UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN ROFFE PROFIT SHARING PLAN, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04081-RWS CLASS ACTION
MAREN TWINING, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04099-RWS CLASS ACTION
GOLDRICH COUSINS P.C. 401(K) PROFIT SHARING PLAN & TRUST, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04131-RWS CLASS ACTION

[Caption continued on following page.]

MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION OF EIFFEL TOWER VENTURES, LLC, THE GAF UNIT TRUST AND WHITE DUNE LLC FOR CONSOLIDATION, APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF SELECTION OF COUNSEL AND IN OPPOSITION TO THE COMPETING MOTIONS

IRVING S. BRAUN, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04150-RWS CLASS ACTION
ALEXIS ALEXANDER, as custodian for Chloe Sophie Alexander, et al., Individually, on Behalf of All Others Similarly Situated, Plaintiffs, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04157-RWS CLASS ACTION
DOUGLAS M. LIGHTMAN, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04184-RWS CLASS ACTION

[Caption continued on following page.]

KATHY REICHENBAUM, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04194-RWS CLASS ACTION
JUSTIN F. LAZARD, On Behalf of Himself and All Others Similarly Situated, Plaintiff, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04252-RWS CLASS ACTION
SYLVIA GREGORCZYK, On Behalf of Herself and All Others Similarly Situated, Plaintiff, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04291-RWS CLASS ACTION

[Caption continued on following page.]

PETER BRINCKERHOFF, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04312-RWS CLASS ACTION
DAVID GOLDBERG, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04332-RWS CLASS ACTION
RICHARD P. EANNARINO, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04360-RWS CLASS ACTION

[Caption continued on following page.]

PETER MAMULA, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04362-RWS CLASS ACTION
ELLIOT LEITNER, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04551-RWS CLASS ACTION
HOWARD SAVITT, On Behalf of Himself and All Others Similarly Situated, Plaintiff, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04648-RWS CLASS ACTION

[Caption continued on following page.]

STEVE SEXTON, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-04777-RWS CLASS ACTION
ROBERT L. LOOMIS, et al., On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. FACEBOOK, INC., et al., Defendants.	Civil Action No. 1:12-cv-05511-UA CLASS ACTION

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Eiffel Tower Ventures, LLC, The GAF Unit Trust and White Dune LLC (the "Personal Investment Funds") respectfully submit this memorandum of law in further support of the motion of the Personal Investment Funds to consolidate the related actions, to be appointed lead plaintiff and to have their selection of counsel approved and in opposition to the competing motions.[1]

I. INTRODUCTION

Congress enacted the Private Securities Litigation Reform Act (the "PSLRA") to ensure that securities class actions would be led by investors that possess a substantial financial stake in a litigation and are not subject to legitimate adequacy or typicality challenges. The PSLRA, therefore, establishes that a movant group is presumptively the "most adequate plaintiff" when that group has the largest financial interest in the outcome of the litigation ***and*** "otherwise satisfies the requirements of Rule 23." 15 U.S.C. §77z-1(a)(3)((B)(iii)(I)(bb)-(cc).

Of the nine lead plaintiff movants in this action, the only movant that satisfies both criteria is the Personal Investment Funds. While North Carolina Retirement System ("NCRS"), Banyan Capital Master Fund (the "Banyan Fund"), Arkansas Teachers Retirement System and Fresno County Employees' Retirement Association (the "Institutional Investor Group") claim the largest

[1] Eight other lead plaintiff motions were filed. Those motions were filed by: (i) Alexis Alexander, as custodian for Chloe Sophie Alexander, Robert Herpst and Vijay Akkaraju; (ii) Desmond Doris, Donald Pompliano, Eric Rand and Ranford Williams; (iii) KBC Asset Management NV and Employees' Retirement System of the Government of the Virgin Islands; (iv) Michael Spatz and Sanjay Israni; (v) North Carolina Retirement System, Banyan Capital Master Fund, Arkansas Teachers Retirement System and Fresno County Employees' Retirement Association; (vi) Ramesh Purohit, Karen Stewart and Scott Wilson; (vii) Rick Pond; and (viii) William H. Anhood and Jose and Mary Galvan. One additional motion was filed on behalf of First New York Securities LLC, F3 Trading Group, LLC and Avatar Securities LLC, but that motion only seeks appointment of the movant as lead plaintiff in the related cases filed against NASDAQ OMX Group Inc. and The NASDAQ Stock Market LLC, not in this case.

loss, the Institutional Investor Group is ***not*** presumptively the "most adequate plaintiff" because it cannot "otherwise satisf[y] the requirements of Rule 23." 15 U.S.C. §77z-1(a)(3)((B)(iii)(I)(cc).

To understand the crippling adequacy and typicality defenses which the Institutional Investor Group is subject to, one must first consider the allegations made here: that in connection with Facebook Inc.'s ("Facebook") May 18, 2012 initial public offering ("IPO"), Facebook, its directors and its underwriters failed to disclose that Facebook was experiencing a pronounced reduction in revenue growth, and that, at the time of the IPO, the Company had secretly advised the lead underwriters to reduce their 2012 performance estimates for Facebook – information that was then communicated to certain institutional investors, yet omitted from the Registration Statement and/or Prospectus (the "Offering Materials"). *See* Complaint filed by counsel for the Institutional Investor Group in *Braun v. Facebook, Inc.*, 12-cv-04150-RWS (S.D.N.Y.) (the "*Braun* Action Complaint"), ¶38. An investor which received this non-public information before purchasing its Facebook shares, or which purchased its shares after this information became public, cannot represent the class here because defendants would be able to argue in defense that these losses are not attributable to any omission. *See e.g.*, *In re Healthsouth Sec. Litig.*, 213 F.R.D. 447, 459 (N.D. Ala. 2003) (denying motion for class certification where plaintiffs "were aware of the very facts the plaintiffs claim were withheld by the defendants or that caused certain statements by defendants to be misleading").

Conflicts of interest pervade the Institutional Investor Group. The largest member of the Institutional Investor Group is NCRS, one of the few state retirement systems governed by a sole trustee. Here, Janet Cowell ("Cowell"), the sole trustee of NCRS, is the North Carolina Treasurer. Treasurer Cowell and NCRS maintain significant personal and financial ties with one of the defendants in this case, Erskine B. Bowles ("Bowles"). Defendant Bowles is not just a defendant in this case; he sits at the vortex of Defendants' misconduct. Bowles is on the Board of Directors of

both Facebook (as Chair of the Audit Committee) and the lead underwriter of Facebook's IPO, Morgan Stanley. And, if it wasn't enough that the sole fiduciary of the largest member of the Institutional Investor Group has a longstanding personal and financial relationship with the one defendant who sits on the board of the two primary defendants in the case, Treasurer Cowell also has Carousel Capital ("Carousel"), defendant Bowles' investment firm, managing millions of dollars of NCRS's money together with yet another underwriter defendant, Credit Suisse. *See* Declaration of David A. Rosenfeld in Further Support of the Motion of Eiffel Tower Ventures, LLC, The GAF Unit Trust and White Dune LLC for Consolidation, Appointment as Lead Plaintiff and Approval of Selection of Counsel and in Opposition to the Competing Motions, dated August 9, 2012 ("Rosenfeld Decl., __"), Exs. A and B.

The extensive entanglements between and among NCRS, its sole fiduciary and defendant Bowles, also include the fact that defendant Bowles' wife, Crandall Bowles (herself a Board member of J.P. Morgan Chase & Co., the parent company of underwriter defendant J.P. Morgan Securities LLC), has a close personal relationship with the North Carolina Treasurer and was a lead contributor to, and fundraiser for, Treasurer Cowell's reelection campaign. *See* Rosenfeld Decl., Ex. C. In fact, Mr. and Mrs. Bowles concluded that Ms. Cowell's election as the sole fiduciary of NCRS was so important to defendant Bowles that the Bowles hosted a Cowell fundraiser at their home. *Id*. Ex. D. In other words, the sole trustee of NCRS – acting on behalf of NCRS and seeking to represent the ***plaintiff class*** – just recently received financial support in her reelection campaign from one of the ***defendants*** in this action. Perhaps even more troubling is that none of NCRS's co-movants even bothered to ascertain these facts or, worse yet, did and remained willing to jointly seek lead plaintiff status with NCRS, notwithstanding these crippling defects.

The sideshow that would be created in assessing defendant Bowles' extensive relationships with the Institutional Investor Group, together with the risk to the class of having a lead plaintiff saddled with these conflicts and typicality challenges, preclude the Institutional Investor Group from being appointed lead plaintiff. *See, e.g., Epifano v. Boardroom Business Products, Inc*., 130 F.R.D. 295, 300 (S.D.N.Y. 1990) (denying motion of proposed class representative whose relationship with a potential defendant might cause counsel to "not conduct as rigorous an examination of potential claims" against such defendant). In fact, "[r]egardless of whether the issue is framed in terms of the typicality of the representative's claims or the adequacy of its representation, ***there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it***." *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) (emphasis added; internal citations omitted); *see also Kuriakose v. Federal Home Loan Mortgage Co.*, 08-cv-7281(JFK), 2008 U.S. Dist. LEXIS 95506 (S.D.N.Y. Nov. 24, 2008) (denying NCRS's lead plaintiff motion despite its having the largest financial interest). Thus, the Institutional Investor Group cannot be appointed lead plaintiff, as courts "routinely f[i]nd a disqualifying unique defense where the potential named plaintiff has had a direct or personal relationship with a board member or officer of the issuing company." *See In re Indep. Energy Holdings PLC, Sec. Litig*., 210 F.R.D. 476, 481 (S.D.N.Y. 2002) (Scheindlin, J.).

The Institutional Investor Group's crippling adequacy and typicality issues are not limited to NCRS. Another Institutional Investor Group member, the Banyan Fund, is likewise subject to adequacy and typicality challenges which prevent the Institutional Investor Group's appointment. Notably, the Banyan Fund's ***only*** purchases of Facebook stock were made on May 21, 2012 and May 22, 2012, two days ***after*** *Reuters* had already reported (on May 19) that Facebook had privately altered its revenue guidance during a road show. *See* Complaint filed by the Banyan Fund's counsel

in *Braun v. Facebook, Inc.*, 12-cv-04150-RWS (S.D.N.Y.) (the "*Braun* Action Complaint"), ¶39. In fact, the Banyan Fund's second purchase – of nearly 450,000 shares – was made ***after*** a second *Reuters* article was published on May 22, 2012 entitled "Insight: Morgan Stanley cut Facebook estimates just before IPO." *Braun* Action Complaint, ¶40. Thus, if the Institutional Investor Group was appointed lead plaintiff, Defendants would undoubtedly exploit the fact that the Banyan Fund is subject to unique defenses since it purchased its only shares of Facebook stock ***after*** it was already publicly reported that Facebook altered its financial guidance during the IPO roadshow – the core misrepresentation and omission from the IPO Offering Materials. Since the undisclosed information from the Offering Materials was publicly disclosed by the time the Banyan Fund purchased its shares, Defendants will argue that the Banyan Fund knew of the undisclosed information at the time of its purchases. *See e.g., Miles v. Merrill Lynch & Co.*, 483 F.3d 70, 73 n.1 (2d Cir. 2006) (acknowledging the defense that the plaintiff knew of the untruth or omission at the time of his or her acquisition of the security). The Banyan Fund's motion should be denied in any event because, as explained more fully below, it is an atypical investor that engages in a unique trading strategy that differs from a typical investor. *See In re MicroStrategy Sec. Litig.*, 110 F. Supp. 2d 427, 437 (E.D. Va. 2000) (denying the appointment of a hedge fund because it "engages in transactions far beyond the scope of what a typical investor contemplates").

Because the Institutional Investor Group is subject to a myriad of typicality and adequacy challenges, it has failed to make the showing required of it under 15 U.S.C. §77z-1(a)(3)((B)(iii)(I)(cc) to trigger the most adequate plaintiff presumption. The motions of the other lead plaintiff movants should not be considered because they each claim a smaller financial interest than the Personal Investment Funds. *See Sofran v. LaBranche & Co.*, 220 F.R.D. 398, 402 (S.D.N.Y. 2004) (quoting *In re Cavanaugh*, 306 F.3d 726, 732 (9th Cir. 2002)) ("'So long as the

plaintiff with the largest losses satisfies the typicality and adequacy requirements, he is entitled to lead plaintiff status'"). Accordingly, the Personal Investment Funds respectfully request that the Court deny the competing motions, recognize the Personal Investment Funds as the presumptive lead plaintiff and grant its motion in full.[2]

II. ARGUMENT

A. The PSLRA Framework

Section 27 of the PSLRA provides that, in securities class actions, courts "shall appoint as lead plaintiff(s) the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of the class members." 15 U.S.C. §77z-1(a)(3)(B)(i). In determining which class member is "the most adequate plaintiff," the PSLRA provides that:

> [T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under this Act is the person or group of persons that
>
> (aa) has either filed the complaint or made a motion in response to a notice . . .
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) ***otherwise satisfies the requirements of Rule 23*** of the Federal Rules of Civil Procedure.

15 U.S.C. §77z-1(a)(3)(B)(iii)(I) (emphasis added).

Once a court determines that a movant has the largest financial interest in the litigation ***and*** otherwise satisfies the requirements of Rule 23, that movant triggers a rebuttable presumption that it is the most adequate plaintiff. *Id.*

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[2] Notably, when the NCRS and the Banyan Fund are removed from the Institutional Investor Group, the Personal Investment Funds (with losses of $1.5 million) represent the largest financial interest of the remaining movants.

At first glance, the Institutional Investor Group may appear to be the most adequate plaintiff because it claims the largest financial interest. However, "a movant's financial interest is just a beginning point." *In re Cable & Wireless, PLC, Sec. Litig.*, 217 F.R.D. 372, 377 (E.D. Va. 2003). For that reason, the PSLRA "does not permit courts simply to 'presume' that the movant with 'the largest financial interest in the relief sought by the class' satisfies the typicality and adequacy requirements." *In re Cendant Corp. Litig.*, 264 F.3d 201, 264 (3d Cir. 2001).

Here, the Institutional Investor Group cannot "otherwise satisf[y]" the PSLRA's requirements. 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc). Rather, the Personal Investment Funds, who possess the largest financial interest of any movant which is also adequate and typical, should be designated the presumptive lead plaintiff and the Personal Investment Funds' motion should be granted in its entirety. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. LaBranche & Co.*, 229 F.R.D. 395, 408 (S.D.N.Y. 2004) (holding that the Court has an "ultimate obligation to appoint as lead plaintiff the member or members of the purported plaintiff class who are 'most capable of representing the interests of the class members'").

B. The Institutional Investor Group Is Not the Presumptive Lead Plaintiff

1. NCRS Cannot Make the Adequacy Showing Required Under the PSLRA

The extensive connections between and among defendant Bowles, Treasurer Cowell and NCRS prevent the Institutional Investor Group from establishing that it "otherwise satisfies the requirements of Federal Rule of Civil Procedure 23." 15 U.S.C. §77z-1(a)(3)(B)(iii)(I)(cc). *First*, the combination of Bowles' role as a defendant individually, and one with oversight of not one other defendant, but ***two*** of the primary wrongdoers in this case, together with his extensive longstanding entanglements with NCRS and its sole trustee, confirm that the Institutional Investor Group "has

issues and interests atypical of and antagonistic to those of the rest of the class." *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 455-56 (S.D. Tex. 2002) (holding that the relationship between a lead plaintiff movant's investment advisor and Enron "could make" the movant subject to unique defenses).

Second, the firm which defendant Bowles founded, and serves as senior advisor to, has provided NCRS with astounding investment returns of 35% annually and an average of 19% over three years, resulting in $13 million in profit for NCRS. *See* Rosenfeld Decl., Ex. A. The relationship with defendant Bowles is clearly one that NCRS values.

Third, Crandall Bowles, defendant Bowles' wife (herself a Board member of J.P. Morgan Chase & Co., the parent company of underwriter defendant J.P. Morgan Securities LLC), is a lead contributor to Treasurer Cowell's reelection campaign. *See* Rosenfeld Decl., Ex. C. In fact, Mr. and Mrs. Bowles opened their home for a Cowell fundraiser. *Id.*, Ex. D. Thus, the sole trustee of NCRS is and has been financially supported by a ***defendant*** in this action, a defendant who sits on the Boards of both Facebook and Morgan Stanley. *See, e.g., Epifano*, 130 F.R.D. at 300 (denying motion where, if proposed class representative would be certified, "counsel for the class might not conduct as rigorous an examination of potential claims" against the representative's husband who was involved in the selling group of the IPO at issue). While the relationship at issue in *Epifano*, and unlike here, was that of a married couple plaintiff/defendant, the concern is nonetheless the same: NCRS will not be "as rigorous" in pursuing its claims against defendant Bowles, the friend and supporter of its sole trustee, or the companies that he is affiliated with.

These extensive relationships between the North Carolina Treasurer, NCRS and a key defendant in these actions are atypical of other members of the class. The conflicts that arise from these various entanglements also means that the Institutional Investor Group cannot be appointed as

lead plaintiff as its constituent members are, at a minimum, "subject to" adequacy challenges. *See e.g., In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 40 (2d Cir. 2009) (noting adequacy is not met if the class representative is "subject to any 'unique defenses which threaten to become the focus of the litigation'") (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59 (2d Cir. 2000)); *Gary Plastic*, 903 F.2d at 180 (emphasis added; internal citations omitted) ("[r]egardless of whether the issue is framed in terms of the typicality of the representative's claims or the adequacy of its representation, ***there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it***."); *Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 476 (S.D.N.Y. 1989) ("Whether the information to which these individuals had access would be relevant to a decision to purchase Calgroup securities, and whether plaintiffs actually relied on such information in their decision to purchase, are difficult factual questions which cannot be resolved at this stage of the litigation. However, whether these defenses will be successful is of no matter. The fact that plaintiffs will be subject to such defenses renders their claims atypical of other class members").[3]

2. The Banyan Fund Is an Atypical and Inadequate Lead Plaintiff

The Institutional Investor Group is also, at a minimum, "subject to" typicality and adequacy challenges because the Banyan Fund made ***100%*** of its class period purchases of Facebook stock on May 21, 2012 and May 22, 2012, ***after*** *Reuters* had already publicly reported on Facebook's revision to its guidance – the core misrepresentation and omission from the IPO Offering Materials, ***as***

[3] Importantly, another judge of this District previously declined to appoint the NCRS as lead plaintiff, despite the NCRS possessing the largest claimed financial interest of any lead plaintiff movant. *See Kuriakose*, 2008 U.S. Dist. LEXIS 95506.

alleged by the Banyan Fund's own counsel. *Braun* Action Complaint, ¶¶39-40. *See In re Healthsouth*, 213 F.R.D. at 459 (denying motion for class certification where plaintiffs "were aware of the very facts the plaintiffs claim were withheld by the defendants or that caused certain statements by defendants to be misleading"). As such, "the timing of [the Banyan Funds'] purchases undermines any causal nexus between the Defendants' alleged misrepresentation and the resulting injury." *In re Cardinal Health, Inc. Sec. Litig.*, 226 F.R.D. 298 (N.D. Ohio 2005).

The Banyan Fund's first of two purchases was made on May 21, 2012 – two days ***after*** *Reuters* reported on May 19, 2012 that Facebook had reduced its guidance during a road show. *See Braun* Action Complaint, ¶39 ("Information about certain underwriters' concerns about Facebook's profitability began to surface on May 19, 2012 when *Reuters* reported . . . that Facebook . . . altered its guidance for research earnings last week, during the road show, a rare and disruptive move."). The Banyan Fund's second purchase – of nearly 450,000 shares – was made ***after*** a second *Reuters* article was published on May 22, 2012 entitled "Insight: Morgan Stanley cut Facebook estimates just before IPO" provided further details of the earnings revision. *See Braun* Action Complaint, ¶40 ("Additional information surfaced on May 22, 2012 . . . when *Reuters* reported that Facebook's lead underwriters, Morgan Stanley, JP Morgan and Goldman Sachs, all reduced their earnings forecast for Facebook in the middle of the IPO roadshow . . . .").

Thus, the Banyan Fund is not an adequate or typical investor since its ***only*** purchases of Facebook stock were made ***after*** it was already publicly reported that Facebook altered its earnings guidance. *See Gary Plastic*, 903 F.2d at 180 (affirming denial of class certification after district court found class representative "subject to" unique defenses because of its continued purchases of securities despite having notice of the alleged fraud); *see also Faris v. Longtop Financial Techs. Ltd.*, No. 11-cv-3658 (SAS), 2011 U.S. Dist. LEXIS 112970 (S.D.N.Y. Oct. 4, 2011) ("These post-

disclosure purchases suggest that these three members invested in Longtop securities notwithstanding notice of defendants' misstatements and omissions. These unusual trading patterns may well undermine the ability of these three members to assert the fraud-on-the-market presumption of reliance, thereby rendering them inadequate class representatives"); *Rocco v. Nam Tai Elecs., Inc.*, 245 F.R.D. 131, 136 (S.D.N.Y. 2007) ("it has been recognized that a 'named plaintiff who is subject to an arguable defense of nonreliance on the market has been held subject to a unique defense, and therefore, atypical of the class under Rule 23(a)(3)'"); *Koenig v. Benson*, 117 F.R.D. 330, 335-36 (E.D.N.Y. 1987) ("there is a concern if a named plaintiff is subject to 'unique defenses' concerning his individual reliance, then attention will be diverted away from issues common to the class. This would impair his ability to act as a representative for the class. Also, questions of individual reliance may place the materiality of the alleged misrepresentations into doubt [citations omitted]."); *Kovaleff v. Piano*, 142 F.R.D. 406, 407-08 (S.D.N.Y. 1992); *cf. Goldstein v. Puda Coal, Inc.*, 827 F. Supp. 2d 348 (S.D.N.Y. 2011) (in a fraud lawsuit, appointing investor as lead plaintiff who purchased ***additional*** stock after a negative investigative report was published of unconfirmed allegations against the defendant company).

The situation at bar is akin to that faced by Judge Algenon L. Marbley in *In re Cardinal Health*, where the court refused to appoint the State of New Jersey, Department of Treasury, Division of Investment because its purchases of Cardinal Health coincided with the Company's revelation of the fraud. As the *Cardinal Health* court explained:

> [c]ompeting movants have argued that New Jersey began buying Cardinal at almost exactly the same time that Cardinal Health began to disclose publicly the ongoing investigations. The timing of New Jersey's purchases undermines any causal nexus between the Defendants' alleged misrepresentation and the resulting injury. It will be difficult to argue that the presumptive Lead Plaintiff incurred the vast bulk of its injury after Cardinal acknowledged that its accounting methodologies were under investigation. New Jersey's trading patterns will make it susceptible to claims that New Jersey did not rely on the Defendants' alleged misrepresentations when

> purchasing Cardinal stock. Thus, the Court finds the presumption of typicality and adequacy rebutted.

226 F.R.D. at 310.

The court in *Enron* similarly declined to appoint an investor as lead plaintiff who purchased its shares following a negative disclosure:

> ***FSBA's purchase of Enron stock between October 19-November 16, 2001 after the initial public disclosure . . . creates a conflict of interest with those who purchased stock before the disclosure***.
>
> * * *
>
> In this case, in light of the factual scenario described below, these unique defenses are likely to more than distract FSBA from duties of Lead Plaintiff. While FSBA argues that those Plaintiffs asserting conflicts of interest are merely speculating and have no proof, which is required by the statute, to support their allegations, what evidence has been submitted, though largely media articles, leads the Court to find that the information raises more than the mere specter of antagonistic interest and unique defenses to rebut the presumption that FSBA is the most adequate Lead Plaintiff. ***In good conscience this Court cannot endanger this litigation by ignoring the issues created by FSBA's unique involvement with Enron***.

206 F.R.D. at 455-56 (emphasis added).

Aside from the timing of its purchases, the Institutional Investor Group's motion should also be denied because, as a hedge fund, the Banyan Fund, and unlike traditional investors and other class members, admittedly trades "on the basis of its assessment of dislocations (*i.e.*, when securities are not correctly priced and cause a sudden repricing) and correlations (*i.e.*, when markets or securities move up or down concurrently with other markets or securities in a way not attributable solely to chance) between markets" and "changes its positions frequently in response to shifting conditions in order to control the risk in its portfolio." Rosenfeld Decl., Ex. E. Thus, defendants will raise unique challenges to the Banyan Fund's typicality based on its trading strategy. *See In re MicroStrategy*, 110 F. Supp. 2d at 437 (denying the appointment of a hedge fund because it "engages in transactions far beyond the scope of what a typical investor contemplates."); *In re Terayon Commc'ns Sys., Sec.*

Litig., No. C 00-01967 MHP, 2004 U.S. Dist. LEXIS 3131, at *24 (N.D. Cal. Feb. 23, 2004) (failing to appoint a movant who engages in unique trading strategies because of the potential "seeds of discord between lead plaintiffs and the remaining plaintiffs"); *In re Bank One S'holders Class Actions*, 96 F. Supp. 2d 780, 784 (N.D. Ill. 2000) (declining to appoint a hedge fund as lead plaintiff who engaged in unique trading strategies); *In re Safeguard Scientifics*, 216 F.R.D. 577, 582-583 (E.D. Pa. 2003) (denying lead plaintiff's motion for class certification due to lead plaintiff's unique trading strategy and citing that lead plaintiff would not be able to prove reliance, which would "impose an unnecessary disadvantage on the class.").

C. The Motion of the Personal Investment Funds Should Be Granted

With losses of $1.5 million, the Personal Investment Funds represent the largest financial interest of any movants not subject to adequacy or typicality challenges.

1. The Personal Investment Funds Have the Largest Financial Interest

Excluding NCRS and the Banyan Fund, the financial interest of the movants are as follows:

Name of Movant	Claimed Financial Interest
(Personal Investment Funds) Eiffel Tower Ventures, LLC, The GAF Unit Trust, White Dune LLC	$1.5 million (with Eiffel claiming individual losses of $840,000)
(Institutional Investor Group) Arkansas Teacher Retirement System, Fresno County Employees' Retirement Association	$1.36 million (with Arkansas claiming individual losses of $782,000)
KBC Asset Management NV, Employees' Retirement System of the Government of the Virgin Islands	$645,000
(Facebook Investors Group) Desmond Doris, Donald	$524,000

Pompliano, Eric Rand, Ranford Williams	
William H. Anhood and Jose and Mary Galvan	$414,600
(Facebook Investor Group) Ramesh Purohit, Karen Stewart, Scott Wilson	$180,000
Rick Pond	$83,981
Alexis Alexander, as custodian for Chloe Sophie Alexander, Robert Herpst and Vijay Akkaraju	$19,000
Michael Spatz and Sanjay Israni	$4,430

Thus, the Personal Investment Funds have the largest financial interest in this litigation of $1.5 million, with Eiffel Tower Ventures LLC individually claiming losses of $840,000.

2. The Personal Investment Funds Are Adequate and Typical

In addition to possessing the largest financial interest in the relief sought by the class, the Personal Investment Funds have claims that are typical of the other members of the class. The Personal Investment Funds are also adequate to represent the class, and they have selected counsel as lead counsel that is adequate to represent the class. Specifically, the claims of the Personal Investment Funds are typical of those of other class members since their claims and the claims of other class members arise out of the same course of events. The Personal Investment Funds are also adequate representatives of the class – their interests are clearly aligned with the members of the class, and there is no evidence of any antagonism between their interests and those of the other members of the class.

The Personal Investment Funds have selected Robbins Geller Rudman & Dowd LLP ("Robbins Geller") as lead counsel. Robbins Geller has substantial experience in the prosecution of shareholder and securities class actions, including serving as lead counsel in *In re Enron Corp. Securities Litigation*, No. H-01-3624 (S.D. Tex.), in which Robbins Geller achieved the largest recovery ever in a shareholder class action. Specifically, the court in *Enron* stated:

> The firm is comprised of probably the most prominent securities class action attorneys in the country. It is not surprising that Defendants have not argued that counsel is not adequate. Counsel's conduct in zealously and efficiently prosecuting this litigation with commitment of substantial resources to that goal evidences those qualities. . . throughout this suit.

In re Enron Corp. Sec. Derivative & "ERISA" Litig., 529 F. Supp. 2d 644, 675 (S.D. Tex. 2006). Moreover, Robbins Geller attorneys have served as lead counsel in hundreds of securities cases and have recovered tens of billions of dollars for defrauded shareholders. These representations have resulted in: (i) the largest stock option backdating class action recovery: *UnitedHealth*, $925 million; (ii) the largest opt-out (non-class) securities litigation recovery: *WorldCom*, $651 million; and (iii) the largest merger and acquisition class action recovery: *Kinder Morgan*, $200 million. Robbins Geller has also been appointed by this Court as lead counsel in numerous cases, including *Sofran v. LaBranche & Co.*, 03-cv-8201 (RWS); *In re NYSE Specialists*, 03-cv-8264 (RWS) and *In re Giant Interactive Group, Inc. Sec. Litig.*, 07-cv-10588 (RWS). Thus, the Personal Investment Funds have selected adequate counsel to represent the class.

D. The Remaining Motions Should Be Denied

The remaining motions, made on behalf of investors who do not represent the largest financial interest, should be denied since they do not satisfy the PSLRA's criteria for being appointed as lead plaintiff.

III. CONCLUSION

For all the foregoing reasons, the Personal Investment Funds respectfully request that the Court: (i) appoint them as lead plaintiff; (ii) approve their selection of lead counsel; and (iii) grant such other relief as the Court may deem just and proper.

DATED: August 9, 2012

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
DAVID A. ROSENFELD

/s/ *David A. Rosenfeld*
DAVID A. ROSENFELD

58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
TRIG R. SMITH
DANIELLE S. MYERS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

[Proposed] Lead Counsel for Plaintiffs

CRIDEN & LOVE, P.A.
MICHAEL E. CRIDEN
7301 SW 57th Court, Suite 515
South Miami, FL 33143
Telephone: 305/357-9000
305-357-9050 (fax)

Additional Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, David A. Rosenfeld, hereby certify that, on August 9, 2012, I caused a true and correct copy of the annexed document to be served: (i) electronically on all counsel registered for electronic service for this case; and (ii) by first-class mail to any additional counsel.

/s/ David A. Rosenfeld
David A. Rosenfeld