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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

LAURA POTTER, Individually and on)	No. 3:15-cv-07658-MAS-LHG
Behalf of All Others Similarly Situated,)	
) <u>CLASS ACTION</u>
Plaintiff,)	
vs.)	MEMORANDUM OF LAW IN
) SUPPORT OF TIAA-CREF'S
VALEANT PHARMACEUTICALS)	MOTION FOR CONSOLIDATION,
INTERNATIONAL, INC., et al.,)	APPOINTMENT AS LEAD
) PLAINTIFF AND APPROVAL OF
Defendants.)	ITS SELECTION OF LEAD
) COUNSEL

[Caption continued on following page.]

MOTION DAY: January 19, 2016

Oral Argument Requested If Opposition
Is Filed

LIHAO CHEN, Individually and on) No. 3:15-cv-07679-MAS-LHG
Behalf of All Others Similarly Situated,)
) CLASS ACTION

Plaintiff,)

vs.)

VALEANT PHARMACEUTICALS)
INTERNATIONAL, INC., et al.,)

Defendants.)

JUSAN YANG, Individually and on) No. 3:15-cv-07746-MAS-DEA
Behalf of All Others Similarly Situated,)
) CLASS ACTION

Plaintiff,)

vs.)

VALEANT PHARMACEUTICALS)
INTERNATIONAL, INC., et al.,)

Defendants.)

ALAN FEIN and ARIEL FEIN,) No. 3:15-cv-07809-MAS-LHG
Individually and on Behalf of All Others)
Similarly Situated,) CLASS ACTION

Plaintiffs,)

vs.)

VALEANT PHARMACEUTICALS)
INTERNATIONAL, INC., et al.,)

Defendants.)

TIAA-CREF respectfully submits this memorandum in support of its motion for: (i) consolidation of the above-captioned actions (the “Related Actions”); (ii) appointment as Lead Plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 (“PSLRA”); and (iii) approval of its selection of Robbins Geller Rudman & Dowd LLP as Lead Counsel.¹

I. INTRODUCTION

Four putative class action lawsuits are pending in this District on behalf of purchasers of Valeant Pharmaceuticals International, Inc. (“Valeant” or the “Company”) securities between February 28, 2014 and October 21, 2015 (the “Class Period”) seeking to pursue remedies under the Securities Exchange Act of 1934 (“1934 Act”) against the Company and several senior executive officers.² The PSLRA requires district courts to resolve consolidation before appointing a lead plaintiff in securities cases. *See* 15 U.S.C. §78u-4(a)(3)(B)(ii). Here, the Related Actions should be consolidated because they each assert identical claims against the

¹ “TIAA-CREF” collectively refers to Teachers Insurance and Annuity Association of America (“TIAA”), College Retirement Equities Fund (“CREF”), TIAA-CREF Funds (including the TIAA-CREF Growth & Income Fund and TIAA-CREF Large-Cap Growth Fund), and TIAA-CREF Life Funds (including the TIAA-CREF Life Growth Equity Fund and TIAA-CREF Life Growth & Income Fund).

² The Related Actions are: *Potter v. Valeant Pharms. Int’l, Inc.*, No. 3:15-cv-07658-MAS-LHG (filed Oct. 22, 2015); *Chen v. Valeant Pharms. Int’l, Inc.*, No. 3:15-cv-07679-MAS-LHG (filed Oct. 23, 2015); *Yang v. Valeant Pharms. Int’l, Inc.*, No. 3:15-cv-07746-MAS-LHG (filed Oct. 27, 2015); and *Fein v. Valeant Pharms. Int’l, Inc.*, No. 3:15-cv-07809-MAS-LHG (filed Oct. 30, 2015). All emphasis is added and all citations are omitted unless otherwise noted.

same defendants on behalf of similar classes of investors that purchased Valeant securities during overlapping time periods. *See* Fed. R. Civ. P. 42(a); §III.A., *infra*.

As soon as practicable after its decision on consolidation, the Court “shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions.” *See* 15 U.S.C. §78u-4(a)(3)(B)(ii). The lead plaintiff is the “member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members.” 15 U.S.C. §78u-4(a)(3)(B)(i). TIAA-CREF should be appointed as lead plaintiff because it: (1) timely filed this Motion; (2) has the largest financial interest in the outcome of this litigation of any person or group of persons of which it is aware; and (3) will adequately represent the interests of the class. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii). In addition, TIAA-CREF’s selection of Robbins Geller as lead counsel for the class should be approved. *See* 15 U.S.C. §78u-4(a)(3)(B)(v).

II. FACTUAL AND PROCEDURAL BACKGROUND

Valeant is a specialty pharmaceutical and medical device company that develops, manufactures, and markets a range of branded, generic, and branded generic pharmaceuticals, over-the-counter products, and medical devices, such as contact lenses, intraocular lenses, ophthalmic surgical equipment, and aesthetics devices.

The complaints allege that defendants made numerous false and misleading statements during the Class Period reassuring investors that Valeant’s business strategy was fully compliant with applicable laws, that it had a strong commitment to ethical practices, that it properly trained its staff, that it had strong internal controls to detect improper conduct, and that it was achieving revenue, sales, and profitability

targets by growing “organically,” *i.e.*, by increasing sales volumes for the drugs it developed and acquired. As defendants put it, Valeant’s operating principles were designed to “[p]ut patients and our customers first by maintaining the highest ethical standards in the industry,” while its CEO (J. Michael Pearson) emphasized that “we believe our stock is trading at artificially low levels.”

Contrary to these statements, and unbeknownst to investors, Valeant had formed a secret network of so-called specialty pharmacies to artificially inflate the sale of Valeant drugs using a variety of fraudulent practices. The systemic use of these practices threatened Valeant’s contracts with Pharmacy Benefit Managers (“PBMs”), increased the risk of regulatory scrutiny and sanctions, undermined the true reasons behind Valeant’s reported sales growth during the Class Period, and increased the risk of reputational harm and loss of business to Valeant if these practices were ever disclosed.³ The unethical, illegal, and misleading practices employed included:

- physically altering doctors’ orders – without consent – to require that prescriptions be filled with Valeant branded products rather than generic alternatives;
- using National Provider Identification (“NPI”) numbers assigned to other pharmacies to submit or resubmit claims that had already been or were likely to be rejected;
- submitting false statements to regulators in attempts to obtain a pharmacy license and additional NPIs; and
- automatically refilling prescriptions for Valeant drugs even though patients had no need for refills.

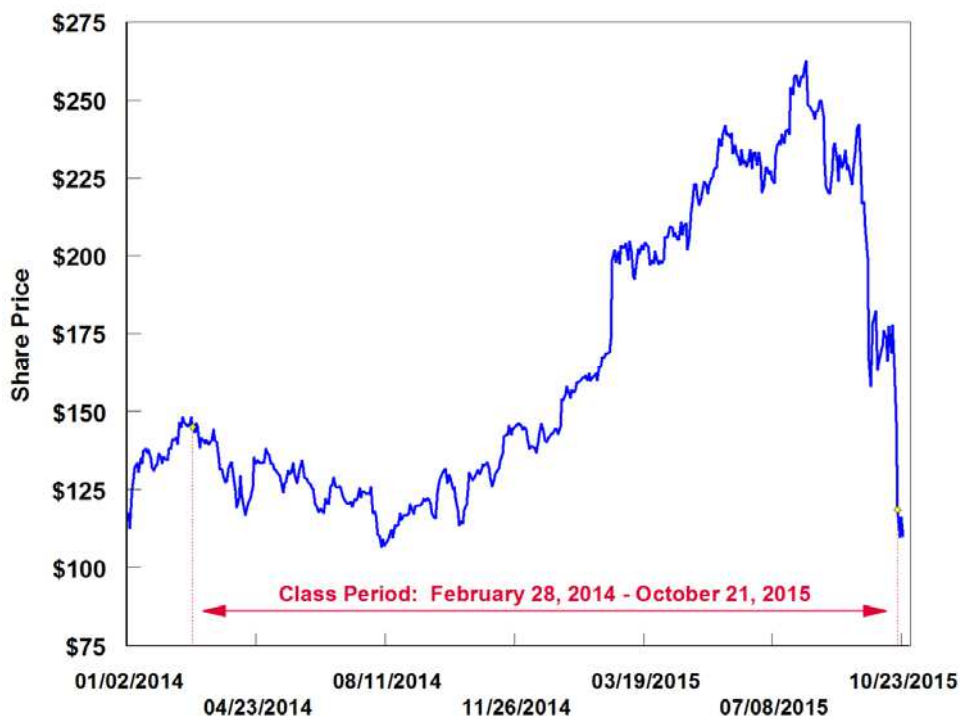
³ Unlike typical specialty pharmacies that dispense drugs requiring special care or refrigeration, the Valeant specialty pharmacy network was created to (and did) drive sales of common treatments for ordinary ailments such as toenail fungus and acne.

Simply stated, Valeant created and used its clandestine network of specialty pharmacies to boost sales and push through massive price increases for Valeant medications that were at risk of not being reimbursed through the retail pharmacy channel and that otherwise would have been substituted with cheaper generics. As a result, Valeant was able to keep the healthcare system paying for inordinately expensive treatments which artificially inflated Valeant's financial results and stock price. While defendants executed this scheme, defendant Pearson pledged nearly 19% of his Valeant stock as collateral for a \$100 million loan from Goldman Sachs, which he used for a variety of personal expenses.

The hub of Valeant's secret specialty pharmacy network was a company named Philidor Rx Services, LLC, which while purportedly independent of Valeant was actually operated with the assistance of Valeant employees. These Valeant employees used aliases like Peter Parker (Spiderman) and Brian Wilson (of The Beach Boys fame) to conceal their involvement. In addition to Philidor (named for a chess strategy), there was a network of seemingly independent local pharmacies and affiliated entities (many of which were also named for chess strategies or moves) that were used to sell Valeant products. Only at the very end of the Class Period, as questions about Valeant's connection to Philidor and these other pharmacies were raised by lawsuits and investigative reporting, did defendants finally admit Valeant had paid \$100 million for a 10-year option to acquire Philidor for a price of zero and had been consolidating Philidor's operations into Valeant's financial statements.

When these troubling disclosures began to reach the market, the United States Department of Justice and Congressional committees opened investigations into

Valeant's business practices and Valeant's stock price lost nearly 70% of its value, falling from a Class Period high of \$262 to below \$80 per share, inflicting several billion dollars of damage upon unwitting investors:



Defendants' time to respond to the four complaints has been extended until after the Court issues an order consolidating the Related Actions and appointing a lead plaintiff. *See* Dkt. No. 17. On December 3, 2015, Magistrate Judge Goodman granted plaintiff Potter's *ex parte* application to serve a document preservation subpoena upon non-party Philidor. *See* Dkt. No. 10.

III. ARGUMENT

A. The Related Actions Should Be Consolidated

The Court may consolidate actions if they "involve a common question of law or fact." Fed. R. Civ. P. 42(a). Here, the Related Actions each assert claims on behalf

of acquirers of Valeant securities during similar periods against similar defendants for alleged violations of the federal securities laws:

COMPLAINT	DEFENDANTS	CLASS PERIOD
<i>Potter v. Valeant Pharms. Int'l, Inc.</i> , No. 3:15-cv-07658-MAS-LHG	Valeant Pharmaceuticals International, Inc., J. Michael Pearson, Howard B. Schiller, Robert L. Rosiello	2/23/15-10/20/15
<i>Chen v. Valeant Pharms. Int'l, Inc.</i> , No. 3:15-cv-07679-MAS-LHG	same	2/28/14-10/21/15
<i>Yang v. Valeant Pharms. Int'l, Inc.</i> , No. 3:15-cv-07746-MAS-LHG	same	2/23/15-10/20/15
<i>Fein v. Valeant Pharms. Int'l, Inc.</i> , No. 3:15-cv-07809-MAS-LHG	same	2/22/15-10/21/15

The factual allegations, class periods, defendants and claims are substantially similar. Accordingly, the Related Actions should be consolidated.

B. TIAA-CREF Should Be Appointed Lead Plaintiff

The PSLRA provides a straightforward, sequential procedure for selecting a lead plaintiff for “each private action arising under [the 1934 Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.” *See* 15 U.S.C. §78u-4(a)(1); *see also* 15 U.S.C. §78u-4(a)(3)(B). First, the pendency of the action must be publicized in a widely circulated national business-oriented publication or wire service not later than 20 days after filing of the first complaint. 15 U.S.C. §78u-4(a)(3)(A)(i). Next, the PSLRA provides that the court shall adopt a presumption that the most adequate plaintiff 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. §78u-4(a)(3)(B)(iii)(I); *see also In re Cendant Corp. Litig.*, 264 F.3d 201 (3d Cir. 2001). Finally, the presumption may be rebutted “only upon proof by a member of the purported plaintiff class” that the presumptively most adequate plaintiff “will not fairly and adequately protect the interests of the class” or “is subject to unique defenses that render such plaintiff incapable of adequately representing the class.” 15 U.S.C. §78u-4(a)(3)(B)(iii)(II); *Cendant*, 264 F.3d at 268.

TIAA-CREF meets each of these requirements and should therefore be appointed as Lead Plaintiff.

1. TIAA-CREF Has Satisfied the PSLRA’s Procedural Requirements

Pursuant to the PSLRA, notice was published on *PR Newswire*, a widely-circulated, national, business-oriented news reporting wire service, on October 22, 2015 advising class members of: (a) the pendency of the action; (b) the claims asserted therein; (c) the proposed Class Period; and (d) the right to move the Court to be appointed as lead plaintiff within 60 days, or by December 21, 2015. *See* Declaration of Samuel H. Rudman in Support of TIAA-CREF’s Motion for Consolidation, Appointment as Lead Plaintiff and Approval of Selection of Lead Counsel (“Rudman Decl.”), Ex. A; 15 U.S.C. §78u-4(a)(3)(A). Thus, pursuant to the

PSLRA, any member of the proposed class may apply to be appointed lead plaintiff by December 21, 2015. As TIAA-CREF has filed its motion within the required time frame, it is entitled to be considered for appointment as lead plaintiff.

2. TIAA-CREF Has the Largest Financial Interest in the Relief Sought by the Class

During the Class Period, TIAA-CREF expended more than \$251 million acquiring in excess of 1.2 million shares of Valeant stock at artificially inflated prices and suffered losses in excess of \$90 million as a result of defendants' alleged wrongdoing. *See* Rudman Decl., Exs. B-C.⁴ To the best of its counsel's knowledge, there are no other plaintiffs with a larger financial interest. Therefore, TIAA-CREF satisfies the PSLRA's prerequisite of having the largest financial interest.

3. TIAA-CREF Satisfies Rule 23's Typicality and Adequacy Requirements

In addition to possessing a significant financial interest, a lead plaintiff must also "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc). Rule 23 of the Federal Rules of Civil Procedure requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class; and [that] the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(3)-(4); *Cendant*, 264 F.3d at 263 (inquiry "should be confined to determining whether the movant has made a prima facie showing of typicality and adequacy").

⁴ TIAA-CREF's loss is \$90.6 million calculated pursuant to the first in, first out (FIFO) method and \$90.5 million calculated pursuant to the last in, first out (LIFO) method.

When making the typicality determination, the court “should consider whether the circumstances of the movant with the largest losses ‘are markedly different or the legal theory upon which the claims [of that movant] are based differ[] from that upon which the claims of other class members will perforce be based.’” *Id.* at 265 (alteration in original). And, in “assessing whether the movant satisfies Rule 23’s adequacy requirement, courts should consider whether it ‘has the ability and incentive to represent the claims of the class vigorously, [whether it] has obtained adequate counsel, and [whether] there is [a] conflict between [the movant’s] claims and those asserted on behalf of the class.’” *Id.* (alteration in original). TIAA-CREF unquestionably satisfies these requirements.

TIAA-CREF serves as the principal retirement system for the nation’s education and research communities, one of the largest retirement systems in the world based on assets under management. *See* Declaration of Jonathan Feigelson, ¶3 (Rudman Decl., Ex. D). Based upon its substantial financial interest, TIAA-CREF is “highly incentivized to maximize the recovery for putative class members harmed by the wrongdoing at Valeant.” *Id.*, ¶4. TIAA-CREF intends to actively direct this litigation via its internal Law and Corporate Governance department, staffed with experienced lawyers, analysts and paralegals. *Id.*, ¶7. As further evidence of its appreciation for the seriousness of the role of lead plaintiff, before filing this Motion, TIAA-CREF “negotiat[ed] a retainer and fee agreement with counsel, implement[ed] litigation protocols and instruct[ed] counsel that TIAA-CREF will direct all major litigation decisions in this case.” *Id.*, ¶7. TIAA-CREF was further “motivated to serve as lead plaintiff to ensure the action is prosecuted in a cost-efficient manner

designed to optimize the net result for the putative class, including obtaining appropriate corporate governance reforms, without diluting the role of the lead plaintiff or incurring duplicative fees and/or increased costs that may ultimately be borne by the class.” *Id.*, ¶6.

As both its Certification and Declaration confirm, TIAA-CREF is entirely typical and adequate to represent the putative class here.

C. The Court Should Approve TIAA-CREF’s Choice of Lead Counsel

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to this Court’s approval. *See* 15 U.S.C. §78u-4(a)(3)(B)(v). The Court should not disturb the lead plaintiff’s choice of counsel unless it is necessary to “protect the interests of the class.” 15 U.S.C. §78u-4(a)(3)(B)(iii)(II)(aa). TIAA-CREF has selected the law firm of Robbins Geller as Lead Counsel.

Robbins Geller, a 200-lawyer firm with offices nationwide, is actively engaged in complex litigation, particularly securities litigation. *See* Rudman Decl., Ex. E. Indeed, this Court has previously recognized that “Robbins Geller has extensive experience with complex securities litigation and a successful track record.” *Grodko v. Cent. European Distrib. Corp.*, No. 12-5530 (JBS-KMW), 2012 U.S. Dist. LEXIS 178478, at *31 (D.N.J. Dec. 17, 2012) (Simandle, J.). Class members will receive the highest caliber of legal representation available from Robbins Geller if this Motion is granted.

Based upon Robbins Geller’s extensive experience and proven track record, TIAA-CREF’s selection of Robbins Geller as Lead Counsel should be approved.

IV. CONCLUSION

The Related Actions share common questions of law and fact and should be consolidated. In addition, TIAA-CREF has satisfied each of the PSLRA's requirements for appointment as lead plaintiff. Accordingly, TIAA-CREF respectfully requests that the Court grant its motion for consolidation, appointment as lead plaintiff, approve its selection of counsel and grant such other relief as the Court may deem just and proper.

DATED: December 21, 2015

Respectfully submitted,

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s/ Ted Trief

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[Proposed] Lead Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 21, 2015.

s/ Ted Trief

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