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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE CHARLES SCHWAB
SECURITIES LITIGATION.

No. C 08-01510 WHA

This Document Relates to:

All Actions.

**ORDER APPOINTING LEAD
PLAINTIFF**

INTRODUCTION

Pursuant to the Private Securities Litigation Reform Act, this order appoints the following members of the YieldPlus Investor Group as the lead plaintiff for the above-named action: Kevin O'Donnell, James Coffin, John Hill, David and Gretchen Mikelonis, and Robert Dickson. Because N. Richard Kimmel, another proposed group member, is unable to travel for litigation purposes, he is not appointed as a member of the group. Accordingly, this order **DENIES** the motions of other parties for appointment as lead plaintiff. This order also sets forth the procedure to be used for the selection and approval of class counsel.

STATEMENT

This is a putative class action that arises from allegations of false and misleading statements in violation of federal securities laws. Plaintiffs are individuals who purchased shares of Schwab YieldPlus Funds Investor Shares and/or Schwab YieldPlus Funds Select Shares from March 2005 through March 2008. Defendants the Charles Schwab Corporation, Charles Schwab & Co. Inc., Charles Schwab Investment Management, Inc., and individuals

1 Charles Schwab, Evelyn Dilsaver, Randall W. Merk, George Pereira, Gregory Hand, Donald F.
2 Doward, Mariann Byerwalter, William A. Hasler, Robert G. Holmes, Gerald B. Smith, Donald
3 R. Stephens, Michael W. Wilsey, and Jeff Lyons (collectively “Charles Schwab”) are the funds’
4 underwriter, investment advisor, officers, and directors.¹

5 Plaintiffs allege that defendants violated the disclosure requirements of federal securities
6 laws. Specifically, the registration statements and prospectuses from March 2005 through
7 March 2008 allegedly contained material misstatements or omissions relating to, *inter alia*,
8 the diversification of the funds and the extent to which investments were assigned to sub-prime
9 mortgage backed and related securities. Because Charles Schwab failed to tell investors that
10 they deviated from investment guidelines, purchasers of these shares were exposed to high-risk,
11 mortgage-backed, not well-diversified, illiquid investments. Investors consequently incurred
12 financial loss.

13 On March 18, 2008, investor Mike Labins was the first to file a lawsuit against
14 Charles Schwab in any district. That same day, he published a notice over the national wire
15 service, *PR Newswire*, informing investors that he had just filed a class action lawsuit against
16 Charles Schwab and that investors had sixty days to seek appointment as lead plaintiff.
17 The notice also described the general allegations against defendants.

18 Several lead-plaintiff candidates filed motions for appointment: the Schwartz Group,
19 the YieldPlus Investor Group, the Peate Group, W. Merrill Glasgow, Karen Cunningham, Mark
20 Kale, Monte Lewis, and Nils and Jill Flanzraich. All but the Schwartz Group and YieldPlus
21 Investor Group withdrew or did not oppose the motions by other lead-plaintiff candidates. The
22 Court then requested that each lead-plaintiff candidate individually file a questionnaire about
23 his or her qualifications, experience in managing litigation, transactions in the shares at issue,
24 and any potential conflicts related to the instant securities case. Both remaining candidates
25 submitted answers to the questionnaire. A hearing on the appointment of lead plaintiff was held
26 on July 2, 2008. Candidate representatives and their counsel all appeared in court. Three
27 members of the YieldPlus Group (James Coffin, John Hill, and Robert Dixon) and two
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¹ Not all candidates for lead plaintiff named all of the same individual defendants.

1 members of the Schwartz Group (Mr. and Mrs. Schwartz) were present. Candidates were
2 questioned on their qualifications.

3 The six members of the original YieldPlus Group were: married couple David and
4 Gretchen Mikelonis (\$227,277.27 loss), Kevin O'Donnell (\$312,865.77 loss), James Coffin
5 (\$309,548.14 loss), John Hill (\$240,914.42 loss), Robert Dickson (\$137,496.82 loss), and N.
6 Richard Kimmell (\$210,156.87 loss). While the Mikelonis' do not have the largest financial
7 interests at stake, Mr. Mikelonis, a retired attorney, has had substantial litigation experience.
8 As vice president and general attorney (and then senior vice president and general counsel) of
9 Consumers Energy Company, he was responsible for all litigation involving the company. This
10 responsibility included closely supervising and implementing legal strategy. Since his
11 retirement, Mr. Mikelonis has served as secretary for a group of employees/investors who
12 objected to certain aspects of an ERISA settlement with CMS Energy Corporation, including an
13 objection to fees and expenses. He and another retired officer of Consumers Energy Company
14 also objected to a class action settlement and participated in a related fairness hearing in a
15 shareholder class action suit with CMS Energy Corporation.

16 Mr. O'Donnell is a retired attorney who practiced in the fields of personal injury and
17 product liability. Mr. Coffin is an attorney experienced in practicing real estate law in
18 Redlands, California. He has also been involved in mediations at JAMS. Mr. Dickson is the
19 managing director of a financial consulting service and the CFO of a medical-device company.
20 He has had extensive experience as a financial officer who worked closely with legal counsel on
21 corporate governance matters. Mr. Hill is a retired lead engineer for Lockheed Missile
22 Systems, where he resolved problems relating to the manufacture, design, and purchase of new
23 missiles.

24 Members of the YieldPlus Group have met and conferred and adopted a detailed
25 governance structure. They will have a three-person management committee, of which Mr.
26 Mikelonis will be the chair, Mr. Coffin the vice chair, and Mr. O'Donnell the secretary. They
27 have already discussed how they will make major case-determinative decisions (*e.g.*, settlement,
28 claims, dismissal) and deal with matters involving counsel and counsel's fees and expenses.

1 The Schwartz Group, on the other hand, is a family group, consisting of husband and
2 wife trustees and related beneficiaries. They allege a total loss of \$231,642.10. Group
3 members are: Richard Schwartz, trustee of two family trusts; Casa Marin, a corporation wholly
4 owned by Mr. Schwartz; and Sheri Bell, Mr. Schwartz's wife, as an individual on her own
5 behalf and on behalf of her brother C. Scott Bell, and as a trustee of another family company.
6 Mr. Schwartz is engaged in a family furniture business.

7 All candidates are investors who purchased Charles Schwab shares during the class
8 period. The YieldPlus Group alleges a total loss of \$1.4 million as a result of the transactions in
9 Charles Schwab securities. The Schwartz Group claims that it incurred losses totaling
10 \$231,642.10. Although the method of loss valuation has not been agreed upon, nobody disputes
11 that Mr. O'Donnell, a member of the YieldPlus Group, has the largest individual loss.

12 ANALYSIS

13 Under the PSLRA, the Court "shall appoint as lead plaintiff the member or members of
14 the purported plaintiff class that the court determines to be the most capable of adequately
15 representing the interests of the class members in accordance with this subparagraph."
16 15 U.S.C. 78u-4(a)(3)(B)(i). The PSLRA creates a rebuttable presumption that the most
17 adequate plaintiff should be the plaintiff who: (1) has brought the motion for appointment of
18 lead counsel in response to the publication of notice; (2) has the "largest financial interest"
19 in the relief sought by the class; and (3) otherwise satisfies the requirements of FRCP 23.
20 15 U.S.C. 78u-4(a)(3)(b)(I)(aa)-(cc). The above presumption may be rebutted only upon proof
21 that the presumptive lead plaintiff (1) will not fairly and adequately protect the interests of the
22 class or (2) is subject to "unique defenses" that render such plaintiff incapable of adequately
23 representing the class. 15 U.S.C. 78u-4(a)(3)(B)(iii)(II)(aa)-(bb).

24 The PSLRA sets up a three-step inquiry for appointing a lead plaintiff. First, a plaintiff
25 files the action and posts notice, allowing other lead-plaintiff candidates to file motions.
26 Next, the district court considers which of those plaintiffs has the largest financial interest in the
27 action, and whether that plaintiff meets FRCP 23's requirements. Finally, other candidates have
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1 the opportunity to rebut the presumption that the putative lead plaintiff can adequately represent
2 the class. *In re Cavanaugh*, 306 F.3d 726, 729–730 (9th Cir. 2002).

3 **1. LARGEST FINANCIAL INTEREST.**

4 In the Ninth Circuit, the test for which plaintiff has the largest financial interest is
5 strictly applied. *Id.* at 729. The PSLRA does not indicate a specific method for calculating
6 which plaintiff has the “largest financial interest.” *See* 15 U.S.C. 78u-4(a)(3)(B)(iii)(I)(bb). In
7 this district, two judges have equated “largest financial interest” with the largest amount of
8 potential recovery. *See In Re Critical Path, Inc. Sec. Litig.*, 156 F.Supp.2d 1102, 1107–08
9 (N.D. Cal. 2001) (Orrick, J.); *Weisz v. Calpine Corp.*, 2002 WL 32818827 (N.D. Cal. 2002)
10 (Armstrong, J.). Here, the aggregate loss of the members of the YieldPlus Group is the greatest.
11 Even without adding up the group losses, it is undisputed that some of its individual members,
12 such as Mr. O’Donnell, have the largest financial interest (\$312,865.77), which exceeds the
13 *combined* losses of the Schwartz Group.

14 **2. REQUIREMENTS OF TYPICALITY AND ADEQUACY UNDER FRCP 23.**

15 The district court must then inquire whether the putative lead plaintiff satisfies the
16 requirements of FRCP 23(a). *In re Cavanaugh*, 306 F.3d at 730. The inquiry focuses on the
17 “typicality” and “adequacy” requirements, as the other requirements in FRCP 23 of numerosity
18 and commonality would preclude class certification by themselves. *Id.* at n5. “Once [the court]
19 determines which plaintiff has the biggest stake, the court must appoint that plaintiff as lead,
20 unless it finds that he does not satisfy the typicality or adequacy requirements. . .” *Id.* at 732.

21 The “typicality” requirement is satisfied when the named plaintiffs have (1) suffered the
22 same injuries as class members; (2) as a result of the same course of conduct; and (3) their
23 claims are based on the same legal issues. *Armour v. Network Assoc., Inc.*, 171 F. Supp.2d
24 1044, 1050 (N.D. Cal. 2001) (Jenkins, J.). In the instant action, members of the YieldPlus
25 Group suffered the same injuries as class members, namely that they suffered financial losses
26 relating to alleged misrepresentations in defendants’ registration statements and prospectuses.
27 Group members’ injuries arose from the same course of conduct, the alleged false financial
28 reporting. Finally, the claims are based on the same legal issues.

1 The “adequacy” requirement is satisfied when the proposed lead plaintiff does not have
2 interests antagonistic to the proposed class. *In re Emulex Corp. Secur. Litig.*, 210 F.R.D. 717,
3 720 (C.D. Cal. 2002) (Taylor, J.). YieldPlus Group members have shown the same interest as
4 the rest of the class. They wish to recover against Charles Schwab for the alleged damages
5 suffered because of the improper disclosures. Three members of the group were present at the
6 hearing. Everybody’s answers to the lead-plaintiff questionnaire were satisfactory.
7 Each member is well-qualified to manage litigation of this type and has specialized experience
8 that will improve representation of the class. They have agreed to perform due diligence in
9 selecting class counsel. Furthermore, they have a decision-making apparatus, elected officers,
10 met and conferred, and has a ready means of communication. This order does, however, modify
11 the composition of the lead plaintiff group; because N. Richard Kimmel is unable to travel, he
12 will not be included.

13 **3. ATTEMPTS TO REBUT PRESUMPTION.**

14 Other plaintiffs may rebut the presumption that the putative lead plaintiff has satisfied
15 the requirements of typicality and adequacy. *Cavanaugh*, 306 F.3d at 730. The Schwartz
16 Group first argues that the YieldPlus Group is a cobbled-together hodgepodge of unrelated
17 investors.

18 After passage of the PSLRA, some plaintiffs counsel tried to amass large aggregations
19 of groups, each group then put forth as a lead plaintiff candidate with the greatest combined
20 loss. The undersigned refused to recognize such aggregation on the ground that such an
21 amorphous, incoherent group would have no decisionmaking apparatus and would be at the
22 complete mercy of the lawyers, the very thing the PSLRA sought to stop. *In re Network*
23 *Assocs. Inc.*, 76 F. Supp. 2d 1017 (N.D. Cal. 1999) (Alsup, J.).

24 “Courts must . . . inquire whether a movant group is too large to represent the class in an
25 adequate manner. At some point, a group becomes too large for its members to operate
26 effectively as a single unit. When that happens, the PSLRA’s goal of having an engaged lead
27 plaintiff actively supervise the conduct of the litigation and the actions of class counsel will be
28 impossible to achieve, and the court should conclude that such a movant does not satisfy the

1 adequacy requirement.” *In re Gemstar-TV Guide Intern., Inc. Securities Litigation*, 209 F.R.D.
2 447, 450 (C.D. Cal. 2002) (Manella, J.).

3 *In re Gemstar* dealt with a group comprised of three institutional and four individual
4 unrelated investors that had “few apparent connections beyond their common desire to be
5 appointed lead plaintiffs in this action.” *Ibid.* The district court found that group members
6 provided little detail as to the procedures needed to prosecute the action, how members and
7 attorney’s would conduct regular meetings (given the group’s size and the fact that relevant
8 players were scattered throughout the world), how the class would be able to obtain the largest
9 possible recovery when all seven proposed lead plaintiffs were sure to seek “costs and
10 expenses” at the end of proceedings, or any of the “procedures and rules that will govern
11 [their] decision making process.” *Id.* at 451.

12 The same concerns in *In re Gemstar* are not present in the instant action. With the
13 exclusion of Mr. Kimmell, the YieldPlus Group only has six individual group members.
14 Counsel for and individual members of the YieldPlus Group have shown that they create a
15 cohesive, coherent, and manageable group with a decisionmaking apparatus. Mr. Mikelonis, for
16 example, has substantial experience in managing counsel and objecting to the terms of two class
17 action settlements. The other members are financially savvy and have suffered extensive losses.
18 Moreover, this order does not see how the super-majority decisionmaking mechanism will be
19 problematic.

20 The Schwartz Group further argues that the YieldPlus Group members have already
21 settled on Hagens Berman Sobol Shapiro LLP as its counsel. It will therefore shirk its duty to
22 exercise due diligence when selecting class counsel. This order disagrees. It is clear that
23 YieldPlus Group members have the right to terminate the relationship at any time. At the
24 hearing, group members also represented to the Court that they will exercise due diligence and
25 interview other firms. Accordingly, the members of the YieldPlus Group are the proper lead
26 plaintiff.

PROCEDURE FOR SELECTING AND APPROVING CLASS COUNSEL

Under the PSLRA, “[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.” 15 U.S.C. 78u-4(a)(3)(B)(v).

Selection and approval of class counsel are important responsibilities for the lead plaintiff and the court. The selection and approval require an assessment of the strengths, weaknesses and experience of counsel as well as the financial burden – in terms of fees and costs — on the class. *Wenderhold v. Cylink Corp.*, 191 F.R.D. 600, 602–03 (N.D. Cal. 2000) (Walker, J.).

Any important decision made by a fiduciary should be preceded by due diligence.

A lead plaintiff is a fiduciary for the investor class. No decision by the lead plaintiff is more important than the selection of class counsel. Consequently, the lead plaintiff should precede his or her choice with due diligence. The extent of such due diligence is a matter of judgment and reasonableness based on the facts and circumstances. Lead plaintiff must also expressly consider amongst themselves what difficulties and conflicts might arise because of another action represented by Hagens Berman Sobol Shapiro LLP, *Levin v. The Charles Schwab Corp., et al.*, C 08-02487 WHA.

The lead plaintiff should immediately proceed to perform their due diligence in the selection of class counsel, and to interview appropriate candidates, and through counsel, move for the appointment and approval of their selected counsel no later than **AUGUST 14, 2008**.

The motion should be accompanied by declarations from the lead plaintiff explaining the due diligence undertaken by each with respect to the selection of class counsel. The declarations should also explain why the counsel selected was favored over other potential candidates.

The declarations should be filed under seal and not served on defendants. The motion for approval of lead plaintiff’s choice of counsel, however, should be served on defense counsel.

No hearing will be held on the motion unless the Court determines that it would be beneficial.

Once class counsel is approved, the first order of business will be to file a consolidated complaint. This will be done by **SEPTEMBER 25, 2008**. Defendant may then file a motion to

1 dismiss (or answer) by **OCTOBER 30, 2008**, any such motion to be heard on the normal 35-day
2 track. Other deadlines for the case management conference and alternative dispute resolution
3 are hereby **VACATED**. If lead plaintiff eventually selects counsel unfamiliar with the facts and
4 circumstances of this case, the Court will consider giving more time for counsel to prepare.

5 This appointment is conditioned on each member of the YieldPlus Group filing a
6 certification in writing, **WITHIN SEVEN CALENDAR DAYS** that he or she has read this order and is
7 willing and able to meet the schedule and its fiduciary obligations.

8 Finally, this order thanks the Schwartz Group for its diligence in pursuing these claims
9 and moving for lead plaintiff.

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11 **IT IS SO ORDERED.**

12 Dated: July 3, 2008.



13 _____
14 WILLIAM ALSUP
15 UNITED STATES DISTRICT JUDGE
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