action is active and awaiting a ruling on the defendants' motion to transfer venue from the Central District to the Northern District of California, which Coughlin Stoia opposed on February 25, 2008. (*See* Lebovitch Decl. Ex. B.)

B. <u>The California State Court Fiduciary Duty Actions</u>

On February 1, 2008, the same day that Microsoft's most recent acquisition offer became public, an individual represented by, *inter alia*, Coughlin Stoia, filed the first of several class action complaints in the Superior Court of the State of California challenging the conduct of the Yahoo Board. (The initial complaint in *Edward Fritsche v. Jerry Yang, et al.*, No. 08-CV-104808 (Super. Ct. Cal.) is attached as Lebovitch Decl. Ex. C.) *Fritsche* was brought as both a derivative action on behalf of Yahoo and a class action brought on behalf of holders of Yahoo common stock. *Id*. The core theory is that Yahoo's Board wrongfully rejected and failed to properly consider Microsoft's offer, made the prior day.

Two additional stockholder class actions were filed that day –*Tom Turberg v. Yahoo! et al*., (No. 08-CV-104813) and *Thomas Stone Trust v. Yahoo! Inc. et al*., (No. 108CV104693). (Lebovitch Decl. Exs. D and E). These two virtually identical complaints both arise from Microsoft's offer to acquire Yahoo, alleging that the Yahoo directors breached their duties because the consideration offered by Microsoft is "unfair and grossly inadequate, because among other things, the intrinsic value of Yahoo's common stock is materially in excess of the amount offered, given the Company's growth and anticipated operating results, net asst value and future profitability." (Lebovitch Decl. Exs. D and E at ¶3.)[1] On February 13, 2008 a fourth class action was filed in California state court – *Congregation Beth Aaron v. Jerry Yang*, et al., No. 08-CV-105632.

On February 6, 2008, Coughlin Stoia removed its name from the *Fritsche* action in favor of the law firm of Byrne & Nixon LLP. (Lebovitch Decl. Ex. H) Mr. Fritsche moved on February 20, 2008 for consolidation of the related California state actions and appointment of lead counsel. (Lebovitch Decl. Ex. F). A hearing has been set for this motion for March 28, 2008.

C. The Delaware Chancery Court Fiduciary Duty Actions

On February 11, 2008, Yahoo's board publicly rejected Microsoft's offer, prompting the filing of two class action complaints in this Court. Chimicles & Tikellis LLP, is the local counsel on both of these complaints (the "Chimicles Complaints"),

[1] Notably, under Vice Chancellor Strine's analysis in *In re Cox Communications*, it is unlikely any plaintiffs' counsel would put themselves at risk by filing such actions in this Court, before the Yahoo Board took any objective actions responsive to Microsoft's offer. 879 A.2d 604 (Del. Ch. 2004).

which are captioned *Wayne County Employees' Retirement System v. Jerry Yang, et al.*, No. CA3538-CC,[2] and *Ronald Dicke v. Yahoo! et al.,* No. CA3539-CC.

On February 21, 2008, the Detroit Funds filed their complaint (the "Detroit Funds Complaint") following: (1) Microsoft's announcement of its intent to initiate a proxy campaign for control of Yahoo's board of directors; (2) reports that Yahoo's board is actively pursuing defensive transactions that would be structured to avoid shareholder approval; and (3) the revelation that Yahoo's board had adopted costly and unusual golden parachutes for *each* Yahoo employees as an affirmative defensive measure (the "Severance Plans"). The next day, the Detroit Funds moved for expedited proceedings, including the setting of a trial date in May of this year. [Dkt. 8-13] On February 25, 2008, we commenced negotiations with defense counsel regarding the motion to expedite, resulting in the February 29 Stipulation and Proposed Case Management Order, providing for almost immediate document discovery. In return, the Detroit Funds agreed temporarily to hold in abeyance their request for a trial date. [Dkt. 18]

Coughlin Stoia filed a derivative and class action complaint on behalf of P&P in this Court on February 27, 2008. [Dkt. 6] The action challenges Yahoo's Board for their rejection of and failure to properly consider Microsoft's offer. *Id.* The same day, the law firm of Schiffrin Barroway Topaz & Kessler, LLP filed a 17 page complaint on behalf of Vernon A. Mercier on behalf of Yahoo's shareholders seeking injunctive relief related to the Yahoo board's treatment of Microsoft's acquisition offer. [Dkt. 5]

On February 25, 2008 the Detroit Funds moved for consolidation and appointment of BLB&G and BM&F as Lead Counsel (the "Detroit Funds' Lead Counsel Motion"). [Dkt. 14] P&P made a similar motion on February 27, 2008 ("P&P's

[2] Wayne County – a Michigan fund with a smaller equity stake than the Detroit Funds, has since withdrawn its pleading. Chimicles & Tikellis (who are counsel to Mr. Dicke along with Cohen Milstein) support the Detroit Funds' Motion.

Motion") [Dkt. 7] P&P seeks the appointment of Coughlin Stoia and BM&F as Lead Counsel.

ARGUMENT

I. THE *TCW/HIRT* FACTORS FAVOR GRANTING THE DETROIT FUNDS' MOTION TO APPOINT BLB&G AND BM&F AS LEAD COUNSEL

A. The Detroit Funds Complaint Remains Superior

This Court looks to the quality of the applicants' pleadings as a significant consideration when appointing lead plaintiff and lead counsel for class and derivative shareholder actions. *See TCW Tech.*, 2000 WL 1654504, at *10-11. The quality of the pleadings is useful in determining the work counsel and their respective clients have done to investigate and identify potential claims, as well as their knowledge of applicable laws.

1. Complaints Filed Subsequent To the Detroit Funds Complaint Add Little New Substance

The Detroit Funds Complaint was the first well pleaded and thoroughly investigated class action complaint to assert that the Severance Plans were adopted by the Yahoo board of directors in violation of their fiduciary duties as inappropriate defensive measures. This theory, though hardly the only basis, was critical to the Detroit Funds' successful motion to expedite. [Dkt. 8-13]

Even though it was filed after our Complaint, the Mercier Complaint is little more than a "bare bones" pleading. *See* Lebovitch Decl. Ex. G (Mercier complaint). For its part, the P&P Complaint appears to be an amalgam of prior-filed pleadings – borrowing from our Complaints details about the Severance Plans and borrowing allegations of director interest from the *Fritsche* Complaint they filed in California. (*Compare* Lebovitch Decl. Ex. C (*Fritsche* Compl.) ¶¶46-51, *with* P&P Complaint ¶¶30-35.

2. The P&P Complaint Seeks Relief In Tension With the Coughlin Stoia Federal Securities Action

More troubling, the P&P Complaint creates a real possibility of conflicting interests on the part of Class counsel. The P&P Complaint is both "a shareholder derivative action brought by a shareholder of nominal party Yahoo! Inc." on behalf of the Company, as well as "a class action brought by plaintiff on behalf of the holders of Yahoo common stock. (Dkt 1 ¶1).

In *Brandin v. Deason*, Vice Chancellor Lamb ruled that derivative counsel cannot concurrently serve as lead counsel in a transaction-based lawsuit stating,

> I'm going to deny the motion to consolidate the derivative and the class litigation. I think it is apparent to me, and I think it should be apparent to everyone, that there is a conflict – or at least a potential conflict involved in acting both as a derivative plaintiff and as a class plaintiff in litigation in which the company is named as the defendant. (Tr. 54:14-21).

(Lebovitch Decl. Ex. I) Indeed, federal courts have also barred counsel from representing both a class and a derivative action regarding the same corporation. *See Kamerman v. Steinberg*, 113 F.R.D. 511, 515-16 (S.D.N.Y. 1986); *Hawk Industries, Inc. v. Bausch & Lomb, Inc*. 59 F.R.D. 619, 623-24 (S.D.N.Y. 1973); *Ruggiero v. American Bioculture, Inc.* 56 F.R.D. 93, 95 (S.D.N.Y 1972) ("there is a substantial question as to whether the attorneys for the Freed plaintiffs can represent them in the derivative suit and the class action without violating the Cannons of Ethics.")

P&P proposes as Lead Counsel the Coughlin Stoia firm, despite the fact that it is currently serving as Lead Counsel in the Federal Securities Action and despite the fact that **t**he Federal Securities Action turns, in part, on alleged false public statements about "Project Panama," which the Detroit Funds Complaint identifies as one of the strategic

efforts that the Yahoo Board pursued and then abandoned in recent years. (Detroit Funds Compl. ¶¶42-48.)

The Federal Securities Complaint seeks damages against Yahoo and other defendants (at least some of whom will undoubtedly claim rights to be indemnified by Yahoo and its insurers) for allegedly false and misleading disclosures relating to business decisions preceding the Microsoft acquisition overture. The risk of a damage award adversely affects the value of Yahoo stock in the hands of the current shareholders, as well as in the hands of a potential acquirer. Because standing is based on the "purchaser/seller" requirements of the federal securities laws, many of Coughlin Stoia's clients there are not current Yahoo stockholders.[3]

In addition, granting P&P's motion to appoint Coughlin Stoia as lead counsel in this case creates a risk that discovery here – whether expedited or not and even if this Court fully supports it – can be stayed by the court hearing the Federal Securities Action. The plaintiff and lead counsel in the Securities Action are subject to an automatic discovery stay pending decision on defendants' motion to dismiss. *See* 15 U.S.C. 78u-4(b)(3)(D). The PSLRA states as follows:

> Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.

[3] The defendants in each case are also only partially overlapping. Appointing Coughlin Stoia to lead the Delaware cases raises a risk that the firm may find itself assessing proposals by certain defendants in one case that could hurt the interests of the plaintiff class in another case. While we do not question the integrity of the Coughlin Stoia lawyers and their desire to balance such competing interests, it is better to avoid this situation altogether.

Id. "The dispositive question is whether some form of relevant discovery is likely to reach the federal Plaintiffs during the pendency of a motion to dismiss in federal Court." *In re Crompton Corp. Sec. Litig.*, No. 03-CV-1293, 2005 U.S. Dist. LEXIS 23001, at *10 (D. Conn. 2005) (internal quotes omitted) (staying discovery in parallel state court action).

Here, the risk that the federal court may stay discovery in this Action is a significant potential barrier to the class in Delaware obtaining the relief it needs in the expedited fashion necessary. In any event, it would be a major distraction to the class to have to litigate a side-show about a federal discovery stay.

B. The Detroit Funds Have The Greatest Economic Stake In The Outcome of this Action

In *TCW Tech. Ltd. P'ship v. Intermedia Commc'ns. Inc*., 2000 Del. Ch. LEXIS 147, at *10, this Court made very clear that "the Court should give weight to the shareholder plaintiff that has the greatest economic stake in the outcome of the lawsuit." *TCW Tech Ltd P'ship* at *10. Although this factor is not applied mechanically, it seems appropriate to "give recognition to large shareholders or significant institutional investors who are willing to litigate vigorously on behalf of an entire class of shareholders." *Id*. at *11.

Here, GRS has current holdings of 258,300 Yahoo shares, and PFRS has current holdings of 81,454 Yahoo shares. *See* Zajac Decl. ¶8. P&P claims to own about 25,000 shares of Yahoo common stock. The individual investors – Messrs. Mercier and Dicke – have not disclosed their Yahoo stockholdings.

P&P argues the Court should apply a unique exception to the "economic stake" element of *TCW*, identified by Vice Chancellor Lamb in *Wiehl v. Eon Labs*, No. 1116-N,

2005 Del. Ch. LEXIS 40 (Del. Ch. Mar. 22, 2005). In *Wiehl*, the Court found that two law firms conducted a rigged organizational meeting in order to exclude an individual shareholder plaintiff and his counsel from leadership. *Id.* at *11. After noting that the individual shareholder filed a superior complaint and was the first to move for expedited proceedings, the Court determined that, as an individual shareholder, his "relative" stake was significant enough to provide incentive to monitor his counsels' conduct during litigation. *Id.* at *9. Accordingly, the Court ordered the three firms to conduct a second organizational meeting and to include the individual shareholder in the voting process.

The facts and circumstances present here do not warrant the exception noted in *Wiehl*. Nothing of the sort took place here. The Detroit Funds conferred with counsel for each of the other Delaware plaintiffs and stated that if this case in fact goes to trial, there will be sufficient work required that any firm not attacking the Detroit Funds can make a contribution and will be rewarded fairly in the event of a successful outcome. *See* Lebovitch Decl. ¶¶4-6. There is no unfairness in that process. The Detroit Funds simply seek a traditional application of the *TCW* factors, while P&P seek to turn *Wiehl* on its head in order to foist upon the Class a diluted and disorganized leadership structure. In fact, P&P's view of *Wiehl* results in the exception swallowing the rule.

In short, "the Court should give weight to the shareholder plaintiff that has the greatest economic stake in the outcome of the lawsuit," which in this case is the Detroit Funds. *See TCW Tech. Ltd.* at *10.

C. The Detroit Funds Are Well Qualified To Vigorously Litigate On Behalf Of The Class

1. The Detroit Funds' Active Dedication to This Litigation Supports Their Selection as Lead Plaintiff

As set forth in both Declarations submitted by Ronald Zajac, General Counsel to both of the Detroit Funds, the separate Boards of each of GRS and PFRS are unquestionably actively involved in ensuring the effective prosecution of this case. Mr. Zajac has separately reported three times to each Board, including consecutive reports this past week that included a written update with supporting materials prepared by BLB&G for the Trustees. Zajac Suppl. Decl. ¶8. The Detroit Funds are acting to vindicate important corporate governance principles and from the outset have made clear that this case is important to their respective Trustees, who are prepared to do whatever is necessary to ensure the best possible result. Yahoo's shareholders will benefit from client-driven (as opposed to lawyer-driven) litigation, and the Detroit Funds are appropriate to lead the case.

As it has in other cases in which the Detroit Funds have appeared as plaintiffs, P&P attacks the Detroit Funds for being "too active" in vindicating shareholder rights. That argument has been rejected time and time again by federal courts facing a specific statutory restriction barring so-called "professional plaintiffs" from representing classes. *See* Zajac Suppl. Decl. ¶14. The Detroit Funds manage nearly $8 billion in assets, have fiduciary duties to their beneficiaries, and are acting appropriately to protect and enhance the value of those assets.

Indeed, the argument P&P raises has no application outside the PSLRA context, and we are unaware of any Delaware case applying it. Moreover, P&P's argument has no merit even under the PSLRA -- managing to misconstrue the language and the history of the PSLRA, and ignore the extensive case law holding that the statute's "professional plaintiff" restriction is not applicable to institutional investors such as the Detroit Funds.

One of the foremost purposes of the PSLRA is to promote institutional leadership in securities class actions and the statute's legislative history explicitly clarifies that the restriction was never intended to apply to institutional investors:

> The Conference Report seeks to restrict professional plaintiffs from serving as lead plaintiff by limiting a ***person*** from serving in that capacity more than five times in three years. ***Institutional investors seeking to serve as lead plaintiff may need to exceed this limitation and do not represent the type of professional plaintiff this legislation seeks to restrict***. As a result, the Conference Committee grants courts discretion to avoid the unintended consequence of disqualifying institutional investors from serving more than five times in three years. The conference committee does not intend for this provision to operate at cross-purposes with the "most adequate plaintiff" provision.

H.R. Conf. Rep. No. 104-369, at *35, *reprinted in* 1995 U.S.C.C.A.N. 730, 734. (emphasis added); *see, e.g., Nursing Home Pension Fund v. Oracle Corp.*, No. C01-988, 2006 U.S. Dist. LEXIS 94470, at 14-15 (N.D. Cal. Dec. 20, 2006) ("Congress has indicated that legislation seeking to prohibit 'professional plaintiffs' from participating in securities class actions was not intended to apply to institutional investors.").[4]

[4] *See also In re Pfizer Inc. Sec. Litig.*, 233 F.R.D. 334, 338 n.4 (S.D.N.Y. 2005) ("While the PSLRA disfavors 'professional plaintiffs' . . . [t]his provision was not intended to target institutional investors"); *In re Fannie Mae Sec. Litig.*, 355 F.Supp.2d 261, 264 (D.D.C. 2005) ("[T]he Court has the discretion to exempt an institutional investor from the 'professional plaintiff' restriction"); *In re Vicuron Pharms., Inc. Sec. Litig.*, 225 F.R.D. 508, 512 (E.D. Pa. 2004) ("[T]he limitation against professional plaintiffs was not designed to be applied mechanically to institutional investors"); *Meeuwenberg v. Best Buy Co.*, No. 03-6193, 2004 U.S. Dist. LEXIS 7686, at *7 (D. Minn. April 29, 2004) ("[T]he majority of courts have held institutional investors exempt from the statutory professional plaintiff restriction."); *In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291, 299 (D. Del. 2003) ("Consistent with this legislative intent, the majority of courts applying the professional plaintiff restriction have concluded that the restriction does not apply to institutional investors."); *In re Gemstar-TV Guide Intern., Inc. Sec. Litig.*, 209 F.R.D. 447 (C.D. Cal. 2002) (holding that the PSLRA's "professional plaintiff" bar does not apply to institutional investors and explaining that "[t]he mere fact that the [institutional movant] has acted as lead plaintiff in seven cases over the past three years is unremarkable for an institutional investor in the business of managing $10 billion in assets."); *Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 641 (D.N.J. 2002) ("The majority of courts... have determined that the limitation does not apply to institutional investors."); *Naiditch v. Applied Micro Circuits Corp.*, No. 01-CV-0649-K-AJB, 2001 WL 1659115, at *2 (S.D. Cal. Nov. 5, 2001) ("For such a large institutional investor, 11 appointments as lead plaintiff is quite understandable, and in fact could evince a laudatory zeal to fulfill its fiduciary duties. Such experience will well equip FSBA to oversee this litigation."); *In re Critical Path, Inc. Sec. Litig.*, 156 F. Supp. 2d 1102, 1112 (N.D. Cal. 2001) (appointing institutional investor as lead plaintiff despite having been appointed in more than five cases in three years); *Piven v. Sykes Enters., Inc.*, 137 F. Supp. 2d 1295, 1305 (M.D. Fla. 2000) ("[T]he Court is less

Indeed, several courts have specifically held the restriction inapplicable in the case of Detroit P&F. In *Police and Fire Retirement System of the City of Detroit v. Safenet, Inc., et al.,* the court appointed Detroit P&F as Lead Plaintiff over the objections of Coughlin Stoia, explaining that "it is clear that Congress did not intend to target institutional investors with this limitation." No. 06-CV-5797, Order Appointing Lead Plaintiff, at 7 (S.D.N.Y. Feb. 21, 2007) (attached as Lebovitch Decl. Ex. J). Similarly, in *Brody v. Dot Hill Systems Corp., et al.*, in which Detroit P&F was appointed Lead Plaintiff along with the General Retirement System of the City of Detroit (again over the objections of Coughlin Stoia), the court explained:

> The Detroit Group [is] exactly the type of movant which the PSLRA and [Congressional] Committee considered immune from mechanical disqualification under the 'professional plaintiff' ban. The Court finds that . . . the ban should not apply because ***appointing the Detroit Group as lead plaintiff in the current action is consistent with the purposes of the PSLRA: the Detroit Group is an institutional investor, has the largest financial interest in [] securing relief for the class, has met the requirements of Rule 23, and has secured experienced counsel***[].

Brody v. Dot Hill Systems Corp., et al., No. 06-CV-0228, Order Appointing Lead Plaintiff, at 16 (S.D. Cal. June 23, 2006) (emphasis added) (Lebovitch Decl. Ex. K).

2. P&P's Hypothetical Conflict About The Detroit Funds' Ownership of Microsoft Stock Is Irrelevant

P&P's contention that the Detroit Funds cannot serve as Lead Plaintiffs because they may own Microsoft stock is meritless. The lawsuit is not about the conduct of Microsoft, AOL, News Corp., Google, or any other potential acquirer; it is focused on the improper defensive actions, taken in violation of their fiduciary duties, by Yahoo's

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concerned about a plaintiff in the business of security investments being lead plaintiff on numerous occasions than if the court were to find some sort of shell corporation created for the purpose of marshaling claims"); *Blaich v. Employee Solutions, Inc.*, No. 97-545-PHX-RGS, 1997 WL 842417, at *2 (D. Ariz. Nov. 21, 1997) ("[T]he provision of the PSLRA concerning restrictions on professional plaintiffs does not apply to institutional investors.").

management and Board of Directors in the face of a non-coercive premium offer. *See* Zajac Suppl. Decl. ¶12. The purpose of the litigation is to allow those interested in acquiring Yahoo, and those interested in preserving it as an independent company, to compete in an unfettered marketplace. P&P recognizes as much in citing this Court's rejection of a similarly contrived "conflict" argument in *Youngman v. Tahmoush*, 457 A.2d 376, 380-81 (Del. Ch. 1983), but then tries to salvage its argument by ignoring the underlying *Unocal* issues and framing the case as turning on whether the Detroit Funds will seek "to maximize the price Microsoft pays for Yahoo." (P&P Motion ¶24)

This circumstance is no different from a lead plaintiff in a securities class action continuing to hold shares of the defendant corporation. In adopting the PSLRA and articulating its preference for institutional shareholders to serve as lead plaintiffs, Congress expressly stated its expectation that continued ownership of the defendant company would exist and would serve to ensure responsible oversight of plaintiffs' counsel. *See In re Vesta Ins. Group, Inc. Sec. Litig.*, No. 98-AR-1407-S, 1999 U.S. Dist. LEXIS 22233, at *28-29 (N.D. Ala. Oct. 25, 1999). The Court stated in *In re Vesta*:

> Congress understood that large institutional investors with multi-billion dollar portfolios would likely always hold equity investments in a broad spectrum of companies, some of which would likely be defendants in securities cases. . . . ***Even if these equity investments are not held in named defendants, in this economy with intertwined business relationships of every kind, it is easy to foresee that a large damage award against one entity might negatively impact an equity position with another. If this condition were enough to defeat certification as a class representative, large institutional investors would almost invariably be disqualified; precisely the opposite of what Congress intended in passing PSLRA.***

Id. (emphasis added).

Further, this Court's ruling in *TCW* effectively opened the door of Delaware transactional litigation to institutional investors by rejecting the "race to the courthouse" that used to prevent an institution requiring prior board approval from realistically expecting to "win" and by giving due credit to the importance of the absolute size of a plaintiff's stake in the defendant company. P&P's argument thus implicitly undercuts this Court's preference for larger holders, as set forth in *TCW*. The typical multi-billion dollar investment fund will often hold shares of both or all parties to a contested takeover battle involving major public companies. Accepting the premise of P&P's argument will leave the largest transactions to be litigated by the smallest investors.

D. No Conflict Among Individuals and Institutions Exists

There is no conflict here among individuals and institutions. First, the Detroit Funds, far from being some kind of monolithic institution, hold their assets for the benefit of thousands of individuals. Second, counsel for Mr. Dicke, an individual investor, support the application of the Detroit Funds to be lead plaintiff and for BLB&G and BM&F to be Lead Counsel.

E. The Detroit Funds Have Vigorously Prosecuted This Action

While we do not question the will or ability of any other plaintiffs or counsel to do an effective job, the fact remains that only the Detroit Funds thought to combine allegations about the Severance Plans and a request for a prompt trial on the merits, which brought defendants to the negotiating table to craft a favorable Stipulation and Case Management Order.

The Detroit Funds' counsel commenced negotiations with defense counsel on a stipulated expedited discovery schedule on Monday, February 25, 2008 – prior to the date

P&P and Mr. Mercier even filed their complaints. The Detroit Funds have also served defendants with two sets of document requests and one set of written interrogatories.

CONCLUSION

For all the foregoing reasons, the Detroit Funds' motion for consolidation and appointment of BLB&G and BM&F as Lead Counsel should be granted, and the motion of P&P should be denied in its entirety.

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Dated: March 3, 2008